

resolved in the coming legislative proposals. We have made specific detailed proposals to this end in a number of submissions."

FOREIGN AND INTERNATIONAL

UNITED NATIONS CONFERENCE APPROVES SET OF PRINCIPLES AND RULES FOR CONTROL OF RESTRICTIVE BUSINESS PRACTICES

The Second Session of the United Nations Conference on Restrictive Business Practices has completed and approved A Set of Multilaterally Agreed Equitable Principles and Rules For The Control Of Restrictive Business Practices Having Adverse Effects On International Trade, Particularly That Of Developing Countries, And On The Economic Development Of Those Countries. The code, the full text of which is appended hereto, will be presented to the United Nations General Assembly in the autumn for adoption as a resolution. The agreement culminates five years of negotiation within the United Nations Conference on Trade and Development (UNCTAD).

The code includes recommended standards of conduct for enterprises, and its reception by the business community will have an important bearing upon its overall impact. Prior to the Second Session, the International Chamber of Commerce issued a paper outlining its views on the draft code as it stood at that time. The paper called for a number of changes including some which were described as minimum conditions. Those conditions and the treatment of the relevant issues in the final code were as follows:

"(1) The code should contain an express statement that its provisions are voluntary and non-mandatory". The Preamble "Transmits to the General Assembly at its thirty-fifth session this Set of Principles and Rules, having taken all decisions necessary for its adoption as a resolution;". According to the U.N. Charter, resolutions of the General Assembly constitute recommendations.

"(2) Section E 3 should be amended to require 'non-discriminatory' treatment of enterprises." The section was amended to call for treatment "on the same basis to all enterprises".

"(3) With respect to transactions and relationships between affiliated enterprises, a general exemption of affiliated relationships and behaviour...must be added." Para. (a) of the footnote to D 4 was enlarged by the addition of "such as in the context of relations within an economic entity and not having restrictive

effects outside the related enterprises".

"(4) The definition of 'dominant position of market power' should be amended to exclude any possible extension to 'shared monopoly' situations." The word "acting" was inserted, so the relevant part of the definition is now "...where an enterprise, either by itself or acting together with a few other enterprises..."

"(5) State enterprises must remain within the coverage of the code." The code applies to all enterprises, the definition of which includes the words "irrespective of the mode of creation or control or ownership, private or state".

O.E.C.D. ADOPTS RECOMMENDATION ON
COMPETITION POLICY IN REGULATED SECTORS

The Council of the Organization for Economic Cooperation and Development (O.E.C.D.), which includes the heads of the permanent national delegations, adopted a Recommendation on Competition Policy and Exempted and Regulated Sectors on September 25, 1979. The Council recommends to the Governments of Member States:

- "1. to undertake, with the participation of competition authorities reviews of regulatory regimes and of exemptions from restrictive business practices laws to consider:
 - whether the initial reasons or circumstances which gave rise to regulations, or to particular aspects thereof, remain valid under contemporary conditions;
 - the extent to which those regulatory regimes, or particular aspects thereof, have achieved their objectives, and the true social, economic and administrative costs, as compared to benefits, of achieving those objectives by means of regulation;
 - whether the same objectives could in fact be achieved under contemporary conditions by the operation of competition subject to control under restrictive business practices laws, or by forms of government intervention which restrict competition to a lesser degree;

2. in undertaking the reviews mentioned above to take into account the experience of other countries in which specific policies regarding regulated sectors have been achieved with a reduction in the extent of regulation or with a more extensive application of competition policies and competition laws;
3. where the reviews mentioned above indicate that regulation remains desirable to achieve public policies, or where public enterprises are involved, to consider whether increased competition and increased application of restrictive business practices laws, consistent with the objectives of regulatory policy, would be useful in alleviating the adverse effects which may result from extensive regulation. More specifically, they should:
 - reconcile, as far as possible, existing regulatory schemes with their competition policy and restrictive business practices laws;
 - ensure that express or implied exemptions from restrictive business practices statutes are no broader than necessary to achieve the public interest objectives of the regulatory schemes;
 - exempt from the operation of competition laws only those restrictive activities of enterprises in regulated industries which are required or expressly approved by the competent authorities as desirable or necessary to achieve the purposes of the regulatory scheme;
4. to grant competition authorities appropriate powers to challenge abusive practices, including unfair discriminations and refusals to deal, by monopolies or cartels approved by the competent authorities particularly where such behaviour is beyond the purposes for which the regulatory scheme was enacted;
5. to make efforts to detect non-filed or unapproved agreements which, although lawful if notified to or approved by the competent authorities, have not been so notified and approved; and to treat such agreements under appropriate restrictive business practices standards;
6. to provide adequate means of consultation and co-ordination of action between regulatory authorities and competition authorities so as to enable the latter to have a positive impact on the formulation and implementation of regulatory schemes and policies regarding issues directly related to restrictive business practices."

CANADIAN COMPETITION POLICY RECORD

The Recommendation follows publication of a study by the O.E.C.D. Committee of Experts on Restrictive Business Practices entitled Competition Policy in Regulated Sectors (With Special to Energy, Transport and Banking).¹ The study examines the regulatory frameworks in Member States including Canada and their interaction with the competition laws. Its conclusions provided the basis for the O.E.C.D. Council Recommendation.

The Economic Council of Canada's interim report on Responsible Regulation (2) was published at about the same time, and it contains a number of recommendations. However, the two sets of recommendations, while not inconsistent with one another, are for the most part not directly comparable. The O.E.C.D. was concerned almost solely with the effects on competition of regulations which limit or control competitive choices directly and primarily. The Economic Council's field of interest is much broader and includes what it calls "social regulation" such as for health, safety, environmental protection, consumer protection and culture, the primary purpose of which is not to control competition.

Nevertheless, both sets of recommendations call for periodic reviews of regulatory systems, the Economic Council proposing a wide range of assessment criteria and the O.E.C.D. confining itself largely to competitive effects.

One of the criteria proposed by the Economic Council is efficiency in the allocation of scarce resources. They remind the reader that in their 1969 Interim Report on Competition Policy they proposed efficiency as the single objective for competition policy. They state, in the context of their broad mandate:

"While it would be inappropriate to argue that economic efficiency should be the primary objective of regulatory policy, nevertheless, it is of great importance. In many cases it will be necessary to sacrifice efficiency for equity. So be it. But the efficiency costs should be carefully weighed in the decision making process."

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1. Organization for Economic Cooperation and Development, Paris, 1979.
2. November, 1979, Canadian Government Publishing Centre, Supply and Services Canada, Hull, P.Q.

U.K. COMPETITION
BILL ENACTED

A major new piece of British competition law was enacted in April and is expected to become effective in June after Parliament has approved an order exempting certain classes of business including very small firms. The Act abolished the Price Commission while significantly strengthening competition law.

By way of background, the Price Commission was empowered to investigate and approve or disallow price increases, and its statutory guidelines placed quite heavy emphasis upon the existence or otherwise of anti-competitive practices. The Commission could not, however, take any remedial actions for such practices other than to disallow price increases and, in practice it could only delay increases. The Commission was unpopular in the U.K. and was not generally regarded as having been effective in curbing either inflation or restrictive business practices.

British competition law deals specifically and reasonably effectively with anti-competitive agreements and resale price maintenance. Also, mergers and monopolies accounting for 25 per cent of the national market may be referred to the Monopolies and Mergers Commission.¹ There was, however, no power to deal with anti-competitive practices other than agreements and resale price maintenance where less than 25 per cent of the national market was involved. Moreover, the provision on resale price maintenance did not cover refusal to supply except where it could be shown that resale price maintenance was the sole motive. As a consequence little could be done to deal with suppliers who refused to supply discounters.

In March, 1979, the Liesner Report, which was the work of an interdepartmental group, was published.² It recommended, inter alia, that the Director General of Fair Trading (corresponding in some respects to Canada's Director of Investigation and Research) should be empowered to investigate whether a practice restricts competition. On a positive finding, he would be empowered to refer the matter to the Monopolies and Mergers Commission or accept an undertaking from the parties to discontinue the practice.

The new legislation has the following main elements:

1. In addition, a merger where the value of assets taken over exceeds 15 million pounds may be referred. Prior to 10 April, 1980, the threshold was 3 million pounds.
2. A Review of Restrictive Trade Practices Policy, H.M. Stationery Office, London, 1979, Cmnd. 7512

- The Director General of Fair Trading is empowered, subject to Ministerial veto, to carry out preliminary investigations of possible anti-competitive practices, which are defined as a course of conduct which has, is likely to have, or is intended to have the effect of restrictions preventing or distorting competition. He will publish his report. If he finds an anti-competitive practice he may either refer it to the Monopolies and Mergers Commission or accept an undertaking by the parties to stop or modify the practice. If the Commission decides the practice is against the public interest, the Secretary of State for Trade may ask the Director General to seek an undertaking from the party or he may make an order against the practice.
- The Secretary of State is empowered to refer public bodies to the Monopolies and Mergers Commission. Public bodies include nationalized industries, bus services, water authorities and agricultural marketing boards. The reference may relate to efficiency, costs, service to consumers or abuse of monopoly.
- The Secretary of State may require the Director General to investigate and report on prices which are of major public concern. There is no power to take action on prices other than to follow the price investigation with an investigation of anti-competitive practices or monopoly.
- The Price Commission is abolished.

U.K. ENACTS TOUGH LAW TO COUNTER
U.S. EXTRATERRITORIALITY

The Protection of Trading Interests Act was signed by Queen Elizabeth on March 20. It reflects mounting British irritation over U.S. antitrust extraterritoriality as exemplified in the Justice Department's action against shipping conferences and the private uranium suits which involve Rio Tinto. The effects of the law include the following:

- Enforcement in British courts of foreign antitrust civil judgements for punitive damages is prohibited.
- British companies forced to pay punitive damages under the U.S. antitrust laws may seek to recover in a British court any amount above that attributed to actual damages by suing a British subsidiary of the U.S. party.
- Persons in the U.K. receiving extraterritorial subpoenas or requests for information in connection with antitrust investigations must report them to the Government, which may prohibit compliance.

GENSTAR SETTLES WITH U.S. FEDERAL TRADE
COMMISSION OVER FLINTKOTE ACQUISITION

The Federal Trade Commission released for comment on April 25, 1980, a consent agreement reached with Genstar Ltd., a Canadian conglomerate whose interests include building materials.

In 1978 Genstar purchased 21.5 percent of the stock of Flintkote Co., a Massachusetts firm whose products include portland cement and gypsum wallboard. In February, 1980, Genstar acquired the remainder of Flintkote stock.

Following the 1978 purchase, the F.T.C. issued a complaint against Genstar. According to the complaint Genstar had earlier entered into long term agreements to supply cement to two of Flintkote's competitors and containing provisions for profit sharing and exchange of cost and price information. It is alleged that, with these supply agreements, the acquisition could reduce competition. The complaint also alleges that, because Genstar and Flintkote both sell gypsum wallboard in western states, the acquisition may lessen competition in that market as well.

Genstar is now reported to have terminated the cement supply contracts and to be planning to supply the U.S. Market by other means.

The F.T.C. reported on the consent agreement as follows:

"Under terms of the consent agreement, Genstar will not participate in agreements with Flintkote's competitors in which the price of portland cement or clinker...Genstar sells to any such competitor would vary in relation to the selling price of products sold in the United States by the competitor.

Genstar is also prohibited from furnishing to or receiving from Flintkote's competitors any information relating to their production costs or resale prices for materials purchased from Genstar.

In addition, the agreement prohibits Genstar for the next ten years from selling cement for further manufacturing or resale to any cement manufacturing plant or facility owned by Flintkote in Oregon, Washington, California or Nevada.

The agreement establishes procedures for Genstar to follow if it chooses to sell cement in the U.S. during the next five years to firms other than Flintkote.

Genstar is prohibited until Jan. 31, 1985 from acquiring more than 3 percent of the stock of any company manufacturing cement or gypsum wallboard within a 300-mile radius of a Flintkote plant. The company is also barred from buying cement or gypsum wallboard manufacturing plants or cement distribution terminals within that radius during that time."

U.S. JUSTICE DEPARTMENT
ABANDONS SHARED MONOPOLY
INVESTIGATION

Sanford Litvack, Assistant Attorney General in charge of Antitrust, announced on April 22 that the Division's investigation of iron ore pricing had been dropped.

Some three years ago a large number of investigations were launched into industries in which the largest three or four firms had a substantial share of the market. The theory behind the investigations was that shared monopoly could be reached by section 1 of the Sherman Act by identifying business practices adopted through concerted actions that

unlawfully restrain trade by facilitating cooperative behaviour necessary for the achievement of a shared monopoly. To date none of the investigations has led to charges, and the iron ore investigation was rumoured to be the most likely to be carried forward.

In Canada Bill C-13, the Competition Act, which was introduced in 1977 but not enacted, contained a provision to deal with "joint monopoly".

BOOKS RECEIVED

Canadian Competition Policy: Essays in Law and Economics, edited by J. Robert S. Prichard, W.T. Stanbury and Thomas A. Wilson, Butterworth's, Toronto, 1979, 652 pages. Based upon papers in law and economics, the first drafts of which were presented at the National Conference on Competition Policy held in Toronto in May, 1977.

Canadian Competition Law: A Business Guide, by C.J. Michael Flavelle assisted by Yves Beriault, McGraw-Hill Ryerson Limited, Toronto, 1979, 414 pages. A useful guide "to instruct persons subject to the law as to its broad ramifications, so that they may at least know when they are in a suspect area".

Anti-Combines and Anti-Trust: Competition Law of Canada and the Antitrust Laws of the United States, by Jack Roberts, Butterworth's, Toronto, 1979. 799 pages. "...a reference book which explains the anticomines laws to lawyers, law students and businessmen...It is written from a comparative point of view; that is, the application of the anticomines laws to various types of business activity is explained by reference to the application of the United States antitrust laws to the same activity."