FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

REVIEW OF RECENT DEVELOPMENTS IN U.S. ANTITRUST LAW

By: Stuart E. Benson, Esq. and
Jeffrey L. Snyder, Esq., Graham & James,
Washington, D.C.

The Antitrust Division is revising its 1977 *Antitrust Guide for International Operations*. The *Guide* has served as a useful tool for practitioners but recently has begun to reflect the Division's policy less and less. The revision will be delayed until the Spring of 1987, largely because of a change in the leadership of the Division. Douglas H. Ginsburg, former Assistant Attorney General of the Antitrust Division, has been named to a seat on the U.S. Court of Appeals for the District of Columbia Circuit. Charles F. Rule, a Deputy Assistant Attorney General, is currently the acting head of the Division.

One of the areas undergoing major revision is the section of the *Guide* covering international technology licensing. During the mid-1970's, the Department had taken a restrictive view toward many licensing practices which it felt should be considered per se illegal. Among them were the so-called nine "no-nos," ranging from tie-ins, tie-outs, and package licenses to grant backs and price restrictions in technology licenses. For example, under the *1977 Guide*, territorial restraints included in know-how and patent licenses were considered a *per se* violation unless the restraint was deemed a reasonable ancillary restraint no greater in scope and duration than necessary to prevent frustration of the underlying contract.

Now, the Department will look at territorial restraints with a less-jaundiced eye. In a recent speech, Mr. Rule explained that significant social benefits flow from licensing restrictions, and accordingly, such restrictions should be (and at least by the Antitrust Division are) analyzed under a rule-of-reason analysis: unless the restriction is clearly anticompetitive, it should not be condemned. He summarized the Division's approach to such cases, which involves a two-step analysis:

> The first step in the rule of reason analysis is to identify the technologies that are true economic substitutes for the patent being licensed and with which the patent competes. This determination is analogous to the process of defining markets in merger analysis. The relevant universe of competing technologies should include all those technologies to which users could turn if the price of the licensed patent -- let's say the required royalty -- were to increase by five to ten percent.
>
> After identifying all the competing technologies -- there may be none, but it is surely rare that this will be the case -- one should determine whether any of the parties to the licensing agreement own or control access to competing technology. If none does or if the license does not implicitly or explicitly limit the independence of the licensee(s) with regard to price or output decisions concerning its (their) competing technologies, then the restrictions in the license should be analyzed as vertical restraints.
>
> If the parties do own or control competing technologies, and the license restricts their price or output decisions, then the license should be analyzed as a horizontal restriction. That analysis will vary somewhat depending on the license, but generically it is the same analysis as that applied to joint ventures among competitors. If the parties' competing technologies do not collectively have market power -- that is, if there are other significant competing technologies not restricted by the license -- and the license passes muster under a vertical analysis, then the license and/or particular restrictions are legal.

> If, however, the competing technologies restricted by the license have substantial market power, the license restriction may reduce output and raise the price. If the license restriction is one that is likely to have such an effect, it is appropriate to determine whether there are any procompetitive justifications for the restrictions. If the parties to the license can establish the existence of such justifications, then one must determine whether the likely benefits of the license outweight its potential anticompetitive dangers.
>
> While I recognized that such a balancing is extremely difficult, I do not think it is impossible.

Mr. Rule reminded his audience and practitioners who might rely on the revised *Guide* that his statements reflected only the Antitrust Division's enforcement practice, not what courts will do. Private treble damage suits are not governed by the Antitrust Division's enforcement policy.

On the legislative reform issue, year-end is a good time to assess the progress of the Administration's reform proposals in the 99th Congress and how those proposals are likely to fare in the new, Democratically controlled 100th Congress in 1987. Early in 1986, the Reagan Administration proposed five reforms: (1) S. 2164, *The Foreign Trade Antitrust Improvements Act;* (2) S. 2161, *The Promoting Competition in Distressed Industries Act;* (3) S. 2160, *The Merger Modernization Act;* (4) S. 2162, *The Antitrust Remedies Improvements Act;* and (5) S. 2163, *The Interlocking Directorate Act.*

All died without final action by the Congress when it adjourned. According to the Administration and Congressional sources, however, some of the bills will be reintroduced and may fare well in the 100th Congress. The bills to watch are the remedies reform proposal and the foreign trade improvements reform proposal. The remedies bill would place substantial restrictions on the treble-damage remedy. The foreign trade improvements proposal would adopt standards for the exercise of U.S. jurisdiction over conduct occurring outside the United States. The big push is expected on the remedies issue, where the Administration perceives the most support on Capitol Hill.

In recent judicial developments, a growing preference for the use of arbitration to resolve antitrust disputes is receiving mixed acceptance. In the past, the courts had refused to enforce arbitration clauses in suits involving antitrust claims on the theory that in bringing antitrust suits, private parties are enforcing a strong public interest. As the U.S. Court of Appeals explained in the *American Safety Equipment* 391 F.2d 821, 826 (2d Cir. 1968) case, the non-arbitrability of antitrust claims is based on four rationales: (1) the pivotal role that private parties play in aiding the enforcement of the antitrust laws; (2) the fact that antitrust disputes by nature involve contracts of adhesion; (3) issues presented in antitrust disputes are often very complex; and (4) such decisions are too important to leave to arbitrators.

However, in *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985) the Supreme Court in 1985 held that U.S. courts should enforce agreements to resolve antitrust claims through arbitration in cases involving international transactions. Although in that case the Court expressly did not address arbitrability in a purely domestic transaction, it laid to rest the argument that antitrust claims are not arbitrable, and expressed skepticism about the *American Safety* doctrine.

Now, in a recent decision at the federal trial court level in Pennsylvania, a court has applied the *Mitsubishi Motors* decision to domestic disputes. At issue in *Genna v. Lady Foot International,* 1986-2 Trade Cases (CCH) ¶ 61,317 (1986) was a franchise dispute that raised an antitrust claim. The defendant moved to stay the suit pending arbitration of the dispute. The court, specifically following *Mitsubishi Motors,* stated:

> Although the Court specifically limited its holding to the international context, its reasoning is more compelling in the domestic context. Unlike foreign arbitrators who have had little or no experience with or exposure to our laws and values, domestic arbitrators have the benefit of the American Spirit of free competition. A domestic arbitral tribunal engrained with American antitrust jurisprudence is far better suited to vindicate these statutory causes of action than an international tribunal with its inherent enthnocentrism.

In contrast to the *Lady Foot* decision, a federal trial court in the Central District of California has declined to follow *Mitsubishi Motors* in the domestic context. In *Newport Components v. NEC Home Electronics (U.S.A.), Inc.*, No. CV 86-5613-DT (Bx) (C.D. Cal. 1986), the court denied NEC's motion to compel arbitration of the dispute. In opposing the motion, the plaintiff relied on several post-*Mitsubishi Motors* cases that declined to follow *Mitsubishi Motors* in non-antitrust contexts, such as securities disputes. See, e.g., *Conover v. Dean, Witter, Reynolds, Inc.*, 794 F.2d 520, 522 (9th Cir. 1986). Given the split on this issue in the various courts, it may well take another Supreme Court decision to settle the issue.

Finally, we should note further developments in some of the proposed mergers that were reported in the last issue. As reported, the Department of Transportation originally denied Texas Air's bid for Eastern, primarily because Pan Am had not been given slots for a full, hourly shuttle service. The parties restructured their arrangement to cure this defect; Pan Am will make fifteen flights per day, and DOT therefore approved the merger. The Pan Am shuttle is in operation. In addition, the ICC has decided to give Santa Fe and Southern Pacific sixty days to perfect a petition to reopen its decision denying approval of their proposed merger.

JOINT VENTURES, COMPETITION POLICY AND INTERNATIONAL TRADE

RECENT DEVELOPMENTS IN OECD

By: Rainer Geiger
Head of the Division on Enterprise and Consumer Affairs
Organisation for Economic Co-operation and Development
Paris

This article reflects the personal views of the author and not necessarily those of the OECD or its Member governments. The two Council Recommendation's referred to in this article will be reproduced in a forthcoming issue of the Record

The internationalisation of markets and business activities has broadened the scope of action of competition authorities. Whatever jurisdictional basis is adopted, the enforcement of national competition laws is bound to affect interests of other countries and international co-operation has become imperative if conflicts are to be avoided. It is the primary function of OECD to provide a forum for co-operation between industrialised countries which account for the bulk of international trade and investment. The need for an international framework for competition policy is at the origin of the OECD's Committee of Experts on Restrictive Business Practices and it is not surprising that this Committee which has just celebrated its 25th Anniversary was created almost at the same time as the Organisation itself.

The tasks of the Committee are twofold:

- To promote exchanges of information and experience between competition authorities of Member countries at both bilateral and multilateral levels and to undertake comparative studies on competition laws and policies with a view to bridging gaps and differences between national approaches;

- To contribute, from a competition policy point of view, to the elaboration of market-oriented economic strategies, the improvement of structural conditions and the maintenance of an open international trading system.

Under the subsequent Chairmanship of Torsten Lowbeer (Sweden), Lawson Hunter (Canada) and Kurt Stockmann (Germany), the focus of the Committee's activities has in recent years shifted from technical studies to discussion of policy issues and the elaboration of guidelines for action by Member governments in the field of competition policy. These activities are backed by thorough analysis of regulatory developments in Member countries and exchanges of experience in the enforcement of competition laws.

Two recent reports which are to be issued shortly should be of high interest not only to government officials but also to legal practitioners and the business community: *Competition Policy and Joint Ventures, Competition Policy and International Trade: Instruments of Co-operation* .[1]

Toward A Common Approach to Joint Ventures

Joint ventures are an increasingly popular form of business co-operation cutting across a broad range of sectors and activities. They cover a variety and complexity of arrangements for pooling of resources which defy easy categorisation. Existing legal literature provides a plethora of possible definitions, none of which is fully satisfactory to capture all relevant aspects. Joint ventures pose a challenge to competition policy as most competition laws do not contain any specific provisions addressing this form of co-operation. In the absence of adequate standards for the evaluation of their competitive effects, there is a possibility that joint ventures will either escape antitrust review altogether or, at the other extreme, be subjected to excessively rigid tests which stifle creative and desirable business activity.

Given the complexity and variety of business arrangments labelled as joint ventures, there is a clear need for business to have some degree of legal certainty concerning their evaluation under competition law. The Committee's report, therefore, after providing comparative analysis of the case law emerging in Member countries, has developed a set of common criteria which could guide competition authorities in the assessment of the pro- or anti-competitive effects of joint ventures within the framework of their legislation.

The report is based on a functional approach to joint ventures. They are understood as business arrangements in which operations of two or more firms are partially, but not fully, integrated in order to carry out various types of activities, including research and development, natural resource exploration and exploitation, engineering and construction, manufacturing and services, buying and selling operations. Many joint ventures cover, in fact, several of these categories, for example, joint research may extend into the manufacturing or even marketing of a new product. This definition offers the advantage of distinguishing joint ventures from cartel-type arrangements or full or partial mergers. As opposed to a merger, parents of a joint venture are able to continue as separate operational units and, unlike a cartel, new productive resources often involving new projects, new processes or products are created.

The Committee's report discusses the potential benefits of joint ventures which concern the spreading of risks and costs of projects beyond the reach of a single enterprise, the creation of efficiency through economies of scale, rationalisation and specialization and, for small- and medium-sized enterprises, the opportunity to overcome entry barriers in a new market. These efficiency claims may carry different weight for each functional category of joint ventures depending on the structure of the industry and the market, the nature and duration of the arrangement and the size and market position of the firms involved. In each case they have to be balanced against any adverse impact on actual or potential competition in the market concerned. Competition may also be harmed if

the arrangement includes ancillary restraints which are not necessary to reach the purpose of the joint venture or sharing of information which can lead to collusion in areas outside the scope of the project.

Even where, as in most OECD Member countries, joint ventures have to be assessed under cartel or merger control provisions or both, new creative solutions are emerging to reflect the unique features of these activities. There is a distinct trend away from rigid *per se* approaches to a balancing test weighing in each case pro- and anti-competitive effects, whether this is done by the rule of reason approach as in the US or through block or individual exemptions from competition law provisions as in the EEC. A surprising number of common features have been identified from case law analysis which has led the Committee to recommend a multi-criteria approach for the assessment of joint ventures under competition law.

The first test to be applied is whether the arrangement is a genuine joint venture, implying a commitment of resources, or a mere cartel-like arrangement in the guise of a joint venture set up to escape stringent cartel provisions. On the other hand, an arrangement would be assessed exclusively under merger control provisions if the parent ceases to be an actual or potential competitor to the venture in a product or geographic market.

In the process of balancing possible pro- and anti-competitive effects of genuine joint ventures, their functional nature can provide an important element. The more remote the venture is from the market, for instance "pure" R & D joint ventures, the less likely it is to raise competitive concerns. Other factors to be considered in this context are the duration and scope of the arrangement and whether it is horizontal or vertical in nature. Important criteria then are the share of the venture in the relevant geographic and product market and its effect on actual and potential competition in that market. If the venture withstands scrutiny on these grounds, then consideration should be given to the existence of ancillary restraints which are not necessary for the success of the project.

The report finally stresses the need to provide facilities for early and timely review of joint ventures before the project actually gets underway. This can be achieved for instance through pre-notification procedures for important ventures (based on size or other criteria) or business review procedures of a more informal type. Remedies should be flexible and tailored to actual problems, for instance, to the elimination of harmful ancillary restraints if the venture appears otherwise to be legitimate. A number of cases reviewed in the report have shown that ventures have been approved only after considerable restructuring of the original agreement.

One type of venture, i.e. export trade arrangements, is not specifically discussed in the report because it was covered in an earlier study.[2] Such arrangements, whether they are labelled as cartels, trading companies or joint ventures, are exempt in most countries from the home country's competition laws if they have no anti-competitive effects in the home market. In many cases such arrangements are the only means for enterprises, in particular, those of a smaller size to compete in export markets and thus add an additional element of competition in international trade. If, however, these arrangements wield market power, practices such as fixing prices and output can have significant anti-competitive effects in importing countries leading to the adoption of defensive strategies like import cartels or trade restrictions in those countries. If the importing country applies its competition laws to restrictive practices which are encouraged or condoned by foreign governments, conflicts between trading partners are likely to arise which can be magnified by jurisdictional problems. The solution to such problems goes beyond the sphere of competition laws and requires a different set of instruments addressing the interaction between competition and trade policies.

Competition Policy and International Trade: A Framework for Co-operation

The OECD Council has recently adopted two complementary Recommendations addressed to restrictive business practices affecting international trade [3] and co-operation in areas of potential conflict between trade and competition policies. [4] The first Recommendation, which is a revision and expansion of a series of texts which have been in operation for almost 20 years sets out procedural arrangements for international antitrust co-operation in cases where inquiries or enforcement action in one country may affect the interest of other countries.

The second instrument is a pioneering approach. It follows the conclusions of an earlier report on the interaction of competition and trade policies and sets out policy principles and a mechanism for co-operation between OECD governments. [5]

Restrictive Business Practices Affecting International Trade

In view of different jurisdictional approaches in the application of competition law and in the absence of harmonization of substantive legal provisions, conflicts in antitrust enforcement with respect to international business activities can be avoided only through dialogue and co-operation between national authorities. As compared to the widespread network of international tax agreements there are yet few bilateral arrangements between OECD governments in the field of antitrust. [6] Therefore, the *Council Recommendation on Co-operation on Restrictive Business Practices Affecting International Trade* constitutes an indispensable multilateral instrument for notification, co-operation in the collection of information located abroad and consultations. This instrument proved to be very effective in its operation, resulting from 1980 to mid-1985 in almost 600 notifications of antitrust proceedings, exchanges of information and bilateral consultations involving almost all Member countries. It is interesting to note that the United States accounted for almost two-thirds of the contacts (361), followed by the EEC Commission (57), Germany (40), Canada (39) and Sweden (25). Canada was the country contacted the most (113), followed by the United Kingdom (103), Japan (93), Germany (80) and the United States (68).

In the event of failure of bilateral consultations, the *Recommendation* provides for a conciliation procedure through use of the good offices of the Committee of Experts on Restrictive Business Practices. This provision which has existed since 1973, has thus far never been used for the main reason that the notification, exchange of information and consultation procedures have operated satisfactorily to avoid conflicts and to resolve differences.

In light of this positive experience, the recent review of the *Recommendation* left the text virtually unchanged. It was complemented however, by procedural guidelines set out in an appendix which form an integral part of the instrument. These Guidelines spell out the circumstances in which a notification of an investigation or proceeding should be made and the procedures for notifying and collecting information from persons or enterprises located abroad. The Guidelines also clarify the consultation and conciliation procedures set out in the *Recommendation* and, finally, contain a provision to safeguard the confidentiality of information supplied in the course of notifications, consultation or any other form of co-operation under the *Recommendation*. The text is silent on two sensitive matters: the application of blocking legislation and the possibility of governments to intervene, as appropriate, in private antitrust litigation to offer their views to the court on questions of international comity and the national interests involved. [7] While an attempt was made to include provisions on these issues in the text of either the *Recommendation* or the Guidelines it was finally decided to leave the matter to bilateral arrangements. In any event blocking legislation in those countries where it exists has been applied only in rare circumstances as far as

competition matters are concerned. Further, government authorities have sought in private actions to ensure that the sovereign or national interests of other countries are adequately taken into account or have provided means by which foreign governments can directly indicate to the court the extent of their interests.

Potential Conflicts Between Competition Policy and Trade Policy

While the above-mentioned *Recommendation* refers to all types of restrictive practices by enterprises in international trade, whether or not influenced by government policies, it applies only to competition law investigations and enforcement action and does not cover trade or trade-related policies nor legislative or regulatory developments which may have important antitrust implications in other Member countries. There was, therefore, a need to develop an additional instrument designed to avoid potential conflicts between competition and trade policies at the earliest possible stage. This is the purpose of the *Recommendation* which was developed by the Committee of Experts on Restrictive Business Practices in co-operation with the Trade Committee and adopted by the Council on 23rd October 1986.

The *Recommendation* sets out policy principles and procedural mechanisms to deal with two problem areas. At the national level import restrictions or other restrictive trade policy measures affect competition and the proper functioning of markets. Further, at the international level, trade policy measures of one country can have anti-competitive effects on the markets of another.

In order to improve decision making on trade policy matters, the Committee, in co-operation with the Consumer Policy Committee and the Trade Committee, has developed an indicative checklist for the assessment of trade policy measures. The checklist provides a comprehensive set of criteria for economic analysis of the effects of such measures on consumers, trade, investment and market structures. It is to serve as a coherent framework for weighing different factors against each other. Where some form of government intervention is felt necessary to ease the adjustment process, the checklist analysis facilitates the search for measures which are the least costly in terms of national welfare and least disruptive to competition and international trade. The checklist approach had been publicly debated at the 1984 OECD Symposium on Consumer Policy and International Trade and received wide support by the organisations represented there, including international consumer organisations. [8] The *Recommendation* formally endorses the checklist and calls upon Member governments to use it as a basis for undertaking "as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as existing measures when the latter are subject to review". There are encouraging signs that the checklist approach has already been followed in a number of Member countries, for example, in discussions on specific trade measures such as the protection of textile and automobile industries. It is hoped that in the future this approach will become a regular feature of trade policy in order to strengthen the hand of governments in resisting protectionist pressures.

Another important element of the Recommendation deals with export limitation arrangements often referred to as Voluntary Export Restraints (VER). The Committee's previous report [9] distinguished three types of such arrangments:

- Quantitative restrictions resulting from a formal agreement between governments [also referred to as Orderly Marketing Agreements (OMA)];
- Arrangements among exporting firms to limit their exports and/or to fix prices to a level which is predetermined by understandings reached between governments;
- Agreements and arrangements concluded without any form of government involvement between exporting firms -- in some instances with the participation of domestic producers in the importing country -- to limit exports and/or raise prices. Such undertakings,

which most closely resemble national or international cartels, are often entered into in anticipation of trade protection measures or anti-dumping proceedings.

In general these arrangements are not challenged under competition laws for legal reasons concerning the scope of these laws or, as far as the third category is concerned, because governments may simply choose to ignore them. Nevertheless, as the Committee stated in its report "non-tariff barriers are of particular relevance to competition policy as they often act as serious impediments to trade flows and thus their impact on market structures can be both direct and substantial. In addition, the way certain types of non-tariff measures such as quotas, VER's and OMA's are implemented can induce collusive behaviour by exporting and/or importing enterprises and lead to cartelisation of world markets". Accordingly, the *Recommendation* calls upon governments to take into account, in the course of discussions on such arrangements, the interests of their trading partners as well as the effects on competition in the markets concerned and to respond as positively as possible to requests for consultations on these matters. Governments are also urged to abstain from encouraging export limitation arrangements by enterprises which restrict competition in export or import markets.

Another concern addressed by the *Recommendation* is the potential misuse, for anti-competitive purposes, of laws against unfair trade practices (anti-dumping, countervailing legislation). The *Recommendation* in this context refers specifically to the initiation of proceedings by competitors who, by threatening litigation or putting forward baseless or completely unsubstantiated claims, may pressure exporters into export limitation or price undertakings. The broader question of potential conflicts between competition policy concepts and standards for trade law enforcement have been discussed by the Committee on the basis of a report by Rodney de C. Grey which had been commissioned by the Canadian Government. [10] The report made a number of useful suggestions to bring trade law standards more closely in line with competition policy concepts such as abuse of market power.

Concerning joint export arrangements mentioned earlier in this article, the *Recommendation* calls upon Member governments not to encourage arrangements which amount to the exercise of market power in foreign markets and to co-operate to the extent possible within their national legal frameworks and, according to the procedures set out in the above-mentioned *Recommendation on Co-operation on Restrictive Business Practices Affecting International Trade*, in investigations into possible anti-competitive effects of arrangements located in their countries.

The procedural arrangements of the *Recommendation* can be briefly characterized as follows:

- Countries envisaging trade policy measures which may have antitrust implications in other countries have the option (and, indeed, may choose in their own interest) to notify the countries concerned;
- Target countries of trade measures affecting the application of their competition laws or policies are given the possiblity to raise their concerns with the country which is at the origin of these measures;
- In both instances there is a possiblity for consultation.

These procedures are of an essentially bilateral nature but, if the countries concerned so agree, the Committee of Experts on Restrictive Business Practices in close co-operation with the Trade Committee can be used as a forum for discussions.

Conclusions

As demonstrated by the examples given in this article, the Committee of Experts on Restrictive Business Practices plays an important role in OECD, serving as a forum for discussion of competition policy issues in the widest sense and thus contributing to the overall aims and priorities of the Organisation. The conclusions and recommendations emanating from its work

are not legally binding and are developed by consensus. This manner of operation which some may consider as a drawback constitutes in reality the Committee's strength. Free from the constraints attached to the drafting of international legal instruments, it can serve as a testing ground for new ideas and creative solutions to common problems. In this process the Committee maintains close contacts with the business community and trade unions through informal consultations with the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). The cross-fertilization of ideas resulting from the Committee's discussions is beneficial to all participants. Canada, for instance, has been providing a major input to the Committee's work which in turn may have inspired or reinforced a number of concepts included in the recent Canadian competition law reform.

International co-operation in antitrust is functioning and this augurs well for the future. With the *Recommendation on Competition and Trade Policies*, an encouraging step has been taken but implementation and further action depends on the political will of our governments. It is not the time to sit back and relax; the threat of protectionism is as present as ever.

NOTES AND REFERENCES

1. *Competition Policy and Joint Ventures*, OECD, 1986 (forthcoming).

   Competition Policy and International Trade: Instruments of Co-operation, OECD, 1987 (forthcoming).

2. *Competition and Trade Policies: Their Interaction*, OECD, 1984, paragraphs 9 to 54, 76 to 95.

3. *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade* [C (84) 44 (Final)]. The Recommendation which was adopted on 21st May 1986 replaces the Council Recommendation of 25th September 1979.

4. *Recommendation of the Council for Co-operation Between Member Countries in Areas of Potential Conflict Between Competition and Trade Policies* [C(86)65(Final)] -- adopted by the Council on 23rd October 1986.

5. *Competition and Trade Policies: Their Interaction*, OECD, 1984.

6. The following bilateral antitrust co-operation agreements have been concluded to date:

   United States--Germany (23rd June 1976);
   United States--Australia (29th June 1982);
   United States--Canada (Memorandum of Understanding of 9th March 1984 replacing the Basford--Mitchell Understanding of 3rd November 1969)
   Germany--France (28th May 1984)

7. These matters are, however, covered by the Committee's conclusions and recommendations set out in its 1984 Report on Collection of Information. See *Competition Law Enforcement: International Co-operation in the Collection of Information*, OECD, 1984, paragraphs 165 *et seq.*

8. *Consumer Policy and International Trade*, OECD, 1986.

9. For a more detailed discussion of VER's see Competition and Trade Policies, precited, paragraphs 96 to 125, 261 to 278.

10. Rodney de C. Grey, *Trade Policy and the System of Contingency Protection in the Perspective of Competition Policy* (not yet published). See also Competition and Trade Policies, precited, paragraphs 286 to 345.

CONFEDERATION OF BRITISH INDUSTRY HOSTS INTERNATIONAL CONFERENCE ON REVIEW OF U.K COMPETITION POLICY

By: J.W. Rowley, McMillan, Binch
Toronto

Britain's recently announced Competition Policy Review was the occasion for a major conference in London on November 28th. The programme, which was put together by the Confederation of British Industry, featured speakers from Canada, the United States and Australia as well as from the U.K.

Sir Gordon Borrie, the Director General of the Office Of Fair Trading (the U.K. equivalent of Canada's Bureau of Competition Policy) told the Conference that a "radical reappraisal" of Britain's 30 year old restrictive practices

legislation was necessary in the Government's coming review of competition policy. This was despite his view that "the *Restrictive Trade Practices Act* has done a good job in the past and has achieved its objectives of improving the competitive efficiency of the U.K. economy."

He urged a simpler and tougher approach to agreements which restrict or prevent competition. At present, provided the OFT is told, such restrictive agreements may lawfully be operated until they are referred to the Restrictive Practices Court and judged to be against the public interest. Sir Gordon argued for change in this area. A major simplification, he suggested, would be to prohibit outright those agreements which restrict or prevent competition, with some provision for exemption in specified circumstances.

The Canadian Competition Law Director's powers of investigation and enforcement, which had been described to the Conference by Toronto lawyer, J. W. Rowley, Q.C., were the envy of a number of OFT officials. Sir Gordon was clearly of the view that an increase in his investigatory powers was urgently needed "Too often, I and my officials have had to rely on information from whistle blowers - people who have caught wind of an agreement that adversely affects them or people who have for some reason fallen out with their partners in an agreement."

Of particular interest was a paper presented by Dr. Hans Liesner, the Chief Economist to the Department of Trade and Industry and the man appointed by the Thatcher Government to conduct the policy review. Dr. Liesner made it clear that legislation would almost certainly not surface during the life of the present government. Nevertheless, he did feel that the review itself should be completed by the summer of 1987. Having said this, he also made it clear that the review was in its early stages and as a consequence, he was not in a position to give any hint at the direction of the likely outcome.

Like Dr. Liesner, Mr. David Vaughan, Q.C, the Chairman of the Law Society's Joint Working Party on Competition Laws, set out a shopping list of matters which will need to be considered under the present review rather than attempting to set directions. With respect to the Monopolies and Mergers Commission, Mr. Vaughan suggested a review of its procedures, in particular so as to increase its awareness of contentions put forward by others. He felt that consideration ought also to be given to having "counsel for the Tribunal." In an approach reminiscent of the recent changes to the Canadian law, in the creation of the Competition Tribunal, Vaughan suggested the possiblity of increasing the status of the Chairman and Vice-Chairman of the Commission, possibly by giving the Chairman High Court Judge status.

If the Regulator's view was represented by the Director General of the OFT, then Industry's view was presented by Mr. Geoffrey Hughes. To his mind, the primary objective of a U.K. competition policy must be to assist with the international competitiveness of British Industry. Every government intervention in the marketplace, he felt, should be judged by this standard. Hughes made it clear that British Industry wanted a law which was both fair and understood. Equally important, however, was his requirement that the new law ought not to extend beyond its objectives, and further, that it be designed to cure known mischiefs only.

Mr. Hughes took the position that the basic thrust of any new law should be based on an attack on horizontal agreements in restraint of trade. With such agreements under control, he felt that much of the rest would look after itself.