

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

INTERNATIONAL COMPETITION LAW

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).

AUSTRALIA

Study of the Professions

The Trade Practices Commission, the independent statutory body having responsibility for administration of Australia's antitrust and Federal consumer protection laws, has issued the first of a series of study papers it is preparing in relation to the professions in Australia. The decision by the Commission in 1990 to institute the study was initially the subject of controversy with a number of professions, including the legal profession, questioning the jurisdictional basis for the Commission to undertake the study.

The first report indicates that the Commission will approach the study on a profession-by-profession basis addressing the following public policy questions:

- Why is particular regulation necessary? What is the nature, extent and consequence of the market failure it seeks to address?
- Does the particular regulation result in net public benefits after taking into account the costs of restrictions on competition?
- Are less restrictive regulatory options available at a lower costs?

The Commission has started with a study of the accountancy profession and will follow with architecture and medicine. The legal profession will no doubt follow.

DENMARK

Interference with Prices under the Competition Act

In its recent publication "Documentation" the Danish Competition Council has laid down guidelines concerning possible interference by the Competition Council in the price fixing of individual businesses. It is the opinion of the Competition Council to create efficient competition, competitors in a given market must have the necessary knowledge and insight in competition matters and have free access to the market. Transparency is of the essence. Efficient competition means that businesses do not obtain profits higher than normal. If businesses obtain profits which are extreme, this can be an indication of competition restrictions.

If a business is in the position to fix extremely high prices and has extraordinary profits this will often be considered a restriction of competition and can be viewed as an abuse of a dominant position. In order to ascertain to what extent a business is abusing a dominant position, the *Competition Act* states that individual cases will have to be considered based on a number of factors.

The dominant position must be held over a long period, and the possibility of keeping a dominant position in the market must be viewed in connection with the possible barriers of entry to the market in question.

It is further a condition that the dominant position have a damaging effect on efficiency. Free access to the market is a condition for efficiency. Unreasonable prices can be a consequence of high costs, and high costs are normally in themselves damaging for efficiency.

According to the rules of the *Competition Act*, the Competition Council must make an

CANADIAN COMPETITION POLICY RECORD

investigation to ascertain whether a restriction on competition is taking place.

Before the Competition Council can interfere it is a condition that the restriction entail a price or profit above what could be obtained in a market with efficient competition. If this is the case, the Competition Council can fix maximum prices or profits for a period of up to two years, or fix specific rules of calculation which have to be used in calculating prices or profits.

When considering whether there is a price deviation due to an abuse of a dominant position it will be necessary to use a hypothetical evaluation of conditions as they would have been in a market with free competition. It is normally considered that in such a market it will not be possible to obtain extraordinary profits, and the price will reflect the cost structure of the most efficient businesses. It is also stated that the price level in other countries can be part of the judgment.

EUROPEAN COMMUNITIES

Soda Ash Cartel

Heavy fines have been imposed on two European producers of soda ash, Solvay and ICI, because of (1) their market partition agreement in respect of the German market, which was found to be contrary to Art. 85, and (2) their pricing policy, based on exclusionary rebates, which constituted an abuse of dominant position (Art. 86).

Pharmaceuticals

An exemption has been granted to a European Economic Interest Grouping (EEIG) called ORPHE, set up by seven small and medium sized wholesalers of pharmaceutical products. The agreement contains anti-competitive provisions relating to joint purchasing, a common trade mark and data bank, and priority for ORPHE members in commercial dealings. This is the first time the Commission has given its opinion on the validity of an EEIG agreement.

Cooperation Agreements

An exemption has been granted to the cooperation agreements between a German, Italian and two American pump manufacturers in respect of the development and production of a new chrome nickel steel pump.

A second exemption was granted to a Swedish and German company for their agreement in respect of the exploitation and marketing of a new type of packaging known as CEKACAN.

A comfort letter has been addressed to Bayer and Hoechst for their research and development agreement in respect of a new drug against AIDS.

Export Ban

In a decision addressed to Bayer A.G., the Commission has made clear once again that even indirect prohibitions to export such as contained in Bayer's general conditions, are contrary to the competition rules of the EEC Treaty. However, no fine was imposed on Bayer.

The Commission has prohibited the Dutch electricity generating companies (SEP) and their distributors from restricting imports and exports of electricity by private industrial consumers, as well as exports by distributors. Although the Commission accepted that SEP is entrusted with the operation of a public service within the meaning of Art. 90(2), it rejected SEP's claim that Art. 85(1) did not apply, because the proper performance of this public task does not require absolute control of imports and exports.

Mergers

The Commission cleared its first merger case in approving the alliance between Renault and Volvo by cross share holdings in the truck and bus markets because these did not result in the creation or strengthening of a dominant position. As regards the car market, the alliance involved only 25% cross share holdings which do not result in a concentration within the meaning of the merger regulation which requires at least a 50% share holding.

CANADIAN COMPETITION POLICY RECORD

The Commission has cleared the merger between a Belgian and a Dutch insurance company, AG and AMEV, because the merger does not strengthen a dominant position since each of them is only a minor competitor in the home market of the other.

The takeover of the Dutch coffee manufacturer Van Nelle by Douwe Egberts which was effected in 1989, just before the adoption of the merger regulation, has finally been approved by the Commission. The Commission previously had issued a statement of objections to Douwe Egberts in which it took the view that the takeover constituted an abuse of Douwe Egberts' dominant position in the Benelux coffee market (market share of about 67%).

Broadcasting

The Commission refused to give an exemption for the agreements between 17 members of the European Broadcast Union (EBU), and Sky-television, establishing Eurosport, a commonly owned transnational commercial TV channel, dedicated to sports.

The Eurosport agreements result in the elimination of competition to Eurosport because (1) it takes away the incentive of Sky to pursue its plans to offer its own independent, competing sports service, (2) it grants Eurosport priority access to all programs of the Eurosport members as well as programs of EBU-members not taking part in Eurosport.

FRANCE

New Law Relating to Public Bids

On January 3, 1991, Law No. 91-3 "relating to transparency and due process of public bids and providing for rules of publicity and competition procedures for the concluding of certain contracts" was enacted.

This law provides for the setting up of an inter-ministerial commission to be responsible for investigations in the lawfulness of execution and impartiality of the preparation, concluding and execution of Public Bids.

A new offence is created, which can result in imprisonment of between six months and two years and/or a fine of 5,000 FF to 200,000 FF.

The law applies only to Public Bids of a certain value which will be stipulated by an order (arrêté) issued by the Minister of the Economy. Furthermore, this law does not apply to companies operating in the domain of transportation, production and distribution of energy and drinking water.

New Law on Intellectual Property Rights

On November 26, 1990, the French Parliament voted a law on intellectual property rights.

According to this law, any patent infringement committed after January 1, 1993 may be prosecuted before either the criminal or civil courts.

The new law facilitates a patentee in obtaining from the summary proceedings judge (juge des référés) an injunction prohibiting any continuation of an alleged infringement.

Definition of Dominant Position

In a decision of October 17, 1990 ("Société Internationale de Boisson et Société TEISSEIRE"), the Court of Appeal of Paris confirmed the criteria established by the former "Commission de la Concurrence" and the "Conseil de la Concurrence" for the appreciation of the concept of "dominant position". This concept "which means the power to hinder an effective competition, implies that the company concerned holds a leading position on the market, which position is determinant according to its share on the market, the disproportion between this share and the shares held by its competitors, as eventually its status and its methods of commercial actions".

Anti-competitive Agreements

The "Conseil de la Concurrence" ruled against a manufacturer for entering into an illegal agreement. Under the terms of the "general conditions of sale", the contractual guarantee could only be relied upon by purchasers who used equipment or accessories manufactured under the same trade-mark as on the original goods.

CANADIAN COMPETITION POLICY RECORD

According to the "Conseil de la Concurrence", such a clause in practice tended to dissuade purchasers from obtaining equipment manufactured under competing trade-marks and consequently restrained access to the market by other manufacturers (Decision no. 90-D-34 of October 2, 1990).

JAPAN

Antimonopoly Law Guidelines on
Distribution and Trade Practices

On January 17, 1991 the Japanese Fair Trade Commission ("JFTC") announced draft Antimonopoly Law Guidelines on Distribution and Trade Practices in Japan. This action by the JFTC is regarded as a result of the Structural Impediment Initiative ("SII") talks held by the US Trade Representative and the Japanese Government. The draft guidelines were presented at the second follow up meeting of the SII talks, and are intended to strengthen the enforcement of the Japanese Antimonopoly Law.

Part One of the Guidelines provides eight sample cases which illustrate illegal conduct relating to transactions between manufacturers and suppliers of materials and parts.

Part Two deals with transactions between manufacturers and distributors and specifically prohibits the maintenance of retail prices imposed by the manufacturer upon the distributor. It discusses the issue of reasonableness in relation to indications of retail prices, i.e. "manufacturer's desired retail price", "price for reference", etc., and also the illegality of checking on price maintenance at retail outlets, or the allocation or restriction of territories for sale.

Increase of Surcharges for Illegal Cartels

At the second follow-up meeting of the SII talks mentioned above, which was held on January 17 and 18, 1991, the US Trade Representative demanded an increase in the surcharges imposed in cases of illegal cartels (art. 7-2 of the Antimonopoly Law) by 10% of the gross sales of products during the period of the illegal cartel.

The Japanese Government's counter-proposal was to increase such surcharges by up to 6%; the current rate of surcharge is 3%

NEW ZEALAND

Apple Fields - Final Round

The Judicial Committee of the Privy Council has reversed the Court of Appeal decision in *Apple Fields* (Update August 1989, May 1990) and held that the Apple and Pear Marketing Board's production-based levy on growers was anti-competitive and not excused as being "specifically authorized" under the Board's empowering legislation. The Court of Appeal had placed reliance on the economic importance of primary producer boards in New Zealand in holding that the *Commerce Act 1986* was not intended to inhibit the operations of such boards. The Privy Council rejected this approach where (as was found) the issue is wholly governed by statute and purely a matter of interpretation. "Specific" authorization meant specific not general. The Board's empowering legislation permitted the imposition of levies which, in most circumstances, would not be anti-competitive in effect. It did not therefore "specifically authorize" an anti-competitive use of the levy power. "Nothing less will do than either a statutory authorization of the very act in question or, if it is one of a class or kind of authorized acts, that the whole authorized class would, if not so authorized, fall foul of the [restrictive trade practice provisions] of the Act". The Privy Council's decision is a reaffirmation of traditional methods of statutory interpretation and provides a workable means of resolving a particularly difficult issue under New Zealand's competition law.

Other Developments

The New Zealand High Court has recently been called on to consider the fundamental concepts of competition law. In *Magic Millions*, Wrightsons was held to have a dominant position in the supply of auction services in New Zealand for the sale of thoroughbred yearlings. In shifting

CANADIAN COMPETITION POLICY RECORD

its sales dates to clash with the newly introduced Magic Millions sales, Wrightsons was found to have used its dominant position in the market for the purpose of preventing or deterring Magic Millions from engaging in competitive conduct in the market.

In *Union Shipping*, the Port of Nelson attempted to require all port users to use its equipment and services when available by virtue of a threat of denied access to the Port. It later altered its position to impose a levy on those utilizing their own staff and equipment. The Court held that the Port of Nelson had misused its dominant position. The case is of particular interest in that it shows the hesitation to incorporate the entire "essential facilities" doctrine into New Zealand law.

The High Court in *Simpson v Fisher & Paykel* has reversed the majority finding of the Commerce Commission (Update, May 1989), concluding that the exclusive dealing policy of New Zealand's sole manufacturer of whiteware does not substantially lessen competition in the market. The Court found that Fisher & Paykel was significantly constrained by its competitors (primarily imports from Australia). Surprisingly, the Court noted that if the practice had been found to substantially lessen competition, the public benefits arising from the practice would not have outweighed its effect. Subsequently, the Court of Appeal exercised its discretion to refuse leave to appeal to that Court because of Simpson's delay in seeking leave. In Australia vertical exclusive dealing arrangements are expressly provided for in the *Trade Practices Act* and, in light of decisions under that Act, the decision in *Fisher & Paykel* means that the law on exclusive dealing is different either side of the Tasman. This does not sit comfortably with the single market concept under the CER Treaty and attainment of the goal of harmonization of commercial and business laws.

SPAIN

The EEC Brought Proceedings Against the Spanish Electrical Monopoly

The European Commission moved against Spain and nine other European countries with

the intention of dismantling the monopolistic markets of gas and electricity importation and exploitation.

The Commission objects to the electrical distribution monopolies in force in Greece, Ireland, Italy, The Netherlands, the United Kingdom, Portugal and Spain; the gas and electric distribution monopolies of France and Denmark, and the gas distribution monopoly of Belgium. This is the reason why the Commission sent a letter of "mise en demeure" to these countries asking for the presentation of their own allegations in two months time.

The European Commission supports its action under Article 37 of the *Treaty of Rome* which obliges the member States to modify their commercial monopolies to avoid any discrimination in connection with the industrial costs of distribution and marketing.

Even though the measure does not have many chances of having practical effects, it evidences the will of the EEC to force the single market of energy through a "common carrier" approach. With regard to Spain, the Commission is not objecting to the existence and management of the Electric System (Redesa). The action is brought against the distribution monopoly of electric companies and, more specifically, against Article 2nd of Law 49/84 which establishes a "unified exploitation of the electric system".

According to the opinion of the Spanish Administration, which will have to respond to the Commission as this action involves proceedings against national legislation, these proceedings are brought against all the European Community because only Germany (having no law regarding exploitation) and Luxembourg (having unimportant electric generation) are excluded.

UNITED KINGDOM

Restrictive Trade Practices Legislation

The UK restrictive trade practices legislation, which was due for reform following the recent White Paper proposing a Competition Bill to introduce an EEC-style "effects" based system, has not been included in the Government's legislative programme for this year.

CANADIAN COMPETITION POLICY RECORD

Acquisitions by State-Controlled Companies

The Government's policy of requiring the investigation of acquisitions of UK businesses by foreign state-controlled companies was taken a step further by the referral to the Monopolies and Mergers Commission of the acquisition by Elf of part of Amoco's UK business. The Department of Trade and Industry over-ruled the Office of Fair Trading ("OFT"), which had argued against a reference, considering that the acquisition by a state-controlled company of the Amoco business raised public interest issues which warranted an investigation.

In its Report into the acquisition by the French state controlled bank *Crédit Lyonnais* of *Woodchester Investments*, a general financial services company, the MMC found that as no concerns had been expressed on competition grounds about the effects of the proposed merger it should be cleared; the issue of state control should be considered in light of the circumstances of each case and there was no general presumption that state control is against the public interest. However, in another case the MMC recommended that the acquisition by the Finnish state-owned company *Kemira Oy* of the agricultural fertilizers business of *ICI* should not proceed. The merged company was expected to have over 40% of the market, with the next largest competitor being only half that size, and the effect would be to reduce the number of UK manufacturers from three to two. Competition would therefore be reduced; the MMC did not consider that the state ownership of *Kemira* affected this analysis.

In its report on the merger of *BAe's* guided missile business with the French state-controlled company *Thompson CSF* in a joint venture, *Eurodynamics*, the MMC found that competition would be stimulated despite concerns from major suppliers; the company kept the relevant French Ministries at arms length and had been managed as a commercial business (e.g.: carrying out drastic rationalization programmes to increase profitability). Furthermore, 40% of *Thompson CSF* was privately owned and internationally quoted. The MMC therefore concluded that it was unlikely that state ownership distorted the market.

The MMC is, therefore, taking a realistic approach and is treating each case strictly on its merits. If a state controlled company behaves like a private company, the MMC recommendation will not be influenced by its state ownership.

UNITED STATES

New Legislation

Last November, President Bush signed the *Antitrust Amendments Act of 1990*, which updates certain provisions of the antitrust law. The Act changes the rules governing interlocking directorates, increases criminal fines for *Sherman Act* violations, allows the federal government to recover treble damages in antitrust actions, and repeals *Clayton Act* Section 10 (requiring competitive bidding by common carriers).

Interlock Rules Modified

Clayton Sherman Act Section 8 has been expanded to prohibit officer as well as director interlocks for competitors. However, the scope of the section was narrowed to cover corporations with assets of \$10 million (with annual adjustments pegged to the GNP), instead of the previous threshold of \$1 million, and created a series of safe harbors to permit interlocks in *de minimis* situations. Under the 1990 Act, interlocks are allowed where:

- (1) competitive sales of *either* corporation are less than \$1 million;
- (2) competitive sales of *either* corporation are less than 2 percent of that corporation's total sales; or,
- (3) competitive sales of *each* corporation are less than 4 percent of that corporation's sales.

While the safe harbors are designed to apply to *de minimis* situations, the 2 percent provision opens a gaping hole for interlocks between corporations that do billions of dollars of business annually.

CANADIAN COMPETITION POLICY RECORD

**Supreme Court May Review Legality of Kodak's
Refusal to Sell Replacement Parts**

In February the Supreme Court indicated that it may review a case in which 19 independent companies that repair Kodak equipment allege that Kodak's refusal to supply them with replacement parts violates laws against tying a product to service and gives Kodak an illegal monopoly in the service market. Kodak has appealed to the Supreme Court in the Ninth

Circuit's ruling that a market for servicing Kodak equipment exists and there is sufficient evidence of monopoly power in that market to let the case go to trial. A number of similar cases have arisen in lower courts in recent years. This case, if accepted for review, will resolve any conflicts between those lower court cases. After the U.S. Department of Justice files its views with the Court, the Court will determine whether to hear the case.