FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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A great deal is currently happening in relation to competition law and policy in Australia.

Changes to the Australian Trade Practices *Act*

The Federal Attorney General has announced the following proposed changes to the *Trade Practices Act*.

- The mergers test will be changed from the current "dominance" to "substantial lessening of competition". A list of factors similar to those in Section 65 of the Canadian *Competition Act* are to be adopted.
- There is to be a simple scheme of mandatory prenotification of mergers.
- Undertakings given to Trade Practices Commission are to be able to be enforced in the courts.
- The authorization process is to be speeded up and import substitution or export enhancement to be listed as specific public benefits.
- Unconscionability is to be extended to cover transactions between businesses.
- There are to be a significant increase in maximum penalties for breaches of the Act (other than secondary boycotts). The penalties are to be increased up to $10 million for anticompetitive conduct provisions of the Act.

It is expected that legislation will be presented to the Federal Parliament in the next two months but the amendments relating to merger pre-notification and unconscionable conduct will be for exposure only and not for immediate passage.

As part of the government's announced change the Trade Practices Commission has undertaken to issue new merger enforcement guidelines before the new legislation becomes law. Consequently draft merger guidelines should be issued around October this year.

TPC Priorities

The Trade Practices Commission issued its *1992/93 Priorities Statement* which sets out priority areas and goals for the next two years. Important areas to be targeted are:

- Implementation of microeconomic reform in areas covered by the legislation.
- Exploration of the reach of competition and consumer protection laws.
- Focused application of competition law in industries not exposed to international competition.
- Renewed emphasis on consumer protection where markets have failed to ensure that the benefits of competition are passed on to consumers.

The Commission, in its *Priorities Statement*, targets areas of particular concern such as price fixing, abuse of market power, collusive bidding and resale price maintenance induced by major customers.

"Regulated Conduct"

It is expected that the Federal government will soon announce a review of the *Trade Practices Act* in relation to areas currently not covered by the Act, ie. the Canadian regulated conduct defence issue. The Act has various exemptions very much coming out of the federal system that Australia shares with Canada. Furthermore there is still some exemptions through Shield of the Crown particularly in relation to certain state or federal government business undertakings. There is

considerable concern in the Australian community that significant aspects of Australian economic life are exempt from the Act. The Victorian State Government's Law Reform Commission has recently published a paper strongly advocating the extension of competition policy to all aspects of business in Victoria.

The Trade Practices Commission has long advocated the universal application of competition law across the economy and any exceptions to come through the authorization process built into the Australian *Trade Practices Act*, ie. anti-competitive conduct may be authorised if there are countervailing public benefits.

The Professions

The Trade Practices Commission has been examining a number of crucial professions to see whether or not there are competition issues and if so what can be done about such issues. The Commission has recently published its final report on the accountancy profession, it is about to publish its report on architects and is well into a study of the legal profession.

Litigation report

- The Federal Court recently dismissed a Commission case involving an alleged price agreement in the Sydney retail petrol market where action was taken by the Commission against the relevant trade association and some of its officers. The Court found that there was not sufficient evidence to prove an agreement or understanding amongst the participants in the industry and also raised some doubts whether an agreement on margins was an agreement to fix/control or maintain prices as is required by the legislation. The Commission has appealed the decision.
- The Trade Practices Commission recently considered a merger involving two grocery wholesalers in the State of Queensland. The commission was of the view that the issue was marginal in terms of whether or not the merger would lead to dominance or enhanced dominance and indicated it would not intervene. In doing so it took account of Canadian, New Zealand and U.S. precedent in the grocery market. Following the Commission's decision the federal Attorney General took injunctive action in the Court to block the merger pending the outcome of private legal proceedings by the target. This was an unprecedented move.
- On 27 August, the Commission instituted proceedings against Gillette Australia Limited in relation to the acquisition of the Wilkinson Sword trademark etc. Initially the Commission is seeking to prevent the transfer of these trademarks out of jurisdiction as they are already controlled by Gillette and eventually it may be moving to divestiture of these trademarks or some other relevant remedy.

The Commission has been undertaking a major investigation of price fixing and related conduct in the Express freight industry involving two large Australian multi national companies namely TNT and Mayne Nickless. Late last year the Commission issued statutory demands for information upon the two companies and these were challenged by both. The challenge by Mayne Nickless was resolved and the information has since been forthcoming but the challenge by TNT is still in process with a possible hearing in late 1992.

The Commission recently settled long standing litigation in relation to an acquisition by BHP of shares in New Zealand Steel. The Commission took action in 1989 in relation to this matter and there was a settlement arrangement between BHP and the Commission which allowed NZ Steel to maintain its independence despite a 30 percent indirect shareholding by BHP. In January 1992 BHP wished to put itself in a position to buy all the shares of NZ Steel and the Commission agreed to this course of conduct on the basis that BHP and the Commission approach the government to accelerate planned reduction in protection. This was eventually agreed to by the government in June 1992.

TPC mergers administration

The following chart gives an overview of the Commission's merger administration of the past year.

MERGERS SUBJECT TO COMMISSION INQUIRY — 1991-92

Total mergers considered	103
Mergers requiring detailed investigation and Commission considerations	18
Mergers subject to limited inquiry	89
Considered by TPC and FIRB	39
Considered by both TPC and ISC[1]	3
Not proceeded with or amended following TPC concern	3
Court action	0
Authorization sought	3

Types of acquisition/merger considered	
Horizontal	58
Vertical	1
Changed shareholding	23
New entry into market	10

The Commission continued its transparency of its mergers administration and instituted a public register where all mergers looked at by the Commission are recorded and the reasons for the Commission's decision are recorded as well. This is in addition to the Commission's Statutory Public Register which contains all applications for authorization be it mergers or other anticompetitive conduct. A full list of all the mergers looked at is contained in a schedule to the Commission's Annual Report.

Notes

1 Foreign Investment Review Board
2 Insurance and Superannuation Commission

TRYING TO UNRAVEL THE "STATE ACTION" ANTITRUST MYSTERY: TICOR TITLE INSURANCE AS THE MOST RECENT WORD IN AN ONGOING SAGA

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Probably no aspect of U.S. antitrust jurisprudence is more confusing than the "state action" doctrine — under which a state may sometimes, but not always shield an anticompetitive private scheme from federal antitrust liability.

The Supreme Court's latest state action decision, *Federal Trade Commission* v. *Ticor Insurance Co.* [1] was handed down on June 12, 1992 and upholds the FTC's finding on antitrust liability on the ground that certain states had not supervised adequately the joint rate filings by groups of title insurance companies. The 6-3 majority opinion reaffirms all of the verbal formulas previously developed in Supreme Court state action cases since 1975, but still tells us relatively little about how the next state action case is likely to come out.

The core question underlying the U.S. state action doctrine is virtually certain to arise in any other federation with strong federal antitrust laws: to what extent will state-sponsered private restraints and monopolies be protected from federal antitrust law? The question becomes doubly acute in the United States where a system of strong private antitrust remedies means that a disgruntled market participant can—and frequently does—invoke the federal antitrust laws to challenge a state scheme which deprives outsiders of competitive benefits or opportunities.

This federal-state tension is well recognized in U.S. antitrust jurisprudence, where federal antitrust policy and state sovereignty are both treated as important public values. It is tacitly accepted that one of the key attributes of sovereignty is being able to protect favoured interests from disruptive competition. There has been pressure on the Supreme Court to develop some middle ground that avoids both extremes —

the extremes of sweeping federal pre-emption and of widespread balkanized monopolies.

The issue is of great practical importance. Individual states have many reasons for preferring monopolistic solutions to fully competitive ones in many areas. Monopoly offers additional rents to favoured producers, tends to support higher wages, can often be coupled with "public service" obligations, makes possible subsidies of favoured customer groups, sometimes results in greater service reliability, and sometimes subsidizes health and environmental costs. When interested private parties are given a chance in designing a "public interest" scheme for a state, they will often assure—or at least seek to assure—that the scheme is made as protective as possible against disruptive competition.

Over the years, the Supreme Court has developed a seemingly straight-forward verbal formula which says that a state-supported anticompetitive restraint is only exempt from the federal antitrust laws if it meets both prongs of a two-part test first announced in *California Retail Liquor Dealers Association* v. *Midcal Aluminum Inc.*[2] This so-called "*Midcal* test" simply says, "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."[3] These are generally referred to as the "clear articulation" and "active supervision" prongs of the test.

The problem is that these concepts are not easily applied in most cases. Nearly every anticompetitive state scheme involves a blend of public and private interests when it is created, and a blend of public and private voices when it is implemented.

Parker and its Progeny

This "public" versus "private" ambiguity has been present since the beginning. The state action doctrine can be traced to the seminal case of *Parker v. Brown*[4], where the Supreme Court upheld a Depression-era farmers' protection scheme created by the State of California against a variety of challenges. A raisin price-fixing scheme was administered by an Agricultural Prorate Advisory Commission on which the state Director of Agriculture served *ex officio*. The statute authorized the adoption of "a prorate marketing plan" on petition of ten growers. If accepted by the Advisory Commission, the petition resulted in the selection of a "program committee" of growers and packers selected by the Director. The "program committee" then created a "prorate marketing program", which had to be approved by the Advisory Commission and 65 percent of the growers owning at least 51 percent of the acreage. Thus, price-quantity restraint programs were created under the statute only if they had been proposed, created and approved by the producers who benefitted from them; but compliance with their terms were enforced by the State of California using its criminal laws.

Despite all this private participation and evidence of market power, the Supreme Court concluded that "it is the state, acting through the [Advisory] Commission which adopts the program and which enforced it with penal sanctions in the execution of Government policy." The Court emphasized, however, that the new immunity it was creating applied only to "state action or official action directed by the state." It warned, "A state does not give immunity to those who violate the *Sherman Act* by authoring them to violate it, or by declaring that their action is lawful."

Thirty-two years went by before the Supreme Court (with an entirely new membership) faced the "state action" issue again in the first of what was to prove to be a rapid succession of state action cases. In *Goldfarb* v. *Virginia State Bar*[5] the Court found that the adoption of minimum fee schedules by a local county bar association constituted "essentially private activity" even though the schedules were enforced through the prospect of disciplinary action by the Virginia State Bar, an agency of the Virginia Supreme Court. The fact that the State Bar supported the fee schedules (and indeed was represented by the Virginia Attorney General in the Supreme Court) was insufficient for immunity. "It is not enough that... any competitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign."

After *Goldfarb*, the Supreme Court's state action decisions went both ways depending on

the Justices' perception of the regulatory program and how it was administered. Thus, decisions upholding state restraints tended to stress the active involvement of the state legislature and public officials in defining and administering them.[6] The decisions rejecting immunity tended to stress the central role of private initiatives and the lack of state focus or supervision on the issue at bar.[7]

For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (where the two-prong test was first announced), the Supreme Court was faced with a classic industry-supported, resale price maintenance scheme. There was a clearly articulated state policy to eliminate retail price competition in wine, but that was not sufficient to establish antitrust immunity. The Court concluded that "The state has no direct control over wine prices, and it does not review the reasonableness of prices set by wine dealers."

The next key "state action" decision was *Southern Motor Carriers Rate Conference, Inc. v. United States*,[8] where the Supreme Court focused entirely on the "clear articulation" issue and upheld immunity for horizontal pricing agreements in the trucking industry. The Justice Department had challenged the rate bureaus used by motor carriers to file rates collectively before state regulators in southern sates. Three of the state schemes were quite detailed in allowing rate bureaus (and some even provided for state antitrust immunity), while at least one other was entirely vague.[9] Nevertheless, the Court upheld the rate bureau agreements with respect to them all.

On the "active supervision" prong, the majority said that the government had conceded the point.[10]

Nevertheless, because the regulatory scheme upheld in Mississippi was so vague, *Southern Motor Carriers* was seen diluting the *Midcal* standard a great deal, thus moving the whole state action doctrine in the direction of greater permissiveness. Increasingly conservative Justices being appointed to the Court by President Reagan were assumed to be more deferential to states' rights when these clashed with federal antitrust policy than their retired predecessors.

Ticor Title Insurance and the New Equilibrium

Ticor is an apt warning against reading too much into past Supreme Court state action decisions. Here, the Supreme Court sustained Federal Trade Commission (FTC) findings that several states had not exercised adequate supervision over the insurance company rate bureaus that collectively filed rates before state regulators. Accordingly, the rate bureau scheme was declared illegal in those states but not in others where the regulatory scheme was more rigourous.

At first blush, *Ticor* looks a great deal like *Southern Motor Carriers*: a federal antitrust enforcement agency challenging a rate bureau scheme by which competitors file collective common rates with state regulatory bodies. It was heard by a Court that was clearly more conservative and less antitrust-minded (after the retirements of Justices Brennan and Marshall) and yet, this time, it came out in favour of the Government.

The focus was on four states which used a "negative option" system of approving rate filings. The FTC found that such schemes failed to satisfy the "active supervision" prong of the *Midcal* test and, therefore, found the collective rate fixing scheme to violate the antitrust laws.[11] The Third Circuit Court of Appeal reversed, holding that the simple existence of a state regulatory program, if staffed, funded and empowered to act by statute, satisfied the requirement of active supervision.[12]

The Supreme Court, in turn, reversed in a broadly written opinion by Justice Kennedy. Interestingly, he was joined in the majority by Justices Scalia and Blackmun who were a part of the majority going the other way in *Southern Motor Carriers*. The majority was clearly swayed by the fact that a group of 36 states (including two of the four whose "negative option" schemes were under review) had filed an amicus brief supporting the FTC and denying that the respondents' arguments that a "broad immunity rule would serve the States' best interest."

Justice Kennedy's opinion turns on the "active supervision" prong of *Midcal* (which had been bypassed in *Southern Motor Carriers*). He explains

Parker v. Brown as a "state-supervised market sharing scheme" which was upheld against a *Sherman Act* challenge, "We announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs. Our decision was grounded in principles of federalism."

Turning to *Midcal*, he stresses that the anticompetitive state "policy must be actively supervised by the State itself." What this means, says Justice Kennedy, is that, "While a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details." The majority makes clear in several places that its deference to the states is based on the politics of federalism rather than economics.

The majority's approach is summed up by Justice Scalia's concurring opinion, "I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place."

The Critics

Three of Justice Scalia's normal conservative allies vigorously dissented. Chief Justice Rehnquist (joined by Justices O'Connor and Thomas) would have stuck with the logic of *Southern Motor Carriers*, and specifically would have held that the "active supervision" requirement was met where the state had officials who were empowered, funded and in place regardless of whether they had actually done anything. In their eyes, the majority's more stringent standard "necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme in order to determine whether the State has met the 'requisite level of active supervision'."

Justices O'Connor and Thomas added in a separate opinion that:

> Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. A regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that his filings may receive.

They concluded that "Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes 'negative option' regulation an unattractive option for both States and the parties they regulate."

It seems clear that these conservative dissenters see the controlling consideration to be the administrative flexibility available to the state. They do not seem to have serious qualms about the Supreme Court making it easier for a state to sponsor a cartel or monopoly under some vague public umbrella. This seems to be what ultimately divides the Court, with case-specific details creating *ad hoc* majorities in particular decisions.

The dissenters do make a telling point about "a vague and retrospective standard, combined with a threat of treble damages." This argument would be most persuasive in the context of a state scheme which requires private parties to take anticompetitive action (as in *Midcal*) as opposed to just authorizing them to do so (as in *Tricor* and *Southern Motor Carriers*. It is clear that treble damages complicate the situation immeasurably. If a private party obeys an inadequately-supervised sovereign command (as in *Midcal*), or authorization (as in *Tricor*), it conceivably may face antitrust treble damage liability. By contrast, if it fails to obey a *Midcal*-type command, a private party may be subject to unpleasant state sanctions (such as loss of license or fine).

Conclusion

The "state action" area is a jurisprudential bog. The doctrine got off on the wrong foot in *Parker v. Brown* and has never quite recovered.

Having once accepted that a broad antitrust exemption exists for state-sponsored producer cartel, the Supreme Court has found itself forced into a calculus in which everything turns on characterization. Did the state design the scheme or rubber stamp a private scheme? Were state officials exercising "public interest" responsibilities or were they just doing favours for their buddies? Were private parties the creators or the captives of the scheme? These questions do not yield clear and predictable answers in advance in a great many cases.

Ticor could turn out be be quite helpful. It offers two ideas that could be usefully fitted into

the "state action" antitrust analysis: namely, the seriousness of the antitrust offence involved and political responsibility for displacing the antitrust laws.

Justice Kennedy's majority opinion and Justice Scalia's brief concurrence reflect a special distaste for the cartel-type of activity involved. Thus, the majority emphasizes that "the preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom."

This anti-cartel emphasis suggests that the state action immunity analysis might take into effect the nature of the antitrust wrong. Where the challenged restraint involved horizontal price-fixing or market allocation (as in *Tricor*), a higher level of specificity under both the "clearly articulated" and "active supervision" prongs would be required under the *Midcal* test. A state would still be permitted to organize a cartel or a monopoly in the name of federalism, but where it did so, it would have to act in a clear, open and notorious way, taking the political consequences. By contrast, where a state allowed a tie-in (such as *Cantor* v. *Detroit Edison*) or some other vertical restraint, a general "public interest" mandate to a state regulatory commission might satisfy the "clear articulation" prong and some general bureaucratic oversight might satisfy the "active supervision" requirement. This point seems clearest in a true natural monopoly environment, where the state is not suppressing free competition, but is regulating prices and services to achieve various often-vague "public interest" goals — but, in doing so, it may still generate some antitrust claims by foreclosed competitors.

In order to adopt such an explicit two-tier approach, the Supreme Court would have to engage in some serious reinterpretation of some aspects of *Parker* v. *Brown* because the private decisional elements in the California raisin scheme were so large that the scheme might not meet the modern "active supervision" standard now articulated in *Ticor* (and *Midcal*). It must be remembered that the raisin price-fixing scheme did not go into effect for any crop without grower initiative and approval by a majority of the growers who would profit by it.

The virtue of distinguishing between horizontal price fixing and other cartels on one hand and various lesser generally non-*per se* offences on the other is obvious from the standpoint of antitrust policy. It would tend to preserve antitrust where it most mattered, while leaving the states to go on with less-focused competition restraining schemes in other areas. It might also make private groups a little less willing to sponsor cartels while, at the same time, not greatly increasing the risk for enterprises subject to a variety of compulsory Government regulations. In *Ticor's* own case, the companies were free to file separate rates for title search examination and settlement with the state insurance authorities, and perhaps even compete with each other on the basis of price in these areas.

In the end, if the state's action exemption becomes too confusing and risky for businesses, Congress could write its own version of "state action" immunity in the federal antitrust statutes. So far, however, nobody on Capitol Hill in Washington seems to be campaigning for the job, nor are bar and business groups across the country pressing Congress to take on the daunting task.

Notes

[1] No. 91-72 unreported (U.S. June 12, 1992) (hereinafter "*Ticor*")

[2] 445 U.S. 97 (1980)

[3] as quoted in *Ticor*, *supra*, note 1

[4] 317 U.S. 341 (1943)

[5] 421 U.S. 773 (1975)

[6] See *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 137 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox*, 439 U.S. 96 (1978); *United States v. Southern Motor Carriers Rate Conference*, 471 U.S. 48 (1984); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *City of Columbia v. Omni Outdoor Advertising Inc.*, 111 S.Ct. 1344 (1991).

[7] See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980); *City of Lafeyette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *324 Liquor*

Corp. v. Duffy, 479 U.S. 335 (1987); *Patric v. Burget*, 486 U.S. 94 (1988).

[8] 471 U.S. 48 (1985)

[9] The Court explained, "The [Mississippi] legislature thus made clear its intent that intrastate rates would be determined by the regulatory agency rather than the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State commission exercised its discretion by actively encouraging collective rate making among common carriers." 471 U.S. at 63-64.

[10] 471 U.S. at 62 and 66 (1985).

[11] 112 F.T.C. 334 (1989)

[12] 922 F. 2d 1122 (1991

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

Mergers and Acquisitions in 1991

In 1991 there were 513 mergers and acquisitions.

- 306 businesses were merged by 205 mergers, while
- 333 businesses were taken over by 308 acquisitions, whereby
- a total of 639 businesses changed status.

The total turn-over of the businesses taken over was DKK 42.5 billion and a total of 39,138 employees. The registered share capital was DKK 4.3 billion, giving an average turn-over of approximately DKK 66.5 million, 61 employees, and a registered share capital of approximately DKK 9 million per business taken over.

Of the 205 mergers, 159 (or 78%) took place between businesses which at the time of the merger were already within the same concern.

The figures indicate that businesses taken over by mergers have a larger turn-over than businesses taken over by acquisitions. Most of the businesses taken over have a turn-over of between DKK 10-50 million, and the largest group of businesses (212) had between 0-19 employees.

Within the banking sector there were 6 actual mergers and 4 take-overs, and these comprised approximately 36% of the employees in the entire banking sector.

Acquisitions by foreign businesses amount to 15% of the total acquisitions, representing 21% of the turn-over and 16% of the employees of the total acquisitions. Acquisitions by foreign businesses are on average larger, measured in turn-over (45%) and employees (12%), than the average of all acquisitions, thirty-eight per cent of foreign acquisitions were by other Nordic businesses, mainly Swedish. The remaining acquisitions were mainly from the EEC countries with a few from America, Japan and Switzerland.

The development has been that a number of mergers and acquisitions and the size of the companies have been growing until 1989 while as well the number of employees and turn-over is lower in 1991.

Of some of the larger mergers can be mentioned the following: Alfa Solo A/S taken over by Unilever (Holland), Danogips A/S taken over by Knauf (Germany), Ginge-Kerr taken over by SNC Industrial Technologies Inc. (Canada), and Nokia Data A/S taken over by ICL (U.K.).

The information transpires from a recent publication from the Danish Competition Council (Mergers and Acquisitions 1991).

EUROPEAN COMMUNITIES

Procedural Judgements

Recently the Court of First Instance (CFI) has annulled a number of Commission decisions on procedural grounds.

In the most controversial case, the CFI overturned ECU 23.5 m. in fines against a plastics industry cartel on grounds of internal administrative defects. The Commission has already announced it will lodge an appeal against the judgment.

In another case, the CFI quashed the Commission's decision not to take interim measures which aim at bringing infringements to an end. The criteria applied by the Commission

in refusing such action were too strict, according to the CFI.

Finally, in yet another case, the CFI held that the Commission had wrongfully disregarded the right of the parties to react upon a Commission decision before it was adopted.

Distribution

Upon the discovery of important differences in car prices, the Commission has adopted guidelines which should reduce the price differentials and serve as a warning to car manufacturers. If they do not comply, the block exemption on selective distribution of cars may not be extended after 1995.

The Commission has also published a notice as to how it regards exclusive purpose agreements of beer involving small breweries. The notice, inspired by an earlier judgement of the Court, specifies certain criteria which have to be met for Article 85 of the EEC to be applicable.

Finally, the CFI upheld a Commission decision which lifted the protection of a distribution agreement of cosmetics against fines following its notification. The Vichy contract, which limits the distribution outlets to pharmacists, constitutes a clear violation of Community law, according to the Commission.

Forbidden Transparency

The Commission has fined a number of associations of Dutch building and construction firms which had formed a cartel aimed at restricting competition. The rules and regulations of the cartel amounted to the exchange of information prior to tendering procedures, concerted action on price tenders (fixing selling prices of building contracts) and sharing contracts between the members through the prior designation of successful tendering undertakings, the protection of the entitled undertaking, etc. It is interesting to note that the rules, now prohibited by the Commission, had been openly supported and partly made compulsory by the Dutch State. This practice is the subject of separate infringement proceedings.

Abuse of Dominance

Recently, the Commission decision in which Tetra Pak was fined ECU 75 m. for abusing its almost monopolistic leading position on the markets for aseptic and non-aseptic machines and cartons for the packaging of liquids was finally published. The abuse Tetra Pak was accused of consisted of binding users by imposing contractual obligations, limiting inter-brand and avoiding intra-brands competition, thus compartmentalizing national markets. This enabled it to apply a differential and discriminatory pricing policy.

The dominant airline on the London-Dublin route, Aer Lingus, was obliged by the Commission to resume its interlining relationship with British Midland for at least two years. It was accused of terminating its interlining agreement with British Midland after the latter announced its plan to start competing with Aer Lingus on the same route and a rate concertation was reached between the two airlines.

Finally, the CFI partly cancelled a Commission decision which imposed fines upon several Italian flat glass manufacturers. By not analysing the relevant market properly and basing itself on rather vague evidence, the Commission was unable to prove joint dominance.

FRANCE

Merger in the Wet Shaving Business

While the EC Commission has not yet rendered its decision on the Gillette/Wilkinson case under articles 85 and 86 of the Rome Treaty, the Minister of Economy has issued a final decision on the same case under French merger control (ministerial order of March 11, 1992).

The Minister considered that the acquisition by Gillette of the Wilkinson business outside the EEC and the USA, plus the partial financing by Gillette of an LBO permitting a Dutch company named Eemland to acquire the Wilkinson business in the EEC, gave Gillette a decisive influence on the management of Eemland.

Consequently, the Minister delivered a double injunction:

- for Gillette to refrain to exercise any influence on the management of Eemland;
- for EEMLAND to have, within one year, its products distributed in France by an independent third party.

Freedom to Determine Tobacco Prices

By a judgment of February 18, 1992, the Conseil d'Etat (French supreme administrative court) annuled a decree on tobacco prices to implement the law of May 26, 1976 on the tobacco monopoly.

This decree has been judged to be incompatible with the EC directive of December 19, 1972 providing for the freedom to determine prices for the tobacco manufacturers and importers.

With this important judgment, the Conseil D'Etat for the first time admits superiority of EC directives on French laws.

Ad Hoc Teaming

In a judgment of January 14, 1992 ("Bureau Véritas"), the Court of Cassation ruled that, while *ad hoc* teaming between complementary enterprises for bidding to government contracts was permissible under competition law, systematic teaming between the same companies having the same scope of activities, and resulting in an allocation of the market in equal shares, could constitute an antitrust infringement.

Comparative Advertising

Article 10 of a law of January 8, 1992 authorizes comparative advertising in France, provided it is "loyal, truthful and not of such a nature as to induce the consumer to error."

A decree of the Prime Minister will prescribe, "if need be", how this provision will be implemented.

GERMANY

The transfer of a trademark can constitute a merger under German law (Law against Restraints of Competition), according to a judgment dated May 23, 1991 of the Berlin Court of Appeal (Kammergericht). If the trademark owner owns little or nothing else, the acquisition of the trademark can be tantamount to the acquisition of a substantial part of the assets of another enterprise and thus be subject to merger control.

The Linde/Lansing merger was cleared by the Federal Supreme Court (Bundesgerichtshof decision, December 10, 1991) after both the Federal Cartel Office and the Berlin Court of Appeal had refused to approve it. Even though Linde's market share of more than 40% (well ahead of its competitors) would have been increased by adding that of the German Lansing company, the Court felt that prohibiting the merger would have negative effects on competition, Linde having already acquired Lansing's non-German operations. With a questionable reference to the ECJ's Hag II decision (Judgment of October 17, 1990, case no. C-10/89), the Federal Court concluded that Lansing GmbH would be able to disrupt the free movement of goods in the EEC by using its German trademarks to block the importation of goods manufactured by the other Lansing companies (already acquired by Linde). However, the Hag II decision does not cover situations where trademarks with a common origin have been split up by the voluntary sale of some subsidiaries, each owning the trademark in its country of incorporation.

ITALY

An Interpretation of the Italian Antitrust Law with Respect to Monopolies and Harbour Services

Section 9 of the Italian antitrust law provides, *inter alia*, that either in case of monopoly of the state or of a public body with respect to a certain activity, or should an activity be reserved by the law to an individual economic entity, third parties are nevertheless entitled to carry out the activity which is the object of the monopoly or of the reserve set forth by the law, for the purpose only of internal use or consumption.

The National Antitrust Authority, further to the rendering of three opinions with respect to self-production of harbour services by marine companies and shipping agents, has stated that self-production of goods or services for internal

use or consumption is a right of any economic operator and, accordingly, exercise of this right cannot be hampered by the holder of the monopoly with respect to that specific activity.

On the basis of the above statement and pursuant to section 21 of antitrust law, which entitles the Antitrust Authority to call the government's attention to situations which may adversely affect competition, the Authority pointed out to the Ministers of Industry and of Merchant Navy that carry out of harbour activities in the Italian ports, as currently governed by relevant rules, i.e., mainly the Navigation Code, may adversely affect competition as self-production of harbour services may sometimes be hampered. Such circumstance is considered by the Authority a violation of a right and, therefore, the holder of such right to self-produce goods or services which are the object of a monopoly may take legal action in order to protect such rights.

The Authority has furthermore stated another important principle: fares of monopolists should not exceed costs for the same products or services borne by self-producers of these.

JAPAN

Extraterritorial Application of the U.S. Antitrust Law

According to the Nihon Keizai Shimbun dated April 7, 1992, the U.S. Justice Department announced a new guideline on the extraterritorial application of the U.S. antitrust law on April 3, 1992. The Ministry of International Trade & Industry is opposed to this new guideline and plans to prepare a draft regulation blocking such extraterritorial application of the foreign antitrust law. It is reported that this guideline purports to restrict KEIRETSU (intimate links with Japanese corporate groups) and DANGO (collusive bidding) widely practiced in Japan.

Exemptions

The U.S. government requested Japan to abolish the system of exemption from the antimonopoly law of retail price maintenance.

The Japanese Fair Trade Commission ("JFTC") decided on April 15, 1992 that although it will not abolish all of the exemptions, it will abolish (1) the authorized price maintenance of 13 items of cosmetics, etc. and 10 items of medicine sold at drug stores from April 1993 and (2) vitamins and health drugs from January 1995. The JFTC also plans to abolish the exemptions for all other items which are exempted this time after reviewing works to be conducted in 1988.

POLAND

Agreement on Exclusive Distribution

An agreement limiting the access of third parties to the market, or excluding them from it, is a monopoly practice under Polish antitrust law. Therefore, the Antimonopoly Office ordered the provisions of a contract on exclusive distribution, concluded between a German car producer and a Polish dealer, to be cancelled.

According to that contract, a Polish partner was to import and distribute cars on an exclusive basis.

An appeal against the Office's decision was made to the Antimonopoly Court. The dealer asserted that the car market in Poland included various types of cars so distribution of one type on an exclusive basis should not be ascertained as a restraint of fair competition.

In order to explain whether such kind of exclusive sale might deprive other car retailers a possibility of participation in the market, the Antimonopoly Court had to first establish a definition of "the market". Under its interpretation only goods which might be considered as substitutes because they served the same purpose had comparable prices and standards composed "the market". Accordingly, it was necessary to perceive the car market not as including all types of cars offered for sale, but some groups of them. Thus, the car market in Poland was not a market of all types of cars, but had to be seen divided into the classes of luxury, medium, compact and small cars. The Antimonopoly Court restricted its considerations to the medium size car market. It noted also that another Polish manufacturer produced approximately 70% of all cars sold in that class in Poland by a state company. Having only the outstanding 30% for other manufacturers

and distributors left, the exclusive distribution agreement was violating fair competition rule and was a monopoly practice.

SPAIN

Manufacturers of Cosmetics Subject to Scrutiny for Anticompetitive Practices

Some 42 manufacturers and distributors of cosmetics are subject to proceedings before the Spanish Directorate General for the Defense of Competition of the Ministry of Economy and Finance, for alleged anticompetitive practices, following a denunciation by the Spanish Union of Consumers that such companies are distributing a number of their products exclusively through drug stores in an attempt to reduce the number of marketing channels.

The Directorate General opened an information period. If the proceedings lead to the conclusion that the practices are in fact anticompetitive, the Directorate General would submit the case to the Court of Defence of Competition on the basis of Arts. 37 and 39 of the *Act on Defence of Competition.*

Even Funeral Services can be Anticompetitively Rendered

Such is, at least, the thinking of the representatives of the Spanish Union of Insurers and Reinsurers, who filed a complaint before the Directorate General for Defense of Competition against the Municipality of Madrid and the Funeral Services Company (F.S.C.) on the basis that the F.S.C. has abused its dominant position (the rendering of funeral services within the Madrid city area is a monopoly conferred upon the Funeral Services Company) by increasing tariffs between 15 and 302% depending upon the nature and quality of the services rendered. Furthermore, the complaint alleges that the F.S.C. has developed other unlawful activities such as (i) ceasing to offer some of the cheap funeral services, thus forcing the insurers and the public in general to contract more (and unnecessarily) expensive services; (ii) actively offering its services beyond the limits of the Municipality of Madrid; (iii) increasing by 300% the prices to individuals not formally recorded with the Municipality as residents in Madrid; and (iv) creating new tariffs without warning.

Gillette May Have Cut Its Own Throat When Buying Wilkinson

This may be an accurate expression if the investigation being currently carried out by the Directorate General for the Defence of Competition (DGDC) proves the existence of abusive prices.

Following actions by the U.S., French and British authorities, the Spanish DGDC has started its own proceedings as a result of the acquisition by Gillette, back in 1990, of the European operations of Wilkinson.

Gillette has been physically present in Spain since 1987 through a manufacturing facility located in Seville. The company has some 74% of the Spanish market of shaving products while Wilkinson has only 8%. Gillette claims that both companies have no relationship whatsoever at commercial or operational levels, and the allegations are therefore unfounded.

UNITED KINGDOM

MMC Reports on Cars and Spare Parts

The UK Monopolies and Mergers Commission has published two reports concerning the UK market in new cars and spare parts (see Newsletter of October 1991) which are largely favourable to the car suppliers. Despite noting that car prices were significantly higher in the UK than elsewhere in the EC and that private buyers got a worse deal than fleet customers, the MMC concluded that these effects did not result from the complex monopolies it found existed in the supply of new cars in the UK. Indeed it found that no steps were being taken for the purpose of exploiting and maintaining the monopoly situation, although it did make some recommendations for relaxing advertising restrictions, quantity restrictions and bans on acquiring competitors commonly found in distributor agreements for cars. The report on the supply of car parts also noted that some car suppliers benefited from a complex monopoly in the supply of car parts but did not find that the

monopoly operated against the public interest and made no recommendations.

The reports are now being considered by the Secretary of State who may also have to take account of the EC Commission's current review of the block exemption for car distribution agreements. The Commission is reported to have been in contact with the Secretary of State since it is said to be critical of the MMC's findings.

Joint Venture in Beer

A proposed joint venture between the brewers Allied-Lyons and Carlsberg has been referred to the MMC and is simultaneously the subject of an EC Commission investigation. The MMC is expected to report in June. The EC Commission, which opened its proceedings after the reference to the MMC, is investigating the proposal under Article 85 of the EEC Treaty. The joint venture was not considered to be a "concentration" and therefore did not fall to be examined under the EC Merger Regulation. The Commission's investigation is expected to reach a conclusion after the MMC has reported. Interesting problems concerning the relationship between UK and EC competition law may be raised if the two authorities reach conflicting findings.

Take-over in Tiles

A long battle for the control of the building materials group Steetley has ended in Steetley's acquisition by Redland, a brick and tile manufacturer. The take-over succeeded after an alternative proposal for a joint venture between Steetley and the Tarmac group was examined by the EC Commission under the Merger Regulation, but was then handed back to the UK competition authorities at the request of the UK government on the grounds that it threatened to create a dominant position in the UK market which would impede effective competition there. This was the first time that the Commission has relinquished the right to examine a merger falling under the Regulation. The proposed joint venture was abandoned after referral by the Secretary of State to the Monopolies and Mergers Commission; Redland avoided referral by giving undertakings to dispose of parts of its own and Steetley's brick manufacturing business after the acquisition.

UNITED STATES

Legislation Introduced to Further "Predatory Pricing" Antitrust Cases

On April 9, 1992, Sen. Metzenbaum (D-OH) introduced the *International Fair Competition Act of 1992* (S.2610), purportedly to strengthen the U.S. antitrust laws in order to safeguard U.S. markets from predatory pricing "anticompetitive conduct originating overseas". This legislation would amend the *1916 Antidumping Act* (15 U.S.C. § 72) to provide treble civil (not criminal) damages in suits where a plaintiff can prove that (1) a foreign company is pricing its products in the U.S. below total average production cost; (2) there is injury to a U.S. industry; and (3) the home market of the foreign company is substantially closed to effective competition. This legislation would legislate a reversal of the approach in the Supreme Court decision in the *Zenith* v. *Matsushita* case. In that case the Supreme Court found that allegations of predatory dumping of television receivers failed to meet the legal standards of the *1916 Antidumping Act* or the *Sherman Act*.

In March 1992, the U.S. Supreme Court granted *certiorari* in *Spectrum Sports Inc.* v. *McOuillan* to review the ruling of the U.S. Court of Appeals for the Ninth Circuit that anticompetitive or predatory conduct alone is sufficient to infer a specific intent to monopolize, which, in turn, satisfies the "dangerous probability of success" element of an attempted monopolization claim. The Ninth Circuit affirmed a $5.2 million treble-damage verdict in favor of a terminated distributor finding that evidence of a threat that the plaintiff would be "looking for work" if she did not sell her sorbothane distributorship was sufficient to satisfy both the specific intent and dangerous probability of success elements of the plaintiff's attempted monopolization claim. This threat was made shortly after the plaintiff was told that she would have to sacrifice her athletic distributorship rights to retain her equestrian distributorship rights for sorbothane. The Supreme Court, therefore, will have the opportunity to consider the Ninth Circuit

position that the plaintiff need not prove the defendant's dangerous probability of success in an attempted monpolization case.

Justice Department Changes Policy

The Bush administration has announced that it has revised its antitrust enforcement policy to permit suits against foreign companies that conspire to restrain U.S. exporters, even when U.S. consumers are not affected. The new policy, which will be exercised "cautiously" and with due regard to international comity, is actually a return to the enforcement standard that existed prior to 1988, although few such cases were ever filed. Several foreign governments have expressed concern over the intended "extraterritorial" enforcement of U.S. law, and further discussions on the subject are expected.