FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

CANADA/EC COMPETITION POLICY NEGOTIATIONS

Canadian and European Commission officials have held extensive discussions during the past year toward the formulation of a bilateral competition policy agreement. The negotiations have aimed to build on the parties' respective experience with bilateral antitrust arrangements under the 1984 Canada/U.S. Memorandum of Understanding and the 1991 EC/U.S. Competition Law Agreement.

It is expected that an eventual Canada/EC Agreement will include provisions expanding on the current mutual notification and consultation requirements that the parties observe under the 1986 OECD Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade as well as the parallel provisions of the Canada/U.S. MOU and the EC/U.S. Agreement. Other matters, such as increased enforcement cooperation and comity issues, are also apparently being addressed.

In December 1992, European Commission Vice-President Sir Leon Brittan, the Commissioner responsible for competition policy at the time, announced that the discussions between Canada and the European Commission were at an advanced stage and that the draft text under consideration had adopted many of the principles contained in the EC/U.S. Agreement as well as a number of improvements.

It appears that the conclusion of these negotiations may have been delayed by the outstanding European Court of Justice proceedings initiated by the French government that challenged the European Commission's competence to conclude the EC/U.S. Agreement. In this respect, France has alleged that many of the matters covered by that Agreement are beyond the jurisdiction of the Commission. The French challenge was promoted in part by the dispute within the Commission and among member states over the Commission's 1991 decision to block the proposed acquisition of de Havilland by the French/Italian ATR joint venture. The European Court of Justice is not expected to issue a decision before the fall of 1993.

Staff

U.S. PRIVATE ANTITRUST LITIGATION AS A SOURCE OF BUSINESS UNCERTAINTY AND RISK FOR JOINT VENTURES: *SEARS* v. *VISA AND MASTERCARD* AS THE LATEST INSTALLMENT

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The bank credit card business in Canada is structured very differently from that in the United States. In part, the difference seems to have been created by the high risks in American private antitrust litigation over joint venture membership rules.

In Canada, the Visa and MasterCard systems are quite separate and always have been: Bank of Montreal and National Bank of Canada are the principal issuers of MasterCards and processors of MasterCard transactions, while most of the other large Canadian banks are Visa issuers and processors. In the United States, however, virtually every major bank offers both Visa and MasterCard cards to its customers and processes both Visa and MasterCard transactions for merchants. The net result is that much less competition exists in the U.S. between the two systems at the "network" level compared to Canada, where inter-brand competition seems an important part of a retail banking scene.

The "Private Attorney General" As An Antitrust Enforcer

Private antitrust litigation has been a major (and risky) part of the American legal system, at least since the *Electrical Equipment* cases in the 1960's. In fact, private plaintiffs bring many more cases than the two federal agencies do in the federal courts. Moreover, private antitrust litigation sometimes represents a high stakes war between major participants in U.S. markets. The pending battle between America's largest retailer and its largest credit card system (discussed below) illustrates the process well.

Because it distrusted the Government's ability and willingness to enforce the new law vigorously, Congress incorporated a unique bounty-hunting scheme in the *Sherman Act* of 1890 to encourage private parties to enforce the legislation themselves. Thus, the successful plaintiff (sometimes pretentiously called a "private attorney general") would get treble damages for any loss proven, as well as reasonable attorneys fees and costs.[1] Interestingly this provision was copied from the English *Statute of Monopolies* of 1624 which provided not only for treble damages but double costs for the successful plaintiff to encourage suits.

This scheme gives a private party powerful incentives to convert common law contracts, tort and unfair competition claims into federal antitrust cases, thereby gaining access to the federal court and the federal bounties.[2]

A private antitrust plaintiff in a damages case (but not an injunction-only case) has a constitutional right to trial by jury and many private plaintiffs will seek to avail themselves of this right. Thus, in a complicated antitrust case, the key factual determinations may be made by a group of 6 or 12 randomly selected individuals with no special experience in the industry or in fact-finding. When a jury is given very general questions to answer (as often happens in antitrust cases), jury verdicts become very hard to predict.

The jury is the finder of fact not only on liability but also on the amount of any damage recovery. The plaintiff bears the burden of proof of its antitrust-caused loss (which may be measured in overcharges, profits on lost sales, or otherwise), but the Supreme Court has allowed juries a lot of flexibility here because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."[3]

Although the losing side in a private action may still appeal after the jury verdict, the factual findings of the jury are accepted as true so long as they exceed a low plausibility threshold, i.e., there is "sufficient evidence for the jury reasonably to have concluded" as it did. Therefore, the post-verdict appeal will tend to turn on legal questions including the judge's instructions to the jury or the judge's failure to grant a motion for summary judgment or for post-verdict judgment as a matter of law.

Joint Venture Banking Networks As Sources Of High-Visibility Antitrust Conflicts

Nowhere is private antitrust litigation more important than in the area of joint ventures. The principles are far from clear and their application becomes ever more confused in the unique factual situations which surround so many joint venture circumstances. These joint venture partners, and would be joint venture participants, use the federal courts to battle over business decisions. These disputes are necessarily cast in "antitrust" terms: Does the joint venture partners constitute a "cartel"? Does some joint venture rule at least constitute an "unreasonable restraint of trade"? Or, is the joint venture rule in some sense "necessary" to a "new product" which otherwise would not have been created?

The whole process of joint venture conflicts is illustrated by the bank credit card industry, which has seen a number of high stakes private antitrust cases. The most current are two closely-followed private antitrust cases now going on between America's largest retailer, Sears Roebuck & Co. (Sears) on one hand, and the banking industry (in the form of Visa and MasterCard) on the other.[4] Sears wants admission to at least one of these large and familiar banking joint ventures so that it can offer a "Visa" or "MasterCard" service to consumers. Visa and MasterCard members see Sears as the creator of the highly successful "Discover" card and do not want it as a partner.

The Visa and MasterCard organizations started in the 1960s and early 1970s as entirely separate organizations, along the lines that are familiar to Canadians. A major bank either belonged to the Visa system (then called BankAmericard) or the MasterCard system (then called MasterCharge). A large bank would only issue cards and process merchant paper for the system to which it belonged. Interestingly, in a good many cities the Visa issuer was exclusive and tended to compete against a group of several MasterCard issuers.

The system of exclusivity came to an end in the 1970s as a result of actual and threatened antitrust litigation. First, a leading bank in Little Rock, Arkansas brought a "boycott" suit against Visa charging that its exclusivity rule was a *per se* violation of the antitrust laws. The Eighth Circuit Court of Appeals held that the claim should be judged under an "unreasonable restraint of trade" standard rather than a *per se* standard, and sent the case

back for trial[5] (it was settled instead). After that case, Visa, fearing more private cases, filed a so-called Business Review request with the Justice Department in 1974 asking that the Department in effect approve its exclusivity rule after almost a year of the Department declining to say whether it regarded the rule as illegal or not.

At that point, Visa completely abandoned the idea of exclusivity and offered to open its doors to all MasterCard issuers. They flooded in at a pace which surprised not only the banking industry but also the Justice Department: the net result is that almost every major bank and most smaller ones belong to both systems. The two systems have separate managements, separate processing systems and they advertise their offerings vis-a-vis each other as well as vis-a-vis American Express and the Sears "Discover" card. The member banks often treat the cards and transactions as reasonably interchangeable: a typical bank might offer both Visa cards and MasterCard cards on the same terms and almost invariably offers the same pricing for processing Visa transactions and MasterCard transactions.

The Sears Litigation Against Visa and MasterCard

Despite the fact that membership in both credit card associations remains open to "depository institutions" generally, Visa has specifically adopted a rule to bar the banking affiliates of Sears and American Express, while MasterCard has rejected Sears affiliates under its general rule on admitting new members.

In its antitrust complaints against Visa and MasterCard, Sears alleges that the two banking networks are largely controlled by the same members, they collectively account for over 70% of all "general purpose credit card" business, and their exclusion of the Sears affiliates constitutes a *per se* "boycott" or at least an "unreasonable restraint of trade". The networks' defense is that the members of Visa (or MasterCard) should not have to share their joint credit card product with the creators of the most successful alternatives to it (namely the Sears "Discover" card and the various American Express cards).

Sears has secured a jury verdict against Visa on the "unreasonable restraint of trade" theory and the District Court in Utah is seeking a preliminary injunction against MasterCard in the Southern District of New York on both theories. Its claims for treble damages as a result of its exclusion are still to be tried.

Sears' antitrust boycott claims against Visa are much more advanced than its MasterCard claims (which were not filed until March 1993). Its Visa complaint challenges Section 2.06 of the Visa Bylaws which provided that "the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors" At trial this was simply challenged as a "conspiracy" by the Visa members to "boycott" Sears and its affiliates.

The Sears "boycott" claim was tried before a jury in Salt Lake City, Utah over a ten week period last fall. The jury was ultimately asked to decide:

> a. Has Sears proved, by a preponderance of the evidence, that Visa's Bylaw 2.06 has a substantially harmful effect on competition in the relevant market?

> b. Has Sears proved, by a preponderance of the evidence, that the harmful effect substantially outweighs any beneficial effect on competition in the relevant market?

The jury answered "yes" to both questions, and rendered judgment for Sears.

Visa then filed a Motion for Judgment as a Matter of Law arguing that it need not share its "property" with a major competitor. The District Judge recognized the force of VISA's argument that competition between VISA cards and Sears' Discover cards was likely to be reduced if VISA were forced to admit the Sears' affiliates to the network; and that "[c]ompulsory sharing of private property discourages innovation and the creation of new products". Having said that VISA's argument raised legitimate "economic policy issues", the Court ruled against Visa as a matter of law:

> Joint ventures are treated differently from single entities under the antitrust laws based on the very structure of the Sherman Act. 'The Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct.'

The District Judge repeatedly stressed that, "[t]here are no legal principles granting antitrust immunity to a joint venture for its refusal to share its property" and explained:

> Congress determined the concerted action and restraint of trade would be subject to antitrust scrutiny .... it made no exceptions to joint ventures, or for refusals to deal.

The court then added that the Supreme Court's 1945 *Associated Press* decision[6]:

> makes it clear that notions of private property and protection of incentives to create are not entitled to special protection from the antitrust laws. Although such notions are important policy considerations and may be important to the factual Rules of Reason inquiry, they may not be used to avoid antitrust scrutiny.

Conclusion

The Sears cases are the latest (and most famous) of a long series of private antitrust cases involving membership restrictions in banking joint ventures which have sought to bar membership (and access to service marks) to (i) entities that are not traditional banking organizations or (ii) offer services that compete with the joint venture's branded offering. Most of these cases have been settled rather than tried, usually with the joint venture modifying its membership rules (as Visa did in 1976).

It seems clear that the lesser level of "network" competition in the United States vis-a-vis Canada has been significantly created by private antitrust litigation (which does not exist in Canada for abuse of dominance), legal uncertainty and the high cost of defending against "boycott" and similar claims for compulsory access in the United States.[7]

Jury trial in this type of case is obviously risky for the defendant, especially if it is a large organization or a group of large organizations. First, the issue of liability of the antitrust laws may turn on whether a group of laymen think that the defendants' conduct was "unreasonable" in motive or "anticompetitive" in effect; and then the defendants' damage exposure turns on how much the jury estimates that the plaintiff lost by virtue of the defendants' conduct. In a case such as *Sears/Visa*, the damages become a measure of the joint venture's success in the marketplace: the more successful the joint venture is, the more it must pay the plaintiff for having "unreasonably" excluded it. Thus, in the *Sears/Visa*

case, the plaintiff's damage claims (which have not yet been adjudicated) may run in the hundreds of millions of dollars and then, as already noted, the jury's damage finding is automatically trebled under the antitrust law. The net result is that it can be very expensive for the defendants and their counsel to incorrectly predict how a jury may come out on the "unreasonable restraint of trade" question in the context of a joint venture or other complicated business arrangement.

These network joint ventures combine an "interchange" function with a "product creating" function. The network's trademark identifies the network-based service and where it is available (merchant, bank, etc.) even though it is being offered on differing and competitive terms by network participants. Thus, it identifies both "network" competition and "consumer services" competition. The actual marketplace function of a network logo is not substantially different, regardless of whether the "network" function is carried on by a single enterprise (such as Sears) or a joint venture (such as Visa). If the network is very successful, a joint venture logo and associated goodwill may become by far its most valuable asset in accounting terms.

The *Sears/Visa* and *Sears/MasterCard* cases may come down to a legal question of whether such a plaintiff should be able to get a compulsory trademark license and access to a network processing and authorization system by convincing a finder of fact that (i) the defendants' refusal to admit it as a member was an "unreasonable restraint of trade" regardless of whether the joint venture has "market power", or (ii) the defendant association is at least part of a larger "conspiracy" of dual Visa-MasterCard issuers with market power.

Thus stated, the question explains why so many plaintiffs have seen *Sherman Act* §1 litigation (or threat of it) as an attractive way to attain use of a valuable network logo and services, because nobody can predict outcomes with any certainty, and losing is so potentially costly for the defendant. The question also underscores the asymmetry of the *Sherman Act*. If Visa (or MasterCard) were a single, unitary enterprise, such as American Express, it would not face any threat of being compelled to license its valuable service mark to Sears on a "boycott" theory. Whether the practical results need to be so asymmetrical is likely to be the main focus of any appeal to the Tenth Circuit Court of Appeals or the Supreme Court.

Notes

[1] Mandatory trebling of antitrust damages goes back to the *Sherman Act* §7, now expanded and codified in the *Clayton Act* §4. It is a key part of the general scheme affirmatively to encourage private antitrust enforcement. It is amplified by *Clayton Act* rules giving the private plaintiff the right to use a government judgment as *prima facie* evidence of liability (§4B), tolling the statute of limitations during a Government investigation or case (§5), and the right to obtain injunctions against continuing violations (§26). The successful private plaintiff (but not the defendant) has a statutory right to recover reasonable attorneys fees and costs (§5(a)).

[2] Thus, for example, in *Copperweld* v. *Independence Tube*, 467 U.S. 752 (1984), the plaintiff (a group of former employees of the defendant) had already recovered the same damages in an unfair competition claim under state law; and the practical question before the Supreme Court was whether the plaintiff could have these damages trebled based on a claim that they arose out of an "intra-enterprise conspiracy" in violation of the *Sherman Act* §1 (the Supreme Court said "no").

[3] *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 at 566 (1981).

[4] See *SCFC ILC Inc. d/b/a MountainWest Financial* v. *Visa USA, Inc.*, No. 91-C-0047B(d) (Utah filed January 9, 1991) and *MasterCard International, Inc.* v. *Dean Witter, Discover & Co.* (S.D.N.Y. Complaint filed March 11, 1993, Answer and Counterclaim filed March 16, 1993).

[5] *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973). The Justice Department, at the request of the court, had submitted an amicus brief urging rule of reason treatment of the NBI rule.

[6] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

[7] See *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), where the U.S. court declined to apply the *Sherman Act* "boycott" rule to the MasterCard joint venture in Canada on grounds of international jurisdiction and comity.

BLUEPRINT FOR U.S. ANTITRUST ENFORCEMENT

Task Force Offers Suggestions to New U.S. President

By: Sheldon B. Richman
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A task force of 11 antitrust practitioners in March recommended that U.S. President Bill Clinton should commit his new administration "to preserving and enhancing competition as a critical component of national economic policy."

The Task Force on Competition Policy of the Section of Antitrust Law of the American Bar Association advised the new administration on various issues to be considered within the Executive Office of the President and to be implemented by the two federal antitrust enforcement agencies. The views of the task force represented those of the Section of Antitrust Law and do not constitute expressions of American Bar Association policy.

Five recommendations were made by the task force for the Clinton administration's general consideration:

- One major pillar to support the administration's economic policy should be competition policy;
- The Chief of the Antitrust Division of the Justice Department should be a member of the President's National Economic Council;
- The formulation of any new health care policy should be accomplished with assistance from competition law advisors;
- Vigor in the domestic economy and export trade should be ensured with enforcement of federal antitrust law; and
- Competition policy should continue to guide the deregulation of regulated industries.

The task force, which noted that antitrust law is self-enforcing through advice of counsel to corporate executives, emphasized the importance of projecting to the business community the perception that there was an active cop on the beat watching. The task force also pointed to the role played by antitrust law in increasing the availability of low-cost alternative health care delivery systems and urged coordination of competition and trade policies with those of U.S. trading partners.

In directing its attention to the Justice Department's Antitrust Division and the Federal Trade Commission, the task force recommended:

- The U.S. and its trading partners should continue efforts to harmonize their competition policies;
- New realities involving global and technological competition should be factored into development

of new antitrust enforcement policies;

- The federal enforcement agencies should enhance their cooperation with the enforcement units of state attorneys general;

- Each federal enforcement agency should manage its resources effectively;

- The Justice Department's Antitrust Division should have a seat at the National Economic Council table;

- Competition policy should play a significant role in developing proposals to modify health care delivery mechanisms; and

- Both federal enforcement agencies should maintain their competition advocacy programs.

Finally, the task force outlined its concepts for an enforcement agenda appropriate for the 1990s.

The Justice Department should withdraw its 1985 Vertical Restraints Guidelines because that document does not reflect current case law; but, in the event the Clinton administration finds some needs for guidelines in this area, the Justice Department should collaborate with the state attorneys general to develop a set of guidelines containing consistent enforcement policies. The task force also suggested that the Justice Department and Federal Trade Commission monitor all their guidelines to assure useful and accurate guidance to the business community.

After it endorsed continuation of the Justice Department's traditional vigorous criminal enforcement program, the task force urged both agencies to expand their civil enforcement programs: (1) use of section 2 of the *Sherman Act*, such as in local monopolies or recently deregulated industries; (2) development of cases under section 1 of the *Sherman Act* challenging the consequences of vertical restraints that might inhibit the competitive functioning of a product market; (3) expansion of section 5 of the *Federal Trade Commission Act* "to reach new and complex fact patterns and to test uncertain and untested legal theories"; and (4) improvement of the FTC's recent expanded consumer protection mission.

The task force submitted its final report to the Clinton administration on March 3, 1993. However, the President waited until April 29, his 100th day in office, to nominate Anne K. Bingaman, who currently practices antitrust law in Washington, D.C., to be his Chief of the Justice Department's Antitrust Division.

AUSTRALIAN NEWSLETTER

By: R. Baxt, Arthur Robinson & Hedderwicks, Melbourne, Australia and
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The Hilmer Committee (under the Chairmanship of Professor Fred Hilmer of the Australian Graduate School of Management) will be delivering a report in August 1993 to the federal government on how Australian competition law should be "recast" to meet the challenges of the 1990s and beyond. The terms of reference of the Hilmer Committee, appointed by Prime Minister Keating in October 1992, includes the following terms:

(a) Whether the scope of the *Trade Practices Act 1974* (the Act) should be expanded to deal effectively with anti-competitive conduct of persons or enterprises in areas of business currently outside the scope of the Act; and

(b) alternative means for addressing market behaviour and structure currently outside the scope of the Act.

In considering these questions the Committee was asked to take into account the following principles:

(a) no participant in the market should be able to engage in anti-competitive conduct against the public interest;

(b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;

(c) conduct with a potentially anti-competitive impact, but said to be in the public interest, should be assessed by an appropriate transparent assessment process, with provision for review, in order to demonstrate the nature and incidence of the public costs and benefits claimed; and

(d) any changes to the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:

(i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and

(ii) in recognition of the increasingly national operation of markets, to reduce complexity and eliminate administrative duplication.

A number of other questions are to be addressed by the Hilmer Committee. These include whether the authorization and exemption provisions under the Act should be changed, and whether there will need to be a transition period for some of the currently regulated sectors of the economy to be given time to adjust to an environment when the Act may apply to them as well.

The Hilmer Committee has already published a discussion paper (in February 1993). In this it has given clear signals that it is likely to come down with a set of strong recommendations calling for the broad application of the Act to large sectors of the Australian economy currently exempt from operation of the legislation. The implementation of these changes will require considerable cooperation from State Governments. The Commonwealth Government has limited powers to legislate in this area (although the courts are tending to read the powers of the Commonwealth more and more widely). There is also the sensitive question of whether the Commonwealth should get into a "bun fight" with the States if the States try to exclude the operation of the Act in a way that they are now permitted to do under to s. 1(1) of the existing legislation. The need for the Act to "reach out" to the professions has been well and truly documented, by the Trade Practices Commission and others. The activities of professionals who do not operate through the corporate form or do not engage in interstate trading or commerce appear to be outside the reach of the Act. To date, some State Governments have shown their willingness to cooperate. They seem to be leaving the door open for the Commonwealth to come

forward with a proposal that will enable greater, if not universal, application of the Act in the very near future.

Signalling the Federal Government's very real concern with developing a broader competition policy, the Keating government, which was re-elected in March 1993, has shifted the policy responsibility for competition law from the Attorney-General's Department, which has been the traditional home for this legislation (apart from a period in the late 1970s when it rested with a department known as Business and Consumer Affairs) to Treasury. Much of the Trade Practices Commission's new work is now taken up in areas which are the responsibility of Treasury or other departments such as Transport and Communications. The banking, insurance, and general financial sectors have become more and more part of the day-to-day work of the Trade Practices Commission. Furthermore, the Prices Surveillance Authority has been the responsibility of Treasury and there are strong moves afoot to either merge the Trade Practices Commission and the Prices Surveillance Authority, or alternatively, to create a new super competition body which may carry much of the workload of both. This will be one of the matters the Hilmer Committee will discuss in its final report and has already been the subject of submissions by the Trade Practices Commission, the Prices Surveillance Authority and many sections of the community.

As deregulation occurs in a number of service industries previously exempted from the operation of the Act, a difficult question involves how to "regulate" pricing by natural monopolies once they are "freed" from State government controls, and fall under the general operation of competition law instead. Should Australia follow the British model of creating specific regulators to deal with these area? There are already a number of industry specific regulators in place such as AUSTEL which regulates Telecommunications, and the Australian Broadcasting Authority, which is primarily responsible for the broadcasting area. Whether the Prices Surveillance Authority or the Trade Practices Commission should be given primary responsibility over these new areas is one of the more fascinating problems the Hilmer Committee will have to grapple with. It may opt instead for industry specific regulators. Another problem is the question of access to essential facilities, an issue that has hardly been touched by the Australian courts, but one which is clearly becoming a matter of relevance in the context of deregulation.

The Hilmer Committee has also to determine whether the current rules on authorization will apply to these new "areas". Readers will be aware that the authorization process involves an evaluation of whether public benefits outweigh detriments flowing from the particular transaction practice, or agreement, etc., and, if so, whether "exemption" from the operation of the Act should be granted to the transaction, practice or agreement, etc. Some argue that the Trade Practices Commission does not have the expertise to deal with many of the new areas soon to be deregulated, while others believe that this can be overcome by appointing specialists to the Trade Practices Commission to deal with these questions. Many are concerned with the fact that the authorization process takes too long, especially as appeals may be brought to the Trade Practices Tribunal which tends to be slow in handling these matters; others say this can be overcome by streamlining the rules. The response of the Hilmer Committee to these questions will be eagerly awaited.

CANADIAN COMPETITION RECORD

There has been a considerable amount of interest in the community with the initiative taken by the Prime Minister in this area. It is consistent with initiatives by the previous Prime Minister Robert Hawke, and confirms a general support in various sections of the community that the *Trade Practices Act* should have, wherever possible, universal application.

Since the Hilmer Committee enquiry has been announced, the Government has also announced a review of Part X of the Act. This provides considerable "protection" to Overseas Shipping Conferences from the operation of most provisions of the Act. It is clear that the Government is anxious to broaden the role of competition policy - a move in line with its initiatives in other areas.