FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.K. GOVERNMENT REVEALS PLANS TO REFORM COMPETITION LAWS

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Secretary of State for Trade and Industry, Lord Young, presented a paper to Parliament in January, 1988, outlining plans to reform the legislation on mergers and on restrictive trade practices (DTI The Department For Enterprise, CM. 278). The plans were described in more detail in two Department of Trade and Industry green papers released in March (*Mergers Policy*), and (*Review of Restrictive Trade Practices Policy*).

Mergers

The proposed changes in mergers control are designed to add flexibility to procedures under the *Fair Trading Act* of 1973 and to accelerate the process of reaching decisions. The Secretary of State will, however, retain his wide discretion in deciding whether or not to refer a merger to the Monopolies and Mergers Commission (MMC). There will also be no change in the broad public interest criteria under which the MMC makes its recommendations. The principal changes are:

- A voluntary pre-notification procedure will be introduced. Those choosing to notify will be entitled to automatic clearance within four weeks unless otherwise informed. Parties who do not pre-notify will remain liable to a reference for up to five years.
- There will be a provision for statutory undertakings by the parties in place of references where appropriate. The Director General of Fair Trading (DGFT) will be empowered to discuss modifications of a merger proposal, usually partial divestment. Where a satisfactory solution is found, the DGFT may advise the Secretary of State against a reference. In the event of the undertakings not being fulfilled, the Secretary of State will have the power to require divestment without a MMC investigation.
- The DGFT will also be empowered to propose legally binding undertakings by the parties to the Secretary of State about post-merger behaviour to prevent anti-competitive effects.

In addition, various administrative and minor legislative changes are planned in order to meet criticisms that MMC investigations take too long. To meet the additional costs, it is proposed to introduce a statutory charge, details of which have still to be decided.

While the foregoing changes will be helpful, they do not address some serious criticisms that have been directed at the existing system. Those criticisms relate to the Secretary of State's wide discretion in deciding whether or not to refer a merger and to the broad public interest criteria under which the MMC makes its recommendations. Indeed, the green paper on mergers states that:

> "[g]iven the law as it now stands, the main policy issue is the set of criteria that the Secretary of State should use in deciding whether or not to refer a merger to the MMC." (p.4).

The Secretary of State may, at his discretion, refer a merger as long as it meets the size and 25 per cent national market share requirements of the law. The MMC's public interest test requires it to take into account not only competition, but also a number of other specified factors including "balanced distribution of income and employment" and "all matters which appear to them to be relevant."

There have been complaints that reference decisions were politically motivated and that considerations such as regional development and foreign ownership have at times taken precedence over competition. The most recent reference was made in May, when Lord Young referred the

acquisition by Kuwait of a 22 per cent interest in recently privatized British Petroleum. Concern about the influence of an O.P.E.C. member on North Sea oil is understandable. Nevertheless, the reference adds to the worries of those who believe that the MMC should concentrate upon the maintenance of competition.

In the 1970's the number of merger references only averaged about three or four annually and the policy was applied quite leniently. A 1978 official study called for a more critical view and recommended some changes in the MMC's public interest criteria to make them more precise. The then Secretary of State, Mr. John Nott, rejected legislative change but indicated a tougher stance. In recent years there have generally been between five and ten references per year out of a total of 200 to 400 mergers that would have qualified. However, the increased activity has been accompanied by complaints that the MMC's conclusions are unpredictable and inconsistent with one another.

In 1984, then Secretary of State, Mr. Tebbit, stated that references would be made primarily though not exclusively on competition grounds. Lord Young's paper of last January makes a similar commitment, stating:

> ...the main, though not exclusive, consideration in determining whether mergers should be referred to the Monopolies and Mergers Commission (MMC) will be their potential effect on competition. But the Government believes that the law should continue to give the Secretary of State for Trade and Industry discretion to refer mergers on other public interest grounds. (p.7).

According to London's *Financial Times* of May 14, Lord Young has in fact referred mergers primarily on competition grounds. Nevertheless, an editorial on March 7 entitled "A Merger Policy for the 1970's" states in part:

> Instead of putting merger policy on a firm philosophical footing, the Government has concentrated on streamlining reference procedures....This is most unlikely to be the last word on British merger policy. A document that could have been written in 1978 is not going to seem adequate in the 1990's. Companies are left with an incentive to sharpen their lobbying skills and can justifiably complain that the referral rules remain opaque.

Restrictive Trade Practices

The government plans to scrap the existing provisions of the *Restrictive Trade Practices Act* for the registration of business agreements and to introduce a prohibition of agreements with anti-competitive effects. The amendments will reflect the principles of European Community cartel law and will provide:

- A comprehensive prohibition of agreements, concerted practices and recommendations by associations which have the object or effect of preventing, restricting or distorting competition in the U.K. or any part of it. Oral or tacit agreements will be covered and all sectors of the economy, including the professions, will come under the prohibition. at least initially.
- There will be procedures for granting both individual and block exemptions where justified according to criteria that will be specified in the legislation.

The prohibition will be administered by an "authority", presumably the Director General of Fair Trading (DGFT), with enlarged powers including those of search and seizure. He will decide whether an agreement is of a prohibited kind, and he will be empowered to levy a fine equivalent to as much as ten per cent of a firm's turnover. Appeals will lie with the Restrictive Practices Court (RPC). Provision will be made for private actions by parties injured by an agreement. Firms will be able to obtain the advice of the DGFT as to the legality of their agreements.

> The proposed system will provide a much stronger deterrent than the existing one. At present, all agreements as defined in the *Act* must be registered with the DGFT. He refers registrable agreements to the RPC, who decide if they are contrary to the public interest and must be abandoned. The *Act*, is credited with dismantling much of the formerly widespread cartelization of the British economy. At the same time, serious shortcomings in the system have become evident.

The definition of registrable agreements is in terms of form rather than of anti-competitive effects, with the result that many harmless agreements must be processed. Some harmful agreements escape scrutiny because they are cast in a form that is not registrable. Moreover, the penalties for failure to register a registrable

agreement are light and the DFGT has inadequate investigative powers.

In addition, a number of broadly worded exemptions have been enacted in the *Restrictive Trade Practices Act* and other acts. The green paper on restrictive trade practices lists 47. For example, one of them exempts most professional services and another empowers the Secretary of State to exempt agreements "important to the national economy." All the exemptions will be terminated by the amendments and new ones will have to be sought. The government's responses to requests for exemptions will be watched with interest.

U.S. DEVELOPMENTS

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The U.S. Supreme Court has recently handed down three decisions in antitrust cases. Given the importance of Supreme Court decisions, its holdings in each of these cases is worth special note.

On May 2, 1988, in *Business Electronics Corporation v. Sharp Electronics Corporation* (No. 85-1910), the court ruled on the applicability of the *per se* rule to vertical conspiracies. The court held that *per se* treatment is appropriate only when the conspiracy also includes an agreement to set prices at some level. In the absence of an agreement to set prices, the *per se* rule is not applicable.

This decision by the court is significant, but it is also a narrow decision. In the first place, it applies only to vertical conspiracies; the agreement alleged was vertical, not horizontal, and that distinction was emphasized by the court. Second, the holding does not change the law respecting the evidence needed to create a vertical conspiracy. The issue in this case was not whether there was a vertical conspiracy; the court assumed there was one. Finally, in holding that vertical agreements without a price-fixing element are not *per se* violations, the court did not disturb the case law that a vertical agreement which has a substantial adverse effect on interbrand competition violates the rule of reason. Thus, a plaintiff who proves the existence of an agreement may still get to trial on a rule of reason theory even in the absence of an agreement on price. Indeed, the plaintiff in *Sharp* can do that under the remand order of the court.

On May 16, 1988, the Supreme Court issued an opinion which increases the antitrust exposure of hospital peer review committees. In *Patrick v. Burget*, U.S. (May 16, 1988), the court held that the "state action" defense, previously thought to immunize many peer review committees from federal antitrust liability, is inapplicable unless state officials actively take part in or review the peer review process.

Under the state action doctrine, there is no federal antitrust liability for actions taken:

- pursuant to a clearly articulated state policy allowing anticompetitive conduct;
- if the anticompetitive conduct is "actively supervised" by the state.

Prior to *Patrick*, it was widely believed that peer review committees established pursuant to state laws were "actively supervised" for purposes of the defense even if state officials played no role in the review process. The Supreme Court has now made it clear that peer review committees are not immune unless "a state official has and exercises ultimate authority over private privilege determinations." Thus the "state action" defense will no longer protect peer review committees of the large majority of private hospitals although it may still protect physicians serving on state boards of medical examiners.

In response to a large award obtained by Patrick in the trial court, Congress enacted the *Health Care Quality Improvement Act* of 1986, 42 U.S.C. § 11101-11152 (1987). The *Act* grants immunity for those involved in "professional review actions" but, as a footnote in the *Patrick* decision notes, immunity exists under the *Act* only if the committee's action was taken in the "reasonable belief that [it] was in furtherance of quality health care." See 42 U.S.C. § 11112(a) and *Patrick*, U.S. at fn.8. If the *Act* does not confer immunity unless the staff acted in good faith, it will probably not decrease the overall volume of staff privileges

litigation. Plaintiffs will still file complaints alleging anticompetitive intent and will still be able to take their claims to the jury in many cases.

In a decision issued on June 13, 1988, the Supreme Court refused to apply the so-called *Noerr-Pennington* doctrine, under which efforts to influence legislative action are immune from the antitrust laws, to the context of standard-setting processes of private associations without official authority, even if the standards adopted by the association are subsequently adopted by state and local governments. *Allied Tube & Conduit Corporation v. Indian Head, Inc.* (No. 87-157). The court found that the *Noerr-Pennington* doctrine protects essentially political activity and observed:

> Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decision making, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law.

The court emphasized, however, that this question presented a close case, and that its holding was based on both the conduct and the nature of the activity in question. In this case, the defendants had not simply sought to influence legislative or quasi-legislative activity, but rather had used their market power to organize and orchestrate the actual exercise of the association's decision-making authority in setting a standard. The context and nature of the activity precluded immunity, but the court declined to decide whether the defendants' activity violated the antitrust laws; on that question, it vacated its grant of *certiorari*.

In a development that occurred as this article was going to print, the Department of Justice Antitrust Division issued a revised edition of *Antitrust Guidelines for International Operations*. It appears to take a more lenient view of various types of international business activity under the U.S. antitrust laws in keeping with the Reagan administration's antitrust policy.