

# FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

## ANTITRUST IN A CLINTON ADMINISTRATION: HOW MUCH CHANGE?

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Antitrust enforcement has not been a subject for sharp partisan division during the last quarter century; and the subject did not appear to attract any mention in the wordfest of the recent presidential campaign. There is no mandate for serious change in enforcement policy, and we believe that change is more likely to be incremental — and, at times, highly visible. Yet antitrust agencies touch on sensitive “competitive” questions with major “political” effect in many international trade and regulatory areas.

The main antitrust enforcement priorities have been in place for at least twenty years:

- Criminal prosecution of agreements among competitors to fix prices, rig bids, or allocate customers or markets; and
- Prohibition of mergers or acquisitions which would tend to facilitate collusion or price coordination in concentrated industries.

In addition, the antitrust agencies have played the competitive gadfly role: urging Congress, courts and regulatory agencies to adopt “pro-competitive” rules and decisions.

There has been no criticism of the Reagan and Bush administrations for their criminal enforcement efforts; and only limited criticism that they have been insufficiently vigorous in enforcing the anti-merger rules. The principal criticisms have been directed at the antitrust gadfly role: critics have charged that recent administrations have been “too theoretical” and too willing to support legislative ideas and Supreme Court litigants seeking to weaken old antitrust rules protecting customers, independent dealers,

repairers, licensees and franchisees vis-a-vis manufacturers, intellectual property owners and franchisors. Some of these criticisms have come from thinkers likely to influence (or even be part of) a Clinton administration, and hence we may expect some changes in what the new administration tells Congress, the Supreme Court, or the public about some antitrust policy questions.

The main point, however, is that these areas of antitrust debate have never been very important as enforcement priorities of the federal agencies, and they are not likely to become so any time soon. My basic conclusion is that some of the style and rhetoric of the Clinton antitrust enforcement may change significantly, but what they actually do in issuing indictments, complaints, and decisions will shift, if at all, only modestly.

## THE BASIC INSTITUTIONAL REALITY

The United States is unique on the planet in promoting “competitive antitrust enforcement” in a single government. The Department of Justice (“DOJ”) is the only agency authorized to enforce the criminal prohibition of the *Sherman Act*, dealing with price fixing, bid-rigging, and market allocations. It shares civil enforcement responsibility with the Federal Trade Commission (“FTC”) and in reality with the state attorneys general in merger and other areas. Congress has also offered statutory bounties and procedural benefits to encourage injured private parties and state attorneys general to sue.

## DOJ Antitrust Division

Selection of the new Assistant Attorney General (“AAG”) is likely to be a critical choice. It is likely to be made by the incoming Attorney General. Until we know who is (or is likely to be) Attorney General, it is almost impossible to predict who

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will be AAG. This position is so important because normally the AAG has broad discretion over new enforcement or policy innovations outside the traditional "price fixing" and "merger enforcement" areas where DOJ's broad programs have become institutionalized; and therefore what actually occurs in various high-visibility areas (such as resale price maintenance) is likely to turn on the personality and policy preferences of the new AAG.

### Federal Trade Commission

The FTC is ultimately ruled by five Commissioners, all of whom have been appointed or re-appointed by President Bush, and none of whose terms expire before September 1994. The Commissioners and the expiration dates for their terms are as follows:

Deborah K. Owen (Republican):	1994
Janet D. Steiger (Republican):	1995
Dennis A. Yao (Democrat):	1996
Roscoe B. Starek III (Republican):	1997
Mary L. Azcuenaga (Independent):	1998

None has indicated a plan to resign.

This leaves the Clinton administration with a couple of options. First, it could retain Janet Steiger as Chair where she has been an effective leader (as leading *Washington Post* commentator David Broder has urged, even though he recognizes that she is an old personal friend of George Bush). Second, it could name Dennis Yao as Chairman: he is an economist and business school professor from the University of Pennsylvania, but has not had any executive experience. Third, it could try to induce one of the sitting Commissioners to leave — presumably by offering her (or him) a post in the administration — thus opening up a Commissioner's seat for an outsider who would be designated Chairman. The Chairman is critical from a management standpoint because she/he is chief executive of the commission and controls the staff.

Whatever happens with the Chairmanship, the White House is likely to face several years in which the Bush appointees control the substantive decision-making at the Commission. This means

a program of moderate activism, especially on mergers, but no dramatic changes toward a more populist program.

### Budgets

Neither the DOJ nor FTC is likely to have its budget for antitrust enforcement significantly increased. This means that each will have to carry on with less than two thirds of the staff which it had when I was AAG in the late Ford and early Carter administrations — a practical reality which will tend to discourage them from undertaking big or novel structural cases. It will also affect the number of DOJ antitrust price-fixing grand juries.

### THE MAIN PRIORITIES

#### Horizontal Price-Fixing Prosecutions

DOJ's largest and most important role is to investigate and prosecute "price fixing." This covers all forms of naked "agreements" among competitors that can be said to affect prices in the market. These include agreements on price levels, pricing methodology, discounting, or supply reduction. Likewise, agreements by a competitor not to bid or to offer a high bid are treated as criminal, as are agreements among competitors to allocate customers or territories. Ferreting out such agreements is generally hard and resource-consuming work; the DOJ, armed with the grand jury where prosecutors have all the advantages, is perhaps the most effective law enforcement agency in the world at this work.

The Clinton administration will surely continue these anti-cartel efforts. It is also likely to continue the practice of prosecuting other Title 18 crimes, such as wire and mail fraud, as part of *Sherman Act* felony prosecutions.

The existing focus on the health care sector is also likely to continue, since health care costs are such a large and politically-visible part of the U.S. economy. The past emphasis on defence contractors' bidding practices may also continue for a slightly different reason. DOJ may well believe that declining demand will tempt defence contractors to engage in price-fixing/bid-rigging activity to avoid "cut-throat competition" and

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preserve market shares.

In recent years, DOJ has been periodically criticized for "not catching enough big fish" with its price-fixing program. The reason is not any unwillingness to pursue "big fish"—but that large companies with effective law departments have generally been very compliance-minded, especially since *Sherman Act* violations became felonies in 1974. A new AAG is likely to know this or soon learn it, and therefore we do not expect any "big fish" campaign to be mounted. On the other hand, a big and visible company can expect that any price-fixing evidence against it will be pursued with extra zeal by the DOJ staff.

To the extent that the FTC staff uncovers evidence of hard-core price fixing, they will turn these over for DOJ criminal prosecution. On the other hand, the FTC will be on the lookout for novel "price affecting" horizontal restrictions which they can pursue civilly themselves. The Commission's Supreme Court victories in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) illustrate this type of effect.

#### Horizontal Merger Enforcement

The DOJ and FTC share jurisdiction in this area, with the larger proportion of cases going to the FTC. The two agencies' substantive standards for evaluating mergers are very close, as underscored by the first issuance of joint DOJ-FTC Merger Guidelines in April 1992. The FTC, with its continuing majority of the existing Commissioners, is not likely to wish to make substantial changes in these Merger Guidelines; and neither, we believe, is DOJ, especially if it has to go its separate way in order to do so.

The Merger Guidelines are of course not self-enforcing or even case-dispositive. How the various factors are weighed in the context of a particular investigation is likely to be critical. This is particularly so of the factors relating to market definition and potential entry, where the evidence is frequently ambiguous and a rational decision maker could often go either way.

We suspect that a new AAG might be willing to insist on a slightly higher level of proof by

proponents seeking to justify a merger on the grounds that (i) the market should be viewed as including substitute products or more distant geographic sources, or (ii) substantial new entry is likely on a timely basis. This would bring DOJ's practice closer to that of many state attorneys general—or, for that matter, many foreign merger enforcers. The net result would be that at least a few more cases would be brought to block mergers in smaller markets with high entry barriers.

At the FTC, the just-resigned Director of the Bureau of Competition has been a tough prosecutor who was willing to prepare cases based on fairly small markets. The FTC staff does not have grand jury work to divert them; they like merger work and are likely to keep on generating a stream of sometimes-small merger cases.

The health care sector is one to watch, especially since excess hospital capacity exists; the markets for acute care hospital services are often geographically isolated and the market shares inevitably high. Similarly, in many defence industries, excess capacity exists, many specialized product markets exist, and high market shares will normally be present. We see this in the FTC's recently successful injunction to block a combination of two military tank ammunition suppliers.

Any perception that DOJ and FTC are stepping up merger enforcement under President Clinton may cause the state attorneys general ("state AGs") to do less than they have. Many active state AGs are Democrats and would have less incentive to want to bash a Clinton administration in the antitrust area.

It does seem that the Clinton DOJ may actually view certain types of mergers—those justified on "competitiveness" or "industrial policy" grounds—more favourably than has the Department in recent years. If we are correct, then the total number of merger cases actually brought by DOJ may turn out to be generally comparable to what one would have expected under the Bush administration. Of course, the mix would be different and an affected company would obviously care much more about the handling of its individual case than about any statistical generality.

It is always difficult to predict FTC merger

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case selection. The instincts and policy preferences of the new Director of the Bureau of Competition may have a lot to do with which cases are sent to the Commissioners for approval; thus we might see a somewhat different case mix, even without changes among the Commissioners. Whether there will be major battles between DOJ and FTC over which agency will handle controversial mergers is still uncertain.

### AREAS OF POTENTIAL POLICY CHANGE

We can see several areas in which the Clinton administration's appointments and philosophy might result in a change of enforcement policy and perspective. Our list, however, is much more a menu of possible changes than an assurance that change will in fact occur. The policy, preferences and priorities of the new AAG will have a great deal to do with whether any particular change occurs; and the priority list may also be influenced by whatever new policy apparatus the Clinton administration sets up for determining economic policy. The FTC will tend to be more influenced by Congressional priorities than DOJ, and it is possible that the arrival of a Democratic administration will change the way that Congress pursues some of the issues.

#### Vertical Pricing

Ever since the Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the U.S. has had a virtual *per se* rule against resale price maintenance (except when it was modified by statute during the period 1935-1975). The Reagan administration thought that this *per se* rule made no sense economically and that it ought to be abolished. When then AAG William Baxter in 1983 filed an amicus brief urging its abolition in the *Monsanto* case, Congress promptly responded by passing a rider to the DOJ budget preventing the agency from using any appropriated funds for this purpose. The Supreme Court's decisions in *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) did narrow the *per se* rule by redefining the "agreement" and "price" concepts

in the prior law. The Judiciary Committees of Congress then developed fairly technical legislation to overturn *Monsanto* and *Sharp Electronics*, but the threat of a Presidential veto was always enough to keep the champions of change from organizing both houses of Congress to pass and reconcile a single vertical price-fixing bill. This legislation is almost certain to reappear in the new Congress.

In response to this legislative situation, DOJ may be willing to follow a course which it has avoided but which has been followed by the FTC in recent years: pick a few — very few — vertical pricing cases in which the liability question is absolutely clear under the established law and prosecute it, at least as far as a consent judgment. Such an effort may be sufficient to head off or narrow vertical pricing legislation.

The economic theory on which the Reagan administration relied in opposing resale price-fixing rules may have been correct, but it is not beyond dispute, and it is certainly sophisticated. It essentially argues that the manufacturer will set the right price to achieve the most effective competitive level of sales/education efforts, and therefore, its judgment should be respected. The alternative view is that resale price maintenance is just a device for preserving the interest of traditional high markup retailers at the expense of newer types of retailing and discounting and that it should be treated as a pejorative form of "price fixing". The state AGs have been a particularly vocal source of "price fixing" rhetoric and enforcement in this area, and they have targeted Japanese electronics companies, in particular.

#### Vertical Service Restraints

One of the more significant current business controversies is over a manufacturer's right to control service and repair parts for its own equipment. The issue was starkly presented to the Supreme Court last term in *Eastman Kodak Co. v. Image Technical Services*, 112 S. Ct. 2072 (1992), where a 6-3 majority rejected Kodak's argument that it was entitled to summary judgment on the legality of this practice. DOJ strongly supported Kodak and then-AAG James Rill participated in the oral argument, while the

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state AGs strongly supported the independent service organizations. The main argument for Kodak was that it would be economically irrational for a business to gouge its customers in after-market services, while the opposing argument was that in fact Kodak charged more and often did no better servicing than the independent service organizations. The case turned heavily on whether the servicing of a single manufacturer's equipment could be treated as a separate "market" for antitrust purposes. That issue was not resolved by the Supreme Court, but the majority decision surely provided ammunition for those arguing that separate "service" markets exist.

The net result of *Kodak* is that pressure will be put on the federal enforcement agencies to follow up on this opportunity and to open investigations of leading manufacturers' refusals to deal with independent service organizations or impositions of restrictions preventing customers from dealing with them. We anticipate that the FTC especially might well open up a number of investigations in this area in response to complaints by independent service organizations. DOJ might even pursue a few itself.

#### **"Industrial Policy" and "Competitiveness" Defences**

DOJ and FTC have been fairly tough in resisting parties' claims that a merger or joint venture should be cleared on "efficiency," "countervailing power" or "failing company" grounds. A Clinton administration could well change somewhat in this area. One of the Clinton group's leading economic figures, Robert Reich, is a consistent advocate of a more "industrial policy" approach to antitrust, and he has some experience in the field as Director of Policy Planning at the FTC in the late 1970s. If he were a major voice in developing Clinton administration economic policy, he could push DOJ to go in that direction and FTC might echo the same theme.

The Merger Guidelines allow for "efficiency" and "failing company" defences. Neither has been a particularly important factor, because the agencies have insisted on such a high standard of proof in an area where facts tend to be elusive and proof difficult. Moreover, in the "failing company"

area, the Republican administrations have tended to regard the defence as a populist sop because they believed that, if the "failing" assets were valuable in industry they would reappear in other hands, and therefore the defence was mainly designed to protect the interests of labor and creditors. Accordingly, they have insisted on only allowing a failing company defence where there is rigorous proof that the enterprise is "failing" and that there is "no alternative purchaser" (i.e., a buyer willing to pay scrap value or more for the failing enterprise).

It may be that in a Clinton administration, merger and joint venture proponents may be able to get a transaction through notwithstanding relatively high market shares, if they can show that the transaction is likely to result in significant efficiencies which would make them a more effective competitor in a market, either at home or overseas, where major foreign competitors exist. Moreover, there might be some special variations on this in the defence, health care, and banking industries. In each instance, there is likely to be substantial over-capacity, which will generate proposals for horizontal mergers and joint ventures as a way of rationalizing and slimming down capacity. The antitrust agencies may facilitate this process with some additional policies or, perhaps less likely, they may oppose almost all major horizontal mergers of this type (as the FTC has just done, successfully blocking a merger of two military tank and munitions suppliers).

#### **Intellectual Property**

The Reagan-Bush DOJ reversed a long-standing DOJ policy of actively pursuing restraints arising from market power resulting from control of patents. The Reagan-Bush policy rested on the entirely sound assumption that patents were a very important incentive to innovation, so that the market benefits resulting from them should be recognized as legitimate. This viewpoint is likely to enjoy continued support, especially in an increasingly competitive international world. On the other hand, general support for patents does not mean that every patent issue is beyond antitrust concern, and a new administration could bring several cases in the patent area (and indeed

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there may be several significant patent investigations in the DOJ pipeline).

One possible area concerns patent procurement and settlement: the Supreme Court clearly established in the 1960s that it is an antitrust violation to fraudulently procure a patent by suppressing prior art or to settle a patent conflict where each side has evidence that defeats the other's claim to allow a patent. Such prosecutions could be pursued quite legitimately on the ground that it is not the goal of the patent system to create artificial barriers to entry through invalid grants.

Another possible area would concern tie-ins, specifically the practice of requiring a patent licensee to obtain non-patented materials from the licensor as a condition. The Reagan-Bush DOJ viewed tie-ins as a permissible practice, even though it had been outlawed by the Supreme Court for many years. It seems unlikely, especially in the wake of *Kodak, supra*, that a new Clinton DOJ would adhere to this past position.

It is not altogether improbable that a Clinton DOJ might pick some foreign, particularly Japanese, licensors as tests for some patent cases. The point seems perhaps even more likely for the FTC, which would be sensitive to the general congressional approval. (Interestingly, one of the FTC's handful of vertical pricing cases in the last two years was against Nintendo, the Japanese electronic games maker.)

### INTERNATIONAL ISSUES

#### Co-operation

As the world economy has become more integrated, the U.S. antitrust agencies have necessarily had to become more interested in international restraints and the impact that these may have in the U.S. markets. In the process, the U.S. agencies have worked hard to develop stronger bilateral cooperation arrangements with the leading foreign agencies (including particularly Canada, the European Community, Germany and Australia). They have also developed informal relationships with the new cartel agencies that are growing up in the former Soviet Bloc and to this end have provided substantial technical assistance. The antitrust agencies of the leading

western countries also have a multilateral-cooperative arrangement through the Organization of Economic Cooperation and Development ("OECD"). Finally, the Bush DOJ has been a particular leader, through the Structural Impediment's Initiative ("SII"), in urging Japan to adopt stronger antitrust enforcement measures. The theory of this initiative has been that, if Japanese cartels are broken, it will open the door to more opportunities for U.S. exporters.

It seems to us that this type of general cooperative effort is likely to continue. The leaders of the various competition agencies in most countries feel a substantial philosophical affinity for each other, and are engaged in often parallel bureaucratic battles with their domestic champions of industrial policy, subsidy and non-market solutions.

#### Jurisdictional Expansion

In the past year, DOJ has been particularly vocal in urging an expansion of the U.S. jurisdictional frontiers, with an eye to purchasing practices in Japan. Attorney General Barr and former AAG Rill have both urged that the U.S. laws be applied to restraints and boycotts by foreign importers, operating in their own markets, where these restrain U.S. imports. This has been highly controversial, especially overseas.

Whether this emphasis is likely to continue in the Clinton administration is uncertain, but many experts expect that it will. As a practical matter, the extra-territorial jurisdiction issue may be clarified significantly by a pending Supreme Court case, *Hartford Insurance Co. v. State of California*, in which the Supreme Court has to face international antitrust jurisdiction questions for the first time in thirty years. DOJ seems likely to support the State of California in asserting broad jurisdiction in this case over the London re-insurance market, with the British Government as amicus strongly on the other side. The briefing schedule in the Supreme Court means that the Government brief would have to be filed before January 20, and it may well be that a Clinton administration — even if it were very interested in the subject — could do little to influence the outcome of the case. A decision can be anticipated by June.

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**Possible Legislation**

Senator Metzenbaum, Chairman of the Senate Antitrust Subcommittee, may well combine with other Democrats to devise legislation to make it easier for foreigners to be sued in the United States courts on various forms of "unfair" competition. Last session he introduced S. 2610, labelled the *International Fair Competition Act of 1992*, which would have created a dumping-type "antitrust" remedy against sales of foreign imports at less than average variable costs, if such sales produced injury to U.S. markets (which seems to mean competitors) and the seller's home market "lacks effective price competition". It would have given the FTC jurisdiction to make the rules to implement this scheme.

It is too early to tell whether the Clinton administration would ever agree to legislation along these lines, but these and similar proposals — which would have significant anti-competitive effects — appear certain to be offered for debate. FTC would probably not be a warm ally to this kind of proposal until several years have passed and there were substantial changes among the Commissioners.

**CONCLUSION**

The ultimate question for antitrust counsel is this: what difference will a change in the Presidency make for how U.S. antitrust enforcement affects domestic and foreign enterprises?

At one level, U.S. antitrust enforcement is not very "political": the leaders of both political parties accept antitrust as a good thing, and it is this favourable tailwind which has helped to convert *Sherman Act* offences converted from misdemeanors to felonies and to increase the maximum corporate fine 200-fold since the 1960's. (It was \$50,000 then and it is \$10,000,000 now.)

At another level, antitrust enforcement activities are highly "political": antitrust law and policy embodies the Adam Smith idea that markets should be allowed to decide who gets what and on what terms. Their enforcement is very "political" because it is the very essence of the modern democratic state to pass out special protections

and entitlements to favoured individuals, groups and constituencies. Congress does it, the federal regulatory agencies do it and the White House does it. So do the state and local governments. The federal antitrust agencies can be a real thorn in the side of these political preference peddlers and their constituents because antitrust enforcers really believe that anti-competitive preferences and barriers should be curbed and that the market should be free — regardless of whose constituents or campaign contributors are gored in the process. This commitment to principles rather than persons can be seen in the DOJ's famous *American Telephone and Telegraph* case (1974-1982), in its campaign against fixed commissions on the New York Stock Exchange (1968-1975), and in the major Antitrust Division campaign for airline and trucking deregulation legislation (1974-1980) — each of which commenced in the administration of one party and was pressed vigorously forward in the administration of another.

Such efforts can, if successful, be important to the markets in which they occur and yet they are very hard to predict. The extent to which they occur and are successful tends to turn on (i) having antitrust leaders with substantive vision and political courage and (ii) effective staff work at the antitrust agency, be it the DOJ or the FTC. One possibility today occurs as the interplay between trade policy and antitrust becomes clearer: in such an environment a vigorous AAG could become both an advocate for liberalized trade rules and a seeker after antitrust cases against those who enter into impermissible price and market restraints not mandated by trade law.

Antitrust policy was not really an issue in the 1992 Presidential campaign and is not promised as a central item on the Clinton economic agenda at the outset of the administration. This means that the White House under Clinton is likely to be reactive rather than innovative in the antitrust area. As a result, we can expect more of the same — ongoing substantial commitment to price-fixing prosecutions and horizontal merger cases — but with the brew spiced up by some substantive innovation flowing from the new antitrust leadership at DOJ.

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## AUSTRALIAN NEWSLETTER

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The foreshadowed amendments to the *Australian Trade Practices Act* have now been introduced into Federal Parliament and will become law before the end of 1992.

The major changes contained in the *Trade Practices Amendment Act* are as follows:

1. Significant increases in penalties for breaches of the Act.
2. Changes in the merger test.
3. Speeding up and enlarging the ground for authorization of mergers.
4. Giving statutory recognition to undertakings obtained by the Trade Practices Commission.
5. Introducing a new remedy for unconscionable conduct.

We comment briefly on each of these changes in this newsletter.

### 1. Penalties Increased

Under the proposed changes the maximum penalties for breaching the *Trade Practices Act* in the case of a corporation will be AU\$10,000,000; for individuals the maximum penalty is to be increased to \$500,000. The previous maximum penalties were \$250,000 and \$50,000 respectively. This maximum level will apply to any anti-competitive behaviour other than secondary boycotts for which there has been no increase in penalties.

Breaches of the consumer protection provisions may result in a maximum penalty of \$200,000 for corporations (the previous maximum was \$100,000). Individuals who aid, abet, etc., the corporation face a maximum penalty of \$40,000 (previously \$20,000).

### 2. Merger test changed

The merger test (s. 50) has been changed. The Trade Practices Commission or other complainants will now need to show that the relevant merger will result in a **substantial lessening of competition** in a market. That test — for the substantial lessening of competition in

a market — is the same which existed before the current test was introduced in 1977. It is similar to the test in the United States.

The previous test required **dominance** or a **substantial strengthening of dominance** to be proved.

The Government has provided some guidance on the new test. In the proposed new s. 50(3) it has listed a number of criteria which must be taken into account in determining whether the acquisition (takeover) will have the requisite effect. These are:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.

There has been no change to the definition of market for the purposes of s. 50 - it still remains "a substantial market for goods or services in Australia, in a State or in a Territory."

### 3. Authorization of Mergers

The Government, recognizing that the new merger test may have a detrimental impact on the way companies operate, has made changes to the authorization test. The Trade Practices Commission (or, on appeal, the Tribunal) must take into account whether the merger will result in a significant increase in the real value of exports or whether the merger will result in a significant substitution of domestic product for imported goods in deciding the application.

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In addition, the Commission (or the Tribunal) must take into account all other relevant matters that relate to the international competitiveness of Australia. This should provide some assistance for companies which will argue that the only way they can improve their international competitiveness is to become bigger, and more dominant in Australian markets.

The Commission will have only 30 days to consider an application for authorization of a merger. This period may be extended to 45 days if the matter is one which is complex and the Commission advises the applicant accordingly. The Tribunal will have 60 days to consider an appeal from the Commission. If the Tribunal believes that the matter cannot be dealt with properly within the period of 60 days, either because of its complexity or because of other special circumstances, it may increase that period. There is no absolute maximum period set down as the time the Tribunal will have available for considering an appeal.

#### **4. Undertakings to Commission to be enforceable**

Under proposed s. 87B, the Commission is given power to accept written undertakings in respect of any matter which the Commission has power to exercise a function under the legislation. These undertakings are binding unless the Commission allows the particular undertaking to be withdrawn. Should there be a breach of the undertaking the Commission is empowered to apply to a court for an order seeking compliance with the undertaking. One significant development in the law is the proposal in s. 87B(4) that the court may order the person breaching the undertaking "to pay the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach."

#### **5. Unconscionable Conduct**

A major change to the *Trade Practices Act* is the introduction of a new remedy (which will be available to all companies and persons). Section 51AA will provide that "a corporation must not in trade or commerce engage in conduct that is unconscionable within the meaning of the

unwritten law of a State or Territory." This section will not apply to conduct that is already prohibited under current s. 52A (which applies to consumer transactions). Both of these provisions will be located in a new part of the main Act entitled "Part IVA Unconscionable Conduct".

The fact that the legislation is limited to the unwritten law of a State or Territory may well limit the reading of the section as a general prohibition. But experience of the use of the New South Wales Unfair Contracts legislation shows that such a limitation may prove illusory.

This provision may be used as a tactic (as s. 52 which prohibits misleading and deceptive conduct has already been used) in forcing a review of contracts and contractual arrangements. Parties which may not be in a weaker position, but which want to take advantage of changed circumstances to see if a new arrangement can be put in place, may use this section to mount actions. The section may become a very important weapon not only for smaller companies (for whom it is intended), but for all companies which may want to review their contractual situation.

### **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**

##### **Change to Merger Rules**

In an abrupt about turn, the Attorney-General Michael Duffy has announced that the Government has changed its mind about the merger test to be applied in Australia and will opt for the 'substantial lessening of competition' test replacing the current 'dominance' test.

There are to be a number of statutory factors, which incorporate basic economic principles, to be taken into account in determining whether a merger substantially lessens competition. They include:

- the level of actual and potential imports

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- barriers to entry and exit
- level of concentration in the market
- the degree of countervailing power
- the ability of the merged firm to increase prices
- the availability of substitutes

The legislation to effect the change is expected to be introduced prior to Christmas. In the meantime, there is likely to be a rush of mergers before the change reminiscent of the activity which preceded the new Economic Community merger guidelines in 1990.

The changes to the merger test will be accompanied by a 'simple' form of compulsory pre-merger notification.

### DENMARK

#### Proposed Change to the Competition Act

The proposed change to the *Competition Act* reported in the June 1992 C.C.P.R. was passed on April 21, 1992, and took effect on June 1, 1992.

The change in the Act entails that decisions on access and secrecy cannot, as a general rule, be appealed to the Competition Appeals Board. Only decisions made in connection with publishing general information can be appealed to the Competition Appeals Board, as well as decisions on secrecy of technical information, and information on the relationship between specific customers and businesses which are supervised by the Financial Supervisory Board. Other decisions, which are taken by the Competition Council concerning access and secrecy, must be brought before the ordinary courts.

#### Prohibition Instead of Transparency

For some time it has been discussed whether the Danish *Competition Act*, based on transparency, is a suitable system to be used on a par with the prohibition system under the EEC competition rules. The Danish Minister for Industry has initiated investigations and discussions with a number of organizations and others in order to obtain a better basis for a possible new competition act. It is also being considered whether merger control should be

part of the Danish competition rules.

The negotiations that have taken place between the various organizations did not result in any unanimous decision. There is, however, a number of organizations who find that it would be an advantage to have competition legislation similar to the EEC competition rules, and especially as the same principle will most likely be applicable in the other Nordic countries.

Other organizations do not believe a change of principle would be an advantage because a change of principle to prohibition will create stricter competition rules.

The majority of the organizations found that there would be no reason to implement merger control in Danish competition legislation.

### EUROPEAN COMMUNITIES

#### Use of Information by National Authorities

The Court of Justice has held that information on certain practices of an undertaking, gathered by the Commission following notification thereof, cannot subsequently be used by national authorities against said company under national competition law. An association of Spanish banks had been the object of national proceedings following a Commission investigation, the results of which had been disclosed to the national authorities.

#### Prevention of Parallel Imports

The Commission has fined a British manufacturer of sports goods, Dunlop Slazenger International, and its Benelux distributor for pursuing a commercial policy aimed at preventing parallel imports of tennis balls and squash-balls. The restrictive practices included the application of an export ban, predatory pricing, buying back low-price parallel exports, marking of products to identify their origin and destination and the use of tennis federation labels. Both parties have lodged an appeal against the Commission's findings.

A similar approach towards parallel imports was found to exist between a manufacturer of writing utensils, Parker Pen, and its distributor.

## CANADIAN COMPETITION POLICY RECORD

### Selective Distribution

The Commission has provided new guidelines as to the selective distribution of luxury cosmetic products in two decisions granting both Yves Saint Laurent and Givenchy an exemption under Article 85(3). The Commission decided to revise its position and no longer tolerates contractual clauses which hinder automatic admission of new distributors fulfilling all qualitative criteria, or which restricts the freedom of the distributor to determine its own retail prices.

### De-Concentration

Problems arose when the former American subsidiary of a French manufacturer of lasers, Quantel, intended to compete with its former parent company some 5 years after their de-concentration. According to the Commission, a transitional period of 2 to 5 years during which the vendor is protected against competition by the purchaser, is admissible. However, the attempts of Quantel to hinder competition beyond this period were prohibited, especially because it contributed to the technological and commercial isolation of the common market from a third country.

## FRANCE

### Television by Cable

The Court of Appeal of Paris judicially reviewed the decision of the Conseil of November 19, 1991 relating to cable television and affirmed by decision of June 17, 1992, the order imposed on cable operators and programme editors to remove the clauses of exclusivity of themes contained in contracts for programme broadcasting. However, it overruled the provision which entrusted the supervision of the sector to the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes.

It held, "where because of a fear that there is a threat to competition in the market in question, the Council may exercise its jurisdiction and proceed with any necessary investigations; it may

not, however, incorporate into the decision by which it judged previous distinct practices, a measure totally different to the former decision ordering a systematic supervision of the sector in the future".

### Group of Companies and Concerted Practices

The Court of Appeal of Paris held in a decision of July 8, 1992 ("Action for review taken by the Company Carrières Gontero and others, of a decision of the Conseil de la concurrence"), that companies belonging to the same group may be individually sanctioned for their common participation in anticompetitive practices, "where they have taken part as autonomous entities through distinctive decisions or behaviour".

### Professional Bodies

In several recent decisions, the Conseil and the Court of Appeal of Paris recalled the limits imposed by competition law on professional bodies. Thus, for example, the latter may not legitimately organize a collective boycott of a producer in order to resist competition "judged to be aggressive and unfair", adopt measures of uniform price increases in order to combat foreign competition, or transmit information which deprive "companies of a direct appreciation of their own costs and thereby allow them to determine individually their prices".

### Abuse of Dominant Position

The Conseil fined Pechiney Electrometal Lurgie 1,800,000 F for abuse of its dominant position. It considered "it particularly serious for a company in a dominant position in a market for primary materials, to attempt to impede the entry into a downstream market by its only competitor, where the latter has developed an important new invention" (Decision No. 92-D-26 of March 31, 1992 "Competition in the market for calcium metal").

## CANADIAN COMPETITION POLICY RECORD

**GERMANY**

Mergers under the jurisdiction of the German cartel authorities must be assessed based upon the market situation prevailing at the time of their decision. This principle was further clarified by the Federal Supreme Court in a decision of October 15, 1991, in the case of *Stormarner Tageblatt* where the applicant gained a dominant position in the period after notification, but prior to decision. The court upheld the prohibition of the merger, referring to the possibility that this practice may operate either to the benefit or the detriment of the applicants. The court responded to claims of potential unfairness by noting that the Federal Cartel Office was required to come to a decision within strict time limits (maximum one year).

An automobile manufacturer does not violate non-discrimination rules when it subsidizes car sales to its own and its dealers' leasing companies (Federal Supreme Court decision in the case of Ford, November 11, 1991). Independent leasing companies cannot demand equal treatment since an obligation on a manufacturer to give them similar subsidies would force the manufacturer to aid competitors of its own subsidiaries with which it forms an economic unity.

An exclusive importer of certain stretch foil packaging machines dominates the market of spare parts for these machines if the parts cannot be purchased from any other supplier in Germany. In line with earlier case law, the Düsseldorf Court of Appeal held that the possibility of purchasing abroad (e.g., from the manufacturer) was not to be taken into account (judgment of December 10, 1991).

**IRELAND**

## Competition Act 1991

Ireland, like most EC members, has introduced as domestic legislation competition rules equivalent to those established by Articles 85 and 86 of the EEC Treaty of Rome, and similar to the provisions of U.S. antitrust law.

The *Competition Act, 1991* came into operation on October 1, 1991 and applies to anyone doing business in Ireland. The Act prohibits and renders

void all agreements between undertakings, decisions by associations of undertakings and concerted practices having their object or effect as the prevention, restriction, or distortion of competition in trade in any goods or services in Ireland. The Act also prohibits the abuse of a dominant position in the market place.

A feature of the legislation is that it fails to apply a *de minimus* rule, making it applicable to any anticompetitive agreement in any part of Ireland. The Act further prohibits an abuse of a dominant position by one or more businesses in Ireland or in a substantial part of Ireland.

A procedure has been established to enable parties to an agreement or practice to notify the terms of the agreement to a Competition Authority set up under the Act. The Competition Authority is empowered to grant certificates and licences. At the request of the Minister for Industry and Commerce, the Competition Authority can also investigate an alleged abuse of a dominant position.

A certificate is, in effect, a negative clearance confirming that the agreement does not fall within the prohibition. A licence permits certain agreements and practices which would otherwise be prohibited.

Persons "aggrieved" by anticompetitive agreements, decisions or practices may apply to Court for an injunction, declaration and/or damages.

**JAPAN**

## Rules on Filing Requirements

The Japanese Fair Trade Commission ("JFTC") revised the Rules on Filing Requirements of International Agreements or Contracts which purport to reduce the scope of international agreements and the items in the agreements to be notified to the JFTC. The revised Rules apply to International Agreements concluded on and after March 31, 1992.

Even if the international license and distributor agreement was made on an exclusive basis, no Notification of the Agreement is required if the Japanese party does not have substantial shares in the relevant market. Under the new Rules, if a

## CANADIAN COMPETITION POLICY RECORD

Japanese party to the joint venture agreement is a medium or small size company, no notification to the JFTC is required.

#### Enforcement of Recommended Decision of the Cease and Desist Order

Based on the acceptance of the recommended decision by 66 construction companies including Kajima, Taisei, Kumagaigumi, Ohbayashi and Shimizu, the JFTC has requested to have signatures of all employees of those construction companies to the code of conduct for preventing collusive bidding (DANGO). Some construction companies are complaining that to get the signatures of all employees is impractical and impossible. Other companies have already obtained the Board's approval for enforcing such signature requirement to all employees including advisors.

#### NEW ZEALAND

Telecom New Zealand has successfully appealed against the Commerce Commission and High Court's refusal to give clearance for Telecom's acquisition of the AMPS, a radio frequency bank (Update, March 1992). The majority of the Court of Appeal held that Telecom was dominant in the mobile telephone market but the acquisition was authorised on public benefit grounds. The decision is significant in the analysis of what amounts to "dominance". The Court of Appeal indicated that the Commission had been setting too low a competition threshold in determining the acquisition or strengthening of dominance in merger cases.

The High Court has also overturned on appeal the Commerce Commission's decision regarding an application by Foodstuffs to acquire five North Island Countdown supermarkets. An administrative settlement was reached between the Commerce Commission and Foodstuffs on the appeal in respect of the South Island proposal. The High Court criticized the Commission for failing to take a broad enough view of the functional aspects of the relevant market and also firmly rejected the proposition that applications for clearance, as opposed to authorisation, provided

a "fast track" procedure which should be confined to simple cases. The Commission's decision was at "high cost to both parties". Although urgent appeals were filed with the High Court, the other prospective purchasers in the wings, Western Australia wholesale grocer Foodland Associated Limited, secured the purchase of the Countdown chain including the wholesale business.

#### 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, 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 of 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 — they served the same purpose and 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 rather divided into different classes — luxury, medium, compact, small cars. The Antimonopoly Court restricted its considerations to the medium car market. It also noted that another Polish manufacturer produced approximately 70 percent of all cars sold in that class in Poland. Having only the outstanding 30 percent for other manufacturers and distributors left, the exclusive distribution agreement was

## CANADIAN COMPETITION POLICY RECORD

violating fair competition rule and was a monopoly practice.

### SPAIN

#### Action Against the High Banking Council

The Court of Defence of Competition has issued a resolution admitting the appeal filed by the Association of Users of Banking Services against the decision issued by the Directorate General of Defense of Competition of the Ministry of Economy and Finance ("DGDC") to terminate the investigation brought against the High Banking Council as a result of the enforcement of a unified system of information on unpaid maturity drafts.

Such register allows interested parties to know the financial status of any company operating in the Spanish market through the Spanish banking system. This is achieved by a procedure whereby operating banks report to the Register of Unpaid Drafts (Registro de Aceptaciones Impagadas - RAI) kept by the Council, any default in payment of drafts discounted or produced for collection by legal entities or individuals.

According to the decision of the Competition Court such registers are based on the existence of concerted actions between entrepreneurs to mutually furnish each other with information on clients, which have a direct and material bearing on commercial transactions, and the competition in the market.

The Court does not rule that such Registers are, per se, illegal. On the contrary, they may have favourable effects and may eventually be permissible, but the Court considers that their structure, formal content and operating system must be subject to previous review. The Court also claims exclusive jurisdiction and authority to grant any such approval.

#### Investigations in Progress Against the Roca Group

Several companies of the "Roca Group", leader in the ceramic business and having the larger share of the Spanish market of bathtubs, lavatories and similar products, have been subject to antitrust proceedings by the Spanish Directorate General of Defense of Competition.

Roca has been denounced (the name of the entity bringing the complaint is not disclosed) for different anticompetitive actions:

1. Enforcement of a system of special discounts to "loyal" distributors, that is, those distributors who would refuse to handle competing brands.
2. Abuse of its dominant position in the market (while not spelled with these words) by imposing upon suppliers of the different companies of the group prices lower than those previously agreed upon.

### UNITED KINGDOM

After the UK general election in the spring, it was anticipated that the returned Conservative government would resurrect its proposals in a 1989 White Paper to strengthen the investigatory powers of the Director General of Fair Trading and the penalties for Breach of UK competition law, and to replace the restrictive trade practices legislation with a domestic version of Articles 85 and 86 of the EEC Treaty. New competition legislation was not, however, among the proposals in the Queen's speech on the opening of Parliament. Legislative time is apparently not available even for a short bill giving the Director General of Fair Trading improved powers to investigate suspected restrictive agreements, and to introduce an alternative to the law of contempt as the ultimate sanction for repeated breaches of the restrictive trade practices legislation.

After nearly a decade and a half as head of the Office of Fair Trading, Sir Gordon Borrie retired in June, to be succeeded by Sir Bryan Carsberg, formerly Director General of Telecommunications. The change of leadership at the OFT is unlikely to result in major changes of policy on the antitrust side of that office's work. The same cannot be said with equal confidence of Ministerial changes at the Department of Trade and Industry. Competition "hawks", Lilley and Redwood, departed in a Ministerial reshuffle after the general election. The new Secretary of State for Trade and Industry is Michael Heseltine, whose industrial policy instincts are sufficient to make his recent predecessors at the Department of Trade and Industry blanch.

## CANADIAN COMPETITION POLICY RECORD

The prolonged UK recession during 1992 has seen fewer deals, and consequently, fewer merger enquiries by the Monopolies and Mergers Commission than in recent years. In *Hillsdown Holdings/Association British Foods*, despite very high combined market shares in certain areas of the food and vegetable canning industry in the UK the MMC permitted Hillsdown to acquire ABF's food and vegetable canning businesses, and specifically drew attention to the fact that the ABF businesses would have closed but for their acquisition by Hillsdown. This recognition of the "failing firm" defence by the MMC contrasts with its rejection of similar arguments in. In *Sarah Lee/Reckitt & Coleman* brand name strength in the self-selection shoe polish market in the UK led the MMC, by a majority, to find against the acquisition of Reckitt & Coleman's shoe care business by the Sarah Lee Corporation. The acquisition would have more than doubled Sarah Lee's share of the market from 24 to 53 percent. A further MMC merger report worthy of note is that into a proposed joint venture between Allied-Lyons and Carlsberg A/S. Again by a majority, the MMC found that the structural effect of the joint venture in removing a major UK brewer of lager as an independent supplier would have adverse effects on competition and be contrary to the public interest. The MMC, however, recommended that the joint venture could proceed if the parties were prepared to give certain undertakings. Of particular interest procedurally, was the way in which the European Commission dealt with the joint venture as if it were a concentration within the Merger Regulation in order to ensure that a decision was reached under Article 85 of the EEC Treaty within a timescale compatible with the UK merger inquiry process.

## UNITED STATES

At the end of its 1991-92 term, the U.S. Supreme Court issued several significant antitrust opinions. Of greatest interest was *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992) where the Court held that Kodak, a manufacturer of micrographic equipment, may violate the *Sherman Act* by tying sales of after-market service to sales of replacement parts and

by refusing to sell parts to independent service companies even though the plaintiffs failed to show that Kodak had market power in the primary equipment market. Importantly, the Court also reconfirmed its standard for granting summary judgment for defendants as set forth in the controversial *Matsushita v. Zenith* decision (475 U.S. 574 [1986]). A defendant is entitled to summary judgment if no reasonable inference of anticompetitive behaviour can be drawn from the evidence. The Court's decision undoubtedly will encourage independent service businesses and equipment users to challenge manufacturers' restrictive practices.

In another significant opinion, *Federal Trade Commission v. Ticor Title Insurance Co.*, 112 S.Ct. 2169 (1992), the Court refused to extend antitrust immunity to title insurance rate-setting arrangements by state governments because the states did not actively supervise those arrangements. The "state action" doctrine, first articulated in *Parker v. Brown*, 317 U.S. 241 (1943) recognized that certain private conduct, when performed pursuant to a program or policy established by a state government, would be immunized from antitrust liability. In this case, the defendant title insurance companies established uniform rates through private "rating bureaus", which were authorized by several state governments to set joint rates for their members and then file them with the state insurance office. Those rates became effective unless the state rejected them. The Court re-affirmed the rule that, in order to grant immunity to private conduct the state must have articulated a clear policy favouring such anticompetitive conduct and must have actively supervised the conduct in question.