FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS

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Public Affairs

As reported in the last issue of the *Canadian Competition Policy Record*, President Reagan nominated Judge Anthony M. Kennedy to the U. S. Supreme Court following the withdrawal of Douglas H. Ginsburg from consideration. After uneventful hearings in January, Judge Kennedy was confirmed by the U.S. Senate without dissent, 97-0, and sworn into office on February 18, 1988. While Judge Kennedy assumed his seat during the court's current term, he will not participate in any decisions on cases argued prior to his arrival.

During his confirmation hearings, Judge Kennedy avoided any endorsement of social or political concerns as important underpinnings of antitrust laws. He did say, however, that he would be "most sensitive" to economic efficiency arguments. In contrast to former nominee Judge Robert Bork, Judge Kennedy declined to endorse a bright line test regarding market concentration issues. With regard to resale price maintenance, Judge Kennedy testified that a *per se* rule of illegality is justified "if, in almost every event, it has an anticompetitive effect." He did point out, however, that economists can argue vertical price fixing can have procompetitive effects which would justify a rule of reason approach. Senator Howard Metzenbaum (D-Ohio), who chairs the Committee's Antitrust Subcommittee, pointed out that Judge Kennedy had rejected *per se* treatment in a case involving doctors fees and that his decision had been rejected by the Supreme Court in its 1982 *Maricopa County Medical Society* decision. Judge Kennedy responded by noting that he always considered that to be a "close case" and that he was "quite willing to accept the Supreme Court's interpretation."

Charles F. Rule, Assistant Attorney General of the Antitrust Division, delivered a speech on January 27, 1988, in which he voiced the belief that U.S. antitrust policy had evolved to the point where its objectives and those of U.S. trade laws are "working at cross purposes." He cited market definition and mergers, efficiencies from vertical and horizontal integration, and vigorous price competition as the three areas of greatest contradiction in this regard.

On the subject of market definition and mergers, Rule remarked that "one of the most significant developments in antitrust merger enforcement has been the recognition" that geographic markets can be international in scope. Current enforcement policy recognizes that the presence of significant foreign competition will often make it impossible for U.S. firms to exercise dominant market power and thus raise domestic prices. Despite this new recognition of the international scope of some markets, Rule noted that "many of the same people who have applauded this refreshing bow to economic reality nevertheless would have us ignore the effect of protectionist trade barriers that exclude foreign competition from our markets." The emphasis, Rule concluded, should be on corporate "self-help through restructuring" and not on protectionism that may actually facilitate the exercise of market power by domestic firms.

Rule decried as "jingoistic" recent protectionist proposals that would condemn

foreign mergers and non-price vertical restraints, tie-ins or exclusive dealing arrangements with foreign firms. Rule stressed that "one of the most important achievements" of the Administration has been the removal of "the irrational stigma attached in the past to cooperative business arrangements that are likely to be efficiency-enhancing and procompetitive." He declared that under the same consumer welfare standard that allows U.S. firms freedom to structure their operations to enhance efficiency and competitiveness, "there simply is no basis for distinguishing efficient, procompetitive behavior when it is engaged in by foreign competitors serving U.S. consumers."

Lastly, Rule criticized the "double standard" that exists in U.S. price competition policy in this context, as evidenced by the clash between U.S. antidumping laws and antitrust laws. Whereas antitrust law now recognizes predatory pricing as "actually vigorous price competition," antidumping law "contains none of the standards for predation developed in recent antitrust cases" and requires "no showing of predatory intent or of injury to competition." As a consequence, he concluded, antidumping law hurts not only U.S. consumers but U.S. firms "in downstream industries that purchase the affected input product by increasing their production costs and causing them to lose their competitive edge in world markets."

Looking ahead to the final year of the Reagan Administration, Mr. Rule has indicated that his top priority for 1988 will be criminal antitrust enforcement. He plans to continue his current efforts to employ antitrust laws in prosecuting organized crime figures. His recent emphasis on criminal enforcement is apparent in the Antitrust Division's 1987 litigation record: 92 criminal cases were filed as opposed to 15 civil cases, with 116 individuals fined $1.6 million. Currently, 148 grand juries have been empaneled to investigate both civil and criminal antitrust violations.

An administrative law judge recently urged Attorney General Edwin Meese to deny an application submitted under the *Newspaper Preservation Act of 1970* for approval of a joint operating agreement under which the commercial aspects of the only two metropolitan papers serving Detroit (the *Detroit News* and the *Detroit Free Press*) would be merged. The application was made under the *NPA* and involves the largest proposed consolidation to date under the *Act*. Following a review of the proposed joint operating agreements, the judge denied the application on the ground that the *Free Press* does not qualify as a "failing newspaper" under the standard set by the Supreme Court in *Citizen Publishing Co. v. United States*.

Legislative Report

With the current legislative year shortened by presidential and congressional campaigns, it appears unlikely that President Reagan will sign into law any of the significant antitrust legislation now pending in the Second Session of the 100th Congress. The six months spent by the Senate Judiciary Committee last Session on the Supreme Court confirmation process stymied the progress of several antitrust bills in the Senate. Meanwhile, in the House of Representatives, the Administration's antitrust reform package first announced in February 1986 is now considered moribund after no legislative progress was made last Session.

While the Senate did pass an interlocking directorate reform bill (currently in the House Judiciary Committee) and the Senate Judiciary Committee has announced plans to hold hearings on an antitrust remedies bill, the other issues in the Administration's reform package – particularly merger reform – are most likely to remain in the background. Senator Joseph Biden Jr. (D-Del), Chairman of the Senate Judiciary Committee, has indicated that his top priority in the commercial area during the Second Session will be private enforcement of the *Racketeer Influenced and Corrupt Organizations Act*, not antitrust legislation. House Judiciary Committee Chairman Peter W. Rodino Jr. (D-NJ), however, has described his most important commercial legislative priorities to be H.R. 585, the Resale Price Maintenance Bill, and H.R. 586, a bill requiring economic impact statements for proposed mergers, closing the "partnership

loophole" in the regulation of mergers and changing the pre-merger notification program.

The following is an update of recent and upcoming action on the pending legislation reported on in the last issue.

Resale Price Maintenance

(S. 430, H.R. 585): Despite approval of a compromise version of a report to accompany the bill on August 6, the Senate Judiciary Committee did not agree on one until late January. This bill seeks to codify vertical price-fixing as a *per se* illegal activity and to establish the level of evidence needed by terminated dealers alleging retaliation by their suppliers for discounting. The draft report maintains that the legislation is necessary because of the confusion resulting from recent contradictory statements by the Justice Department and the ambiguous language of *Monsanto Co., v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The draft report details the judicial history of vertical price-fixing cases, noting that the "Supreme Court has never wavered from the view that vertical price-fixing is *per se* illegal." The purpose of the bill, according to the draft report, is to restate "plainly and unequivocally that all forms of vertical price-fixing are illegal *per se*." With regard to current enforcement policy, the report is critical of the Reagan Administration for failing to file any vertical price-fixing cases, for intervening on behalf of defendants in several private cases, and for issuing guidelines that "appear to narrow the *per se* approach to vertical price-fixing." The draft report concludes that the proposed legislation codifies current law but:

> ...does not address the extent to which firms are permitted unilaterally to affect the pricing policies of resellers by refusing to sell to dealers who discount, nor does it address the extent to which firms, acting unilaterally, may be required to deal with others.

Despite the successful passage in the House of its counterpart (H.R. 585), S. 430 will reportedly have some difficulty in passing the Senate. The Department of Justice and the FTC remain adamantly opposed to the bill and it appears likely that the business community will step up lobbying efforts against it.

Interlocking Directorates

(S. 1068): This bill was adopted by the Senate on July 31 and forwarded to the House for action. While no legislation has been introduced to date in the House, House Judiciary Committee Chairman Rodino has not indicated any opposition to the Senate bill.

McCarran-Ferguson Act

(S. 80, S. 1299, H.R. 2727): The House Subcommittee, considering this bill to remove the antitrust immunity granted to the insurance industry, held three hearings last Session during which several subcommittee members indicated their opposition to the bill. The Senate Antitrust Subcommittee also held hearings last Session without reporting a bill to the full Senate. Senator Biden's announced intention to focus on this issue will likely result in some legislation modifying the existing antitrust exemption of the insurance industry. Committee observers, however, discount the possibility of successful passage in the full Senate. Assistant Attorney General Rule has stated that while he approves ending the insurance industry's antitrust exemption as long as immunity exists for some forms of cooperative activity, he has yet to see any legislation that contains the safeguards necessary to obtain the Administration's support. In a related development, Representative John LaFalce (D-NY) introduced a bill (H.R. 3833) that would amend the *FTC Act* to allow the FTC to study the insurance industry. Mr. LaFalce stressed that his bill was necessary to remove the restrictions imposed in 1980 that prevent the FTC from initiating any study of the insurance industry unless the House or Senate Commerce Committee specifically requests it.

Indirect Purchaser Suits

(S. 1962): The Senate Antitrust Subcommittee plans to hold a hearing on this legislation, which is aimed at reversing the Supreme Court's *Illinois Brick* decision barring indirect purchaser suits. Many observers believe,

however, that this issue is too controversial to make progress during the current Session. House Judiciary Committee Chairman Rodino, a long time supporter of legislation to repeal *Illinois Brick*, has not introduced any legislation during this Congress on this matter.

Antitrust Remedies

(S. 1407, S. 635): The Senate Antitrust Subcommittee plans to hold hearings on this legislation, which will include witnesses that favor the Administration bill (S. 635). The ranking minority member, Senator Thurmond (R-SC), recently stated that he is primarily interested in the provisions concerning claims reduction and detrebling of damages.

Judicial Developments

In the last issue we reported on *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, in which the Fourth Circuit Court of Appeals affirmed a jury verdict awarding damages to an automobile parts distributer and manufacturer for violation of the prohibition against tie-ins. The defendant, a German company, was found to have violated section 1 of the *Sherman Act* by requiring U.S. franchises to deal exclusively in Mercedes-Benz parts or parts approved by Mercedes-Benz.

Recently, the Ninth Circuit affirmed a different result in *Mozart Co. v. Mercedes-Benz of North America, Inc.* While the court found that *Mozart* raised "claims and issues quite similar" to those raised in *Metrix*, it found that *Mozart* was based on different evidentiary facts and, further, that *Metrix* involved no principles of law that collaterally estopped Mercedes-Benz from asserting a business justification defense. The Ninth Circuit held that it was not a reversible error for the jury in *Mozart* to find that the tie-in requirement imposed by Mercedes-Benz was based on legitimate business reasons and that no acceptable, less restrictive alternative was available. It found that the *Metrix* court had not rejected business justification as a defense, but rather had upheld the verdict of the jury that the defendant in *Metrix* had not met its burden in establishing such defense. The Ninth Circuit noted that this tie-in requirement could be necessitated by the possibility that distributors might succumb to the temptation to increase their profits by supplying inferior products at the expense of those dealers who conform to the quality standards. The quality control defense advanced by Mercedes-Benz, the court suggested, might be entitled to less skepticism than it has been accorded in the past, as some have argued that "tie-in arrangements are more effective and less costly than alternative methods for insuring franchisee compliance with quality specifications." The Ninth Circuit concluded that there was "substantial evidence to support the jury's finding that the only feasible method for maintaining quality control (was) the use of the tying arrangement."