FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

COMPETITIVE SERVICING OF EQUIPMENT—THE NEW ECONOMICS MEET OLD ANTITRUST PRINCIPLES

By: Donald I. Baker, Jones, Day, Reavis & Pogue
Washington, D.C.[1]

Every so often a case comes along which is so clear and so general in its implications that it promises to illuminate the antitrust future. *Eastman Kodak Company* vs. *Image Technical Service, Inc.*, now under submission in the U. S. Supreme Court, seems such a case.[2] A decision can be expected within four or five months.

Kodak asked in essence whether it is *per se* reasonable for a manufacturer facing interbrand competition for its new equipment to exclude independent firms entirely from providing downstream repair services for that equipment. The questions before the Court are framed in terms of tie-in and market power issues and the duty of a monopolist to deal; but they boil down to the question of whether a competitive manufacturer may monopolize the downstream "markets" for parts and servicing of its own equipment.

The issue is raised broadly and starkly because it comes up on a summary judgment motion by the defendant. This means that all of the disputed factual inferences must be assumed against the moving defendant.

The defendant's core argument is that it would be economically irrational for a competitive manufacturer to gouge its aftermarket customers on repair parts and services because, if it did so, it would lose future sales of new equipment. The plaintiffs (a group of service organizations) respond that this is a factual question, because the manufacturer's asserted inability to gouge depends on customers being able to predict accurately the cost of repairs at the time they buy the new equipment. The Ninth Circuit Court of Appeals, pointing to "market imperfections," said that this case should be sent back for trial.

The product at issue here is a large and sophisticated one, namely high-speed photocopying and imaging machines. Most buyers of these machines are businesses, not ordinary consumers, and they may well have a better chance of predicting costs. However, the implications of the case are much broader: thus, there are *amicus* briefs on both sides of the case, with the automobile and computer manufacturers' associations supporting Kodak, and automobile and computer servicing organizations supporting the plaintiffs. (In addition, the Justice Department supports Kodak and the state Attorneys-General support the plaintiffs.)

The practical issue in this case arises from the role of the jury in private treble-damage litigation in the United States. Of course, "life of equipment pricing" (i.e., ability of the buyer to predict repair costs at the time of initial purchase and factor it into his choice) raises factual issues, and these issues may differ from one type of customer or equipment to another. Yet to hold that this response would always defeat summary judgment and to throw all cases to the jury would be likely to result in jury verdicts for independent repairers most of the time. Intuition will tell average jurors that it is hard to predict repair costs and that they often feel gouged in aftermarket service (a point incidentally made in the *amicus* brief for the automobile repairers). Thus, jurors will tend to sweep aside economic learning, however prestigious, in favour of their own judgment.

The precise issue framed in the case is: when one party puts forward an economically accepted and plausible argument, is it entitled to get summary judgment—thus preventing the case from going to the jury—unless the other side comes forward with plausible evidence that the theory will not work in the particular case? That

the issue is being considered in these terms indicates how far antitrust law has come under the influence of Chief Justice Rehnquist and the emerging majority of Republican-appointed Supreme Court Justices.

In the old days, the issue would have seemed a lot simpler, or at least a lot less conceptual. For example, tie-in law had never been entirely a matter of economics: it had been concerned with coercion on its face, with the facts that tie-ins tend to annoy consumers, and that tie-ins can be used to squeeze unintegrated competitors out of business (as would be the case of the independent service organizations in the Kodak case). Therefore, tie-ins were prohibited *per se* in a series of landmark cases from the 1940s to the 1960s on the most minimal showing that the defendant had market power. The mere fact that the tying product was patented or copyrighted was taken to be sufficient proof of "economic power," even though the same product might be fully competitive with other patented or copyrighted products.[3] Thus, the International Business Machines Company was held to have committed a tie when it required users of its tabulating machines to buy tabulation cards from it;[4] and likewise the International Salt Company was held to commit a tie when it required users of its salt machines to buy salt from it, so long as cheaper salt was not available elsewhere.[5]

On the theories of those times, Kodak would not be moving for summary judgment itself because its ability to gouge customers of the tied product would not be at issue if it had power to impose the tie. (Incidentally, the salt dispenser purchaser would probably have been better able to predict its salt needs than the high-speed copying machine user to predict its repair needs). Instead, under the *IBM* and *International Salt* principles, Kodak might be concerned about the possibility of summary judgment being used against it, with "market power" resting on the presumption that its equipment embodied some patents.

The *Kodak* case has some broader potential economic implications. In the United States, substantial numbers of service businesses have grown up serving the repair needs of an increasingly technological society. The major manufacturers (such as the automobile companies) generally require their dealers to perform services but require customers only to obtain warranty service from its dealers. At the same time, smaller service organizations have often grown up servicing the products of a single manufacturer or many manufacturers. These independent organizations obviously depend on access to spare parts and, if the manufacturer is the sole source for any part, this dependence immediately raises the public utility question of the price at which parts should be offered. If the manufacturer can simply refuse to provide spare parts to independent repair organizations, then it is in position in many instances to monopolize the servicing of its own equipment.

The independent service organizations say that they often provide better and cheaper servicing. Kodak and its allies respond that the independent servicers are "free riders" (an important idea which was introduced into the antitrust jurisprudence with the Supreme Court's 1977 landmark decision in *GTE Sylvania*).[6] Kodak states its argument baldly:

> Respondents claim a right to free ride. That is, they want to exploit the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues. Respondents refuse to make any like investment, as Kodak's equipment competitors have done, nor even the much smaller investment to make their own parts. They have targeted the least capital-intensive segment of Kodak's equipment business—service—and asked Kodak to supply them with parts.[7]

This sounds like an argument that almost any manufacturer can make in any dispute with an independent repair organization.

At the oral argument on December 10, the broad principles seemed to get cluttered up with facts—which is not wholly surprising in the common law tradition, even if it makes economic scholars uncomfortable. The Justices wrestled with the question of whether spare parts or services could be economic "markets" separate from the original equipment, and several of them recognized clearly that the customer with a broken-down piece of equipment feels locked in. The plaintiff reargued the intensity of competition at the original equipment level and noted that Kodak's

larger competitor, Xerox, had since adopted similar servicing policies; between them, the two companies apparently have over 70 percent of the markets for new high-speed machines. In addition, the fact that Kodak would allow large users to self-service their own equipment and obtain parts to do so tended to strip the case of a "technical necessity" inference and left a "discrimination" echo in the air.

Supreme Court decisions are hard to predict. A decision allowing summary judgment for Kodak would have broad implications for how independent servicing businesses are analyzed, and bury traditional tying jurisprudence. A decision affirming the Ninth Circuit (and sending the case back for trial) would still be useful if it illuminated the "market power" issues in aftermarkets and provided for a more structured inquiry before letting jurors loose to exercise their instincts.

Notes

1 Copyright Donald I. Baker 1992.

2 No. 90-1029 on appeal from 903 F.2d 612 (9th Cir. 1990).

3 A particularly egregious example was *U.S. vs. Loew's, Inc.*, 371 U.S. 38 (1962), where third-rate movies were treated as tying products in a block-booking case simply because they were copyrighted.

4 *International Business Machines Corp. vs. U.S.*, 298 U.S. 131 (1936).

5 *International Salt Co. v. U.S.*, 332 U.S. 392 (1947) ("it is unreasonable, *per se*, to foreclose competitors from any substantial market").

6 *Continental T.V. Inc. vs. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

7 Appellant's brief, pp. 7-8.

EUROPEAN COMMUNITY COMPETITION LAW AFFECTS DE HAVILLAND DEAL

By: Paul K. Lepsoe
Fraser & Beatty, Ottawa

In the autumn of 1991, Canada directly experienced the reality of the reach of "Europe 1992" when the takeover of a faltering Canadian business, de Havilland, was blocked by the new powers of the Commission of the European Community.

The story began in July 1990, when Boeing Co. of Seattle put its de Havilland aircraft division up for sale. Boeing had purchased the Toronto commuter aircraft manufacturer from the Canadian government in 1986. Two state-owned European aircraft manufacturers, Aérospatiale SNI of France and Alenia e Selenia Spa of Italy, formed a consortium to purchase de Havilland from Boeing. The proposed acquisition was turned down by Investment Canada in June 1991 as not being of net benefit to Canada, although the Bureau of Competition Policy had indicated it would not try to block the deal. In an effort to secure federal government approval for the bid, the Ontario government then agreed to become a partner with Aérospatiale and Alenia in September. The European Commission announced its blockage of the deal on October 2, 1991.

The Commission's rejection was the first since the EC's new Merger Regulation went into effect in September 1990, during which time 52 proposed acquisitions were approved. The Regulation provides for review by the European Commission of mergers having a "Community dimension." Simply stated, this applies to mergers where the total "turnover" (basically, the sales) of all the entities involved exceeds five billion ECU (C$7.4B), where the EC-wide turnover of at least two of the entities involved exceeds 250 million ECU (C$370M), and where each of the entities involved does not achieve more than two-thirds of its EC-wide turnover within the same EC member state. The competition régime of the EC member state is ousted for mergers subject to the Regulation.

According to the Commission, the de Havilland deal was rejected because it would have created "a powerful and unassailable dominant position in the world market for turboprop (commuter) aircraft." This dominant position of the combined firms "would be likely to lead to a quasi-monopoly." According to the EC's analysis, the merged entity would have had about half of the world's market and two-thirds of the EC market for commuter aircraft. The percentages were even higher for more specific markets of turboprop aircraft with large numbers of seats.

EC Competition Commissioner Sir Leon Brittan, a one-time senior minister in the government of Margaret Thatcher, was criticized harshly by some for his free-market stance. The former socialist prime minister of France, Michel Rocard, reportedly called Brittan's decision a "crime against Europe." Sir Leon subsequently pointed out on several occasions that the EC Merger Regulation had been developed at a time when France held the rotating EC presidency and current French socialist Prime Minister Edith Cresson was the ministerial representative for France.

The EC Industry Commissioner, Martin Bangemann, has called for other EC departments to have more input into merger approval decisions in the future. The Commission will reportedly discuss Bangemann's proposed changes to merger procedures in January.

In order to meet the EC's concerns about the proposed takeover, Aérospatiale initially re-structured its bid to exclude Alenia. However, in late November, Aérospatiale withdrew. It appears that Bombardier Ltd. of Montreal, backed by the Ontario government, is now the only potential buyer.

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).

DENMARK

Structural Changes in the Danish Telecommunications Sector

As a consequence of the liberalization of the telecommunications sector in the EEC, Denmark has restructured the national companies with a holding company, Tele Danmark A/S, holding 100 percent of the five operating companies

- KTAS (Copenhagen Telephone Company);
- JTAS (Jutland Telephone Co.);
- Fyns Telefon A/S (Funen Telephone Co.);
- Tele Sønderjylland A/S (South Jutland Telecom); and
- TELECOM A/S.

The concessions are gradually given to Tele Danmark A/S which will be the only company holding concessions after March 1, 1992.

Competition in Pharmaceuticals

Based on an investigation in 1990 by the Competition Council in pharmaceutical trade, it transpired that no competition on prices existed, neither on the wholesale nor on the retail level, and further, that competition was restricted by barriers to entry.

Negotiations between the Competition Council and representatives from the trade resulted in an agreement whereafter all agreements on the wholesale level will be abolished as of October 1, 1991. This means that individual producers and importers of pharmaceuticals will enter into wholesale agreements, and wholesalers will no longer have identical purchase prices and profits. Furthermore, it will be possible for wholesalers to vary their prices when selling to pharmacies.

Horizontal Price Fixing

There is in the Danish *Competition Act* no provision on horizontal agreements or price cartels (even if they are based on formal agreements or concerted practices). The memorandum discusses pros and cons of such agreements, which according to Section 5 of the *Competition Act* will have to be filed with the Competition Council if such agreements or concerted practices result in a dominant influence on a certain market.

Definition of Relevant Market

The relevant market cannot be defined in general terms and although the geographic market will often be Denmark, there will also be cases where parts, or even small parts of the country, can be defined as the relevant market. As concerns the relevant product market, substitutability will be an important factor and this will be influenced by technical matters, price differences, possible

authorizations, and factors such as fashion, etc. The decisive factors will be the players in the market and the circumstances on which they base their decisions.

Interference with Prices in Accordance with the Competition Act

The Competition *Act* has a purpose to further competition and strengthen efficiency in production and turnover. As mentioned, one of the means is transparency, but according to Section 13 of the *Competition Act*, the Competition Council can fix prices and profits if these are clearly above what can be obtained in a market with free competition.

In order for the Competition Council to interfere, a dominant influence must be established and this must be viewed in a dynamic context, wherefore the dominant position must be held for a longer period and must be viewed in relation to any barriers to entry to the market in question.

EUROPEAN COMMUNITIES

Abuse of Dominance

The Court of Justice has reduced by one quarter the fine of 10 million ecus imposed by the Commission on AKZO for abusing its dominant position in the plastics market by systematically undermining the activities of a new competitor.

The highest fine ever (75 million ECUs) has been imposed by the Commission on Tetra Pak once again for abusing its dominant position in the market for liquid and semi-liquid packaging machinery and cartons. The abuse concerns the restrictive and exclusive nature of agreements with customers, discriminatory and predatory pricing, and other unfair practices.

Copyright

The Court of First Instance upheld the Commission decision accusing the Irish and British Broadcasting organizations of abusing their dominant position by refusing to give an independent publisher a licence to publish their weekly programme listings. The Court held that, although the exercise of copyright is not in itself an abuse, the three companies went beyond that necessary to fulfil the essential function of copyright. All three companies have lodged an appeal against the judgment with the Court of Justice.

Broadcasting Rights

In reply to a preliminary question put forward by the High Court of Thessaloniki, the Court has stated that a member State may not grant one single company exclusive rights as to both the transmission and the re-transmission of TV programmes if this could lead to a discriminatory policy in favour of that company's own programmes.

Telecommunication

The Court has partly overturned an attempt by France to quash a controversial piece of Commission legislation intended to force telecom authorities to allow more competition in the supply of terminal equipment to start opening up the market for telecommunication services. The Court's judgment broadly supported the Commission in breaking up national monopolies in this sector.

The Commission has adopted guidelines as to the applicability of competition rules in the telecommunication sector.

Mergers

So far, the Commission has received approximately 50 notifications of concentrations under the Merger Regulation. The overwhelming majority has been given the green light.

Among the mergers declared compatible with the common market were:

- a concentration between two suppliers of telecommunication systems and equipment, Alcatel and Telettra. The very high combined market shares on the transmission market in Spain were offset by the agreement between the parties to remove all vertical links with their main customer;

- a concentration between Magneti Marelli, a subsidiary of Fiat which produces automotive parts, and CEAC, a producer of batteries. As the new combination would have a high market share in the French market for starter batteries, Fiat agreed to strongly reduce its majority holding in the capital of a former French competitor.

FRANCE

Application of French Competition Law to Foreign Companies

In a decision dated July 10, 1991, the Conseil de la Concurrence recalled (the "*Yacco-Nature*" case) that it has jurisdiction to examine the anticompetitive practices of companies having their headquarters abroad in the event that such practices have effect within French territory.

Power of the Conseil de la Concurrence (CC) not to Pursue all Parties to an Anti-Trust Infringement

In a judgment of September 25, 1991, (appeal of Salo*mon* against decision number 21 D 03 of the CC) the Cour d'Appel de Paris for the first time established the principle according to which the CC was not obligated to pursue all the parties to an antitrust infringement "where it determines that the action of some of them justifies neither an injunction nor financial penalties."

Possibility for the Courts to Require an Opinion from the Cour de Cessation (CdC)

Law number 91-491 of May 15, 1991, institutes a new procedure which may be applied particularly in competition matters. It allows the courts, in all areas except criminal matters, to request the opinion of the CdC on a new question of law presenting difficulty and likely to repeatedly appear in numerous litigations.

The CdC must render its opinion within three months, during which the court seized with the matter should stay its proceedings. The ruling by the CdC is not binding on the court which referred the question.

Application of French Merger Control

To date, the Minister of Finance, the authority responsible for the French merger control, has never ordered divestiture.

However, attention should be drawn to two recent decisions (ministerial orders of June 26 and July 20, 1991) relative to mergers. In these two cases, the Minister authorized the mergers on condition that certain assets were disposed of in specific geographical zones, in order to prevent the new group from retaining in such zones more than 50 percent market share.

ITALY

The "Single Barrier" Principle in the Italian Competition Law

As of October 14, 1991, the Italian competition law entered into force. This law (entitled *Norme per la tutela della concorrenza e del mercato*) applies to (i) agreements and concerted practices between undertakings; (ii) abuse of dominant position; (iii) concentrations (mergers and acquisitions); (iv) setting up and powers of the Competition Authority; (v) special rules for banks, insurance companies and publishers; and (vi) powers of the government in the field of concentration.

The rules related to agreements and concerted practices between undertakings (Section 2) and the abuse of dominant position (Section 3) are almost identical, respectively, to Sections 85 and 86 of the *EEC Treaty*.

Such correspondence is not due to a "lack of imagination" of the Italian legislator, but to the adoption into the Italian legal system of the "single barrier" principle.

According to this principle, an agreement, a concerted practice (or an abuse of dominant position) may fall—alternatively—within the field of application of national or EEC rules on competition. This means that a certain behaviour shall have to comply only with one legislative barrier, either national or European.

Indeed, according to Section 1, first paragraph of Law 287/90, the provisions of the Italian competition law shall apply to agreements, concerted practices and abuse of dominant positions which do not fall within the field of application of Sections 85 and/or 86 of the *EEC Treaty*, of Sections 65 and/or 66 of the *European Coal and Steel Community Treaty*, and of any other relevant EC rule.

The criteria to determine the applicable law are the effects of the agreement, practice or abuse. Should these effects remain within Italy, national competition rules shall apply, while if behaviour affects competition within the common market or trade between member states, the EEC rules shall apply.

JAPAN

New Guidelines on Distribution and Trade Practice

The Japanese Fair Trade Commission (JFTC) announced the draft *Guidelines on Control of Unfair Trade Practices regarding Exclusive Import Distribution Agreements* on September 18, 1990 and draft *Anti-Monopoly Law Guidelines on Distribution and Trade Practice* on January 17, 1991 for comments from industries and other interested parties in Japan and foreign countries. On July 11, 1991, the JFTC finally announced the new *Guidelines on Distribution and Trade Practice* which combined the above two *Guidelines* and tried to eliminate discrimination between domestic and foreign trade.

These new *Guidelines* try to assist business entrepreneurs and associations (unions) to select trade practices which would not violate the Anti-Monopoly Law. Since it is sometimes difficult to identify whether the conduct in question is legal or illegal, the *Guidelines* provide a pre-consulting (ruling) system on trade practices.

One of the significant points of these *Guidelines* is that they cover not only trade in products but also business services.

NEW ZEALAND

Commerce Commission Under Siege

Recent decisions of the Commerce Commission to block mergers on competition grounds are being attacked in the High Court. Following on its reversal of the Commission's decision in a trade practice case, *Simpson v. Fisher & Paykel* (Update May 1991), the High Court has overturned the Commission's decision to block the proposed merger between the New Zealand Co-operative Dairy Co. Ltd. and Waikato Valley Co-operative Dairies Ltd. The merger would absorb Waikato Valley into NZ Dairy with the merged company accounting for some 45 percent of national dairy production.

The Court agreed with the Commission's conclusion that NZ Dairy would be likely to acquire a dominant position in the market for the supply/acquisition of milk ex-farm. However, although competitive detriment was seen to arise from the dominance, the Court held that the Commission had given insufficient weight to the significant public benefits in the merger which included increased payout to farmers, increased ability to compete internationally, and avoidance of dairy farm failures. These benefits enured to the New Zealand community as a whole and substantially outweighed the detriment resulting from the merger.

Additionally, the Court disagreed with the Commission's finding of dominance in the liquid milk products ("town milk") market. The Court found that NZ Dairy would not strengthen its existing dominant position because of Waikato Valley's imminent failure without a merger.

The case has excited considerable interest because of the importance of dairying and dairy exports to the New Zealand economy. Following the release of the Commission's decision refusing the merger, the government took the unusual step of issuing an economic policy statement, supportive of efficiency-related restructuring within the dairy industry, which was taken into account by the High Court. The judgment on appeal has some interesting comments on the "failing company" doctrine, the origins and ambit of which were extensively argued.

About to be heard in the High Court is an appeal from the Commission's decision declining clearance or authorization for the takeover of the Pacer Kerridge cinema chain by Hoyts, the other major cinema operator in New Zealand. The merger raises issues of market definition for the distribution and exhibition of films and, in particular, whether the market extends to broadcast television and home videos.

POLAND

Activities of the Antimonopoly Office

The Polish Antimonopoly Office, formed on April 13, 1990, is the first office of its kind in a post-communist régime. The Antimonopoly Office administers the Antimo*nopoly Law* (passed on February 24, 1990). Structural functions of the Office include reviewing the division of large firms, the formation of new businesses and the prevention of the emergence of any new monopolies. Regulatory functions cover the prevention of monopolistic practices including excessive profit taking and agreements to limit competition. The Office is also tasked with promoting competition through structural changes to the economy including creating an encouraging climate for new business formation.

From April 1990 to February 1991, the Office has considered 1800 different cases and rendered decisions in 346 cases. Experience to date has shown the following monopolistic practices to be the most prevalent in Poland: the imposition of difficult contractual conditions; conditions precedent which the contracting party would not agree to if given any choice; agreements among firms to bar market access and entry; abuse of dominant position creating a privileged position for some businesses; and, limitations on the production, sale or purchase of goods with the intention of raising prices. Problems with contractual conditions are prevalent in economies where consumer demand greatly exceeds supply and present a challenge to the antimonopoly regulators, as shown by the following case.

Drewbud Decision

This decision involved difficult contractual conditions imposed by a construction company (Drewbud). The Antimonopoly Office commenced proceedings following complaints about the following contractual conditions: lack of interest on promissory notes, inability to amend or annul a preliminary contract, the unclear basis upon which the price of a house would be established, and uncertainty as to whether or not the promissory payment would form part of the price. The Office found that consumers were willing to accept such unfavourable terms because the enormous demand for housing created a producer's market that Drewbud was taking advantage of. The Office ruled that Drewbud should address all four complaints. Drewbud appealed to the Antimonopoly Court. The Court upheld the Office on the three latter points but not with respect to the lack of payment of interest. The Court found that the lack of payment of interest was not a monopolistic practice but necessary to perform economic activity and therefore allowed by article 6 of the An*timonopoly Law* (the clause of reason).

SPAIN

The Ministry of Economy and Finance Brings Action Against Car Dealers

The Directorate General for Competition of the Ministry of Economy and Finance has brought action against the National Association of Car Dealers (Faconauto) and its provincial associations following evidence that the Association had used abusive and restrictive practices with regard to the price fixing of repairs and sales of second hand vehicles.

If the proceedings confirm that the alleged practices have occurred, the Association may be fined an amount of up to 150 million pesetas. In accordance with applicable law, the amount of the fine can be increased up to ten percent of the sales volume reached by the parties involved in the economic year immediately preceding the Resolution of the Court. The importance of this

legal provision can be clearly appreciated in the light of the fact that Faconauto has some 9,000 members, with a total of 150,000 employees, and total sales in excess of three trillion pesetas.

UNITED KINGDOM

Monopolies Against the Public Interest

Press reports indicate that the current investigation conducted by the Monopolies and Mergers Commission (MMC) into cars and spare parts has reached the preliminary conclusion that at least two complex monopolies exist in the U.K. car industry:

(i) the agreement between Britain and Japan restricting Japanese imports to 11 percent of the market;

(ii) the manufacturers' selective distribution systems.

The MMC will now decide whether these monopolies operate against the public interest; if the MMC finding is unfavourable and is accepted by the Secretary of State, there may be a fundamental change to the way cars are sold and priced in the U.K. The final report was expected by October 31, 1991.

The MMC report regarding the acquisition of Stora Kopparbergs Bergslags AB by Swedish Match N.V. has concluded that this acquisition operates against the public interest because of the substantial equity holding held by Gillette in Swedish Match N.V. Gillette has been asked to dispose of both its debt and equity interests in Swedish Match N.V.

Restrictive Trade Practices

Earlier this year, the MMC made enquiries of the seven London Eurobond firms which make up the IPMA Market Practices Committee as to whether the following market practices breach the Restrictive Trade Practices Act:

(i) agreements between firms on acceptable levels of underwriting fees;

(ii) the fixed price re-offer system.

It is thought that the MMC enquiry into the second practice mentioned above will not lead to its curtailment.

The OFT has referred the British Sugar Corporation and Tate & Lyle to the Restrictive Practices Court for agreeing to fix sugar prices to customers. It is anticipated that both companies will give undertakings to the court not to fix prices again.

UNITED STATES

Supreme Court Agrees to Review Kodak Case

The Supreme Court has agreed to review the decision of the Ninth Circuit Court of Appeals to forward a case alleging violations of sections 1 and 2 of the Sherman Act against the Eastman Kodak Company. As reported in the May edition of the *Antitrust and International Trade Law Update*, several independent companies that repair Kodak equipment allege that Kodak's refusal to supply them with replacement parts violates laws against tying a product to a service and gives Kodak a monopoly in the service market for its own equipment. The Court's review should resolve differences between lower federal courts regarding issues raised by tying cases where the company alleged to have engaged in the illegal tying does not have market power in the market for equipment generally, but does have such power if the market is defined as the market for service of its own equipment.

Legislative Developments

The U.S. Congress is considering amendments to the National Cooperative Research Act of 1984 which would limit antitrust liability to companies engaged in manufacture and production joint ventures, similar to the limitations on liability currently allowed for research joint ventures. Under the proposed amendments, companies would be able to limit their antitrust liability to actual, rather than treble, damages for joint manufacturing and production ventures, if antitrust enforcement agencies are informed before the joint venture is begun. A version of the bill has been cleared by both the House and Senate Judiciary Committees. A dispute exists, however, between Congress and the Bush administration

regarding whether the proposed amendment should distinguish between U.S. and foreign joint ventures. Both the House and Senate versions of the bill attempt to define the ventures that would qualify to exclude most foreign joint ventures from eligibility. The Bush administration opposes these limitations.

Judge Rules FTC Lacks Power to Challenge Actions of Non-Profit Organization

An administrative law judge of the Federal Trade Commission has ruled that the Commission lacks jurisdiction to challenge an allegedly illegal agreement between the College Football Association, a non-profit organization, and Capital Cities/ABC, Inc. The agreement gives ABC the exclusive right to televise certain college football games. According to the ALJ, section 4 of the *Clayton Act* gives the Commission power to challenge actions of corporations which may tend to restrain trade only if the corporation is "organized to carry on business for its own profit or that of its members." The fact that CFA operates as a business and not a charity does not remove its status as a non-profit organization, according to the Judge. The ALJ's ruling contradicts some federal court decisions, including a recent decision of the Eleventh Circuit Court of Appeals. There, the Court ruled that the FTC has jurisdiction over the actions of non-profit organizations despite section 4 of the *Clayton Act.*