FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

The following articles are taken from "Update", a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).

AUSTRALIAN ANTITRUST LAW UPDATE

Mergers — Parliamentary Enquiry

The Australian government released in June the report of a major Parliamentary Enquiry ("the Griffiths Committee") on the adequacy of existing legislative controls over mergers, takeovers and monopolization.

The broad ranging recommendations, in effect, supported the present policies of the Trade Practices Commission.

Major recommendations included:

- retention of the current test that mergers offend the *Trade Practices Act* if they result in, or strengthen, a position of dominance;
- rejection of compulsory pre-merger notification;
- entitlement for private litigants to seek injunctive relief to restrain mergers. At present only the Trade Practices Commission and the Minister can institute injunction proceedings. This right would not extend to target companies. Also, the Trade Practices Commission would be empowered to grant immunity from private injunctive action in appropriate cases;
- retention of the current monopolization provision which prohibits corporations with substantial market power taking advantage of that power for the purpose of eliminating or substantially damaging a competitor or preventing or deterring a new market entrant.

The government is considering the report but is unlikely to implement any of the recommendations until after the next elections, due in the first half of 1990.

DANISH ANTITRUST LAW UPDATE

The Danish Act on Competition

Background

Since 1955, the *Monopolies Act* has been the basis for the activities of the Monopolies Control Authority.

On June 7, 1989, the Danish Parliament adopted the *Competition Act*, which entered into force on January 1, 1990, and as of this date the *Monopolies Act* and the *Act of Prices and Profits* are repealed.

Purpose

The purpose of the new *Competition Act* is the achievement of the highest possible efficiency in production and turn-over of goods and services.

Considerations of competition are the only important factors in the administration of the *Act*. All considerations, such as protection of small business or price levels, must be taken care of through other legislation.

Transparency

Transparency is the easiest and least costly way for producers, distributors and consumers to obtain relevant information on prices, business conditions and other information on competition.

All agreements and concerted practices restricting competition have to be filed with the competition authorities, including all agreements and concerted practices resulting in actually or potentially dominant influence on the market. If such agreements or concerted practices are not filed with the competition authorities within fourteen days, such agreements and concerted practices are considered null and void.

The competition authorities can demand information from businesses, including accounts and accounting material, transcripts of books and other business documents, as well as electronic data which are considered necessary for the authorities in order to decide if there are any damaging effects of restrictions of competition. In principle, it is the intention of the *Act* that all information given to the competition authorities can be made available to the public in accordance with the *Act on Publicity of Administration.*

According to the *Competition Act*, information of a technical nature, including research, production methods and the products themselves, are, however, not publicly available, as such information is not considered necessary to obtain transparency in competition.

All other information is, as a main rule, publicly available. The competition authorities do have the possibility to make other information unavailable to the public, if this would result in a substantial economic damage to one or more businesses.

Restrictions in Competition

There will still be a need for remedies in cases of restrictions of competition, either by rules of law or otherwise. After some consideration it was decided to maintain the principle of control and not prohibition.

The *Act* repeats many of the provisions used in the *Monopolies Act* in connection with restrictions on competition. First, there can be negotiations between the competition authorities and the business in question. If this is not sufficient, the authorities can issue an order compromising or cancelling agreements, concerted practices and business conditions. The competition authorities can also order a business to sell to specified purchasers on normal trading conditions.

The *Competition Act* is applicable to all restrictions of competition with effect in Denmark, but when assessing the geographical market, international competition will also have to be taken into consideration, unless there are import barriers or the like, making a Danish market in itself relevant.

In deciding whether a restriction in competition will entail a dominant position in the market, a full economic analysis will have to be performed and, if based on market share alone, a market share of below 40-45% will not in itself create a dominant position.

Prices and Profits

Up to now the Monopolies Control Authority has had very wide powers over prices and profits. In accordance with the *Competition Act* such interference can only take place if such prices and profits can be considered restrictions of competition with damaging effects. Even then the competition authorities will have to follow the rules on negotiations and the issuance of orders. Interference can only take place when the price or profit is clearly above what is considered normal in size and duration in a market with efficient competition. The interference can take place in the form of fixing prices or profits or fixing rules of calculation to be used when fixing prices and profits.

Finally, the principle on the prohibition of binding reselling prices has been upheld in the *Act.*

Administration of the Act

The *Act* is to be administered by a Competition Council having its administrative functions with the Danish Register of Companies. Decisions made by the Competition Council can be appealed to a Competition Board, and the decisions by the Competition Board can be referred to the Courts of Appeal.

EEC ANTITRUST LAW UPDATE

National Cartel

The Court of Justice has upheld the decision of the Commission imposing fines on a national cartel involving the adoption of a common tariff, the allocation of sales quotas and standardization measures. It was deemed to affect trade between Member States because the cartel had the object

and effect to protect itself against foreign competition.

Copyright

The Court of Justice held that a national copyright-management society may violate: 1) art. 85, if its refusal to allow users established in other Member States direct access to its repertoire, results from a consented practice; 2) art. 86, if without any objective reason its royalties are appreciably higher than those charged in other Member States.

Distribution of Films

The Commission declared that the joint acquisition of films by a combination of German TV organizations fell within the scope of art. 85, because it involved exclusive rights for a long duration in respect of a great number of films. However, an exemption was granted after the TV organizations moderated the exclusive character of the transaction.

The Commission has deemed that a joint venture between three major American film producers for the distribution of their films in the Netherlands was caught by art. 85. Again an exemption was granted after the parties had changed the exclusive licence into a right of first refusal and withdrawn the notification of agreements in respect of pay TV.

Steel Market

The Commission imposed fines to a total amount of 9.5 million ecu on fourteen producers of welded steel mesh for a cartel set up by them involving price agreements, allocation of sales quota and the protection of the national market of each of them.

Banking

The Commission has compelled the Association of Dutch Banks to withdraw their agreements in respect of minimum commissions. An exemption was granted for the uniform procedure for the handling of cheques but the Commission reserved its position with regard to the uniform banking conditions and interest rates.

Powers of Investigation

The Court has held that the exercise of powers of investigation by the Commission is subject to national procedural rules for the protection of the rights of the defending undertakings. The Commission is obliged to respect procedural guarantees offered by national law. However, the necessity of the investigation may not be reviewed under national law.

The Commission may not compel undertakings subject to an investigation to answer questions that would result in an acknowledgement of a breach of the competition rules. Only questions relating to facts are therefore allowed and the Commission may not ask for the reason or purpose of certain events.

The Commission may hold a new investigation in order to verify or complete facts regarding a breach of competition rules even if those facts have become known to the Commission by accident during a previous verification.

JAPANESE ANTITRUST LAW UPDATE

Reform of Antimonopoly Law Guidelines for International Technology Licensing Agreements

Based on the interim report of its Technology Licensing Research Committee, the Japan Fair Trade Commission ("FTC") reformed, effective February 15, 1989, the former guidelines published in 1968 ("Old Guidelines") and published "the Guidelines for the Regulation of Unfair Trade Practices relating to Patent and Know How Licensing Agreements".

The Old Guidelines had specified certain restrictive clauses in international technology license agreements to be unfair trade practice and required both Japanese and foreign contract parties to file such international technology license agreements with the FTC.

Scope of Application

The New Guidelines apply not only to domestic license agreements, but also international license agreements. However, they do not apply to technology export agreements which have no impact on the Japanese market.

The New Guidelines apply to various types of license agreements including cross-license agreements, patent pool and multiple license agreements.

They are intended to give guidance on what should be considered unfair trade practices for license agreements but not to deal with the issues of private monopoly and unreasonable restraint of trade which are discussed under article 3 of the *Anti-Monopoly Act.*

Among various technologies, know how and intellectual property, the New Guidelines apply only to patents, utility models and know how license agreements. Software license agreements are outside the application of these new guidelines.

Trade secrets and customer information are not governed by the New Guidelines.

Classification of Restrictive Clauses

The Old Guidelines provided nine items as likely to be unfair trade practices and five items as the legitimate exercise of legal rights of the licensor under the patent or utility model license agreement. The latter five items were considered exemptions under article 23 of the *Anti Monopoly Act.*

The New Guidelines provide more concrete and detailed items in order to make clear the interpretation of unfair trade practices.

The New Guidelines provide seventeen items which, in principle, do not constitute unfair trade practices such as restriction of territory, period, minimum sales, export price, etc. They provide twelve items which are considered unfair trade practices, such as restriction of handling competitive products during the contract period, compulsory use of trademark, limitation of customer to whom one may sell, royalty for non patent products, etc.

The other six items, such as retail price fixing, are categorized as restrictions which are highly likely to be unfair trade practices.

Know How License

The Old Guidelines on know how license agreement applied the guidelines for patent license agreements *mutatis mutandis.* The New Guidelines point out six specific items to be discussed in light of the characteristics of the know how license agreements.

If the license agreement includes both a patent license and know how license, two license agreements are considered executed simultaneously.

Introduction of Clearance System

If a contractual party wishes to know whether a proposed license agreement is likely to constitute an unfair trade practice, each or both parties may ask the FTC for an opinion prior to concluding a license agreement.

SPANISH ANTITRUST LAW UPDATE

Brittan, the European Commissioner, Angry with Campsa

Mr. Leon Brittan recently sent a letter to the Spanish Government expressing his "serious concern" about the way in which the Spanish administration was adjusting the Spanish oil monopoly to European law.

The Commissioner considers that the dismantling of the Campsa monopoly is not taking place and warns about the possible reactivation of proceedings against the Spanish State as well as the termination of the commercial privileges granted to Campsa in the Spanish market.

Brittan granted the Spanish Government a period of one month to communicate to the European Commission the specific measures it will put into effect to guarantee free trade of petroleum products in Spain.

The European Commissioner has listed numerous breaches to the Spanish Government. One of the main breaches (the necessary access of independent operators to large consumers of fuel, butane and gas oil) has been accomplished only with regard to fuel.

Four years after the Spanish authorities made a pledge of free competition, the Commissioner could not accept the survival of exclusive rights in favour of the official monopoly.

The Spanish pledge to reduce by at least 50% the distance between service stations was not respected; in addition, certain provisions of the Spanish highway regulations contain limitations to the installation of new independent service stations.

To date, only fifteen locations have been authorized for independent companies, while groups affiliated with Campsa were granted authorizations to open some forty new stations in the same period.

UNITED KINGDOM ANTITRUST LAW UPDATE

New System for Vetting Mergers

Part VI of the new *Companies Act 1989* amends the *Fair Trading Act 1973*. It provides for a voluntary pre-notification system for proposed mergers whereby a merger notice in the prescribed form may be given to the Director General of Fair Trading. The Director-General has a total period of 45 working days to consider the notice, and has the power to seek further information. Subject to certain exceptions, if a reference has not been made to the MMC within this period no reference may be made.

Where the Director-General has recommended a reference to the MMC, the Secretary of State may, instead of making the reference, accept from the appropriate parties such divestiture undertakings as he considers appropriate to remedy or prevent the adverse effects of the merger. If undertakings are accepted, no reference may be made save where material facts were not disclosed or made public before the acceptance of the undertakings. The Director-General is to monitor the carrying out of the undertakings and review whether they remain appropriate.

The new *Act* also provides that where an anticipated merger is referred to the MMC, each party is prohibited during the period of reference from acquiring any interest in any other party, except where the Secretary of State has consented. This also applies to persons connected with the parties.

UNITED STATES ANTITRUST LAW UPDATE

Court of Appeals Expands Concept of Venue and Personal Jurisdiction

In *Go-Video, Inc.* v. *Akai Electric Co.*, 885 F.2d 1406 (9th Cir. 1989), the U.S. Court of Appeals for the Ninth Circuit held that venue and personal jurisdiction in antitrust cases were proper even though the alien corporate defendants had no presence or business in that district. Plaintiff, Go-Video, had alleged a conspiracy to prevent marketing of a dual-deck VCR among various Japanese and Korean electronics manufacturers, and process was served by mail in Japan and Korea under the worldwide service of process provision in Section 12 of the Clayton *Antitrust Act*. In rejecting the defendants' claim that the service of process provision of Section 12 could not be used without first satisfying the venue requirement of the same section (which specifies that the defendant must transact business in the forum district), the Court ruled that the venue and service provisions of that law were independent of each other. According to the decision of the Ninth Circuit, antitrust cases may be instituted against aliens in any U.S. District Court under the *Alien Venue Act*, 28 U.S.C. § 1391(d), as long as the defendant had some minimal contact with the United States as a whole, and process in antitrust cases may always be served throughout the world. This same principle had been established with regard to securities cases by the same Court in 1985. (*Securities Investor Protection Corp.* v. *Vigman*, 764 F.2d 1309 [9th Cir. 1985]).

House Passes Bill to Increase Antitrust Penalties

The United States House of Representatives recently passed a bill that would increase the penalties for violating the *Sherman Act* from $1 million to $10 million for corporations and from $100,000 to $350,000 for individuals. *Antitrust Criminal Penalties Amendment of 1989*, H.R. 3341. The bill makes no changes with respect to imprisonment for antitrust violations. The measure seeks to lessen the possibility that violation of the antitrust laws would ever be profitable to the offender. The U.S. Senate has not yet acted on the measure.

Manufacturer Obtains Settlement in Grey Market Case

In *Shulton, Inc.* v. *Optel Corp.*, No. 85-2925 (D. N.J., 1989) a manufacturer of health and beauty aids obtained a $4 million settlement in a "gray market" action against distributors. In addition, certain distributors were permanently enjoined from purchasing the manufacturer's products without express written consent. The complaint alleged that defendant distributors induced plaintiff to sell products at reduced export-only prices by representing that the products would only be sold outside of the United States. Plaintiff alleged that the merchandise was sold in the United States at prices far below that of legitimate domestic wholesalers. The settlement also required the distributors to produce affidavits detailing the methods used by defendants to defraud plaintiff and stating whether any of plaintiff's employees participated or acquiesced in the diversion scheme.