

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

AUSTRALIAN NEWSLETTER

The Hilmer Report and its Potential Implementation

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Earlier this year, we reported briefly on the establishment of the Hilmer Committee - The Independent Enquiry into National Competition Policy and its terms of reference.¹ The Hilmer Committee has now delivered its report dated August 23, 1993 (the Report) and the following is a discussion of a few of the major issues discussed in it.

The implementation of the Report will be considered initially at a meeting of Ministers from Commonwealth, State and Territory governments to be held in December 1993. There has been general endorsement of the Report by the Federal Government as well as the Business Council of Australia; but it is as yet unknown how enthusiastic the States and Territories will be in their responses.

The Report is a *tour de force*. In 10 months, the Hilmer Committee has done a remarkable job in

canvassing most of the important issues concerning competition policy and has prepared a general blueprint for the Commonwealth, State and Territory governments to endorse if they are serious about competition policy in Australia.

In this short article it is not possible to canvass all of the important recommendations made by the Hilmer Committee. Some are very easy to follow and the Commonwealth could move to implement them straight away, while others are far more difficult and the Commonwealth will need close co-operation with the States if it wishes to see the spirit of the recommendations reflected in the practice that will follow.

A Competition Ethic

The primary assumption made by the Hilmer Committee is that there will be a genuine move by the Commonwealth (already the move has started), the States and Territories to endorse competition policy as a background against which all commerce in Australia in which they have power to legislate is conducted. This means an abandonment by governments of legislation and practices which contain restrictions on the way in which the *Trade Practices Act* should apply to the activities of businesses - whether they are conducted by corporations, departments, individuals, etc. - which might otherwise be subject to the *Trade Practices*

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Act. In particular, State and Territory government instrumentalities and government-run instrumentalities (such as the utilities, the railways, the ports, etc.) should be opened up to competition. The Hilmer Committee also calls for the privatization (although it is recognized that this will be a process that will require considerable massaging) of government-owned enterprises in various areas.

In order to assist the implementation of its recommendations, the Hilmer Committee has included in the Report a rather unusual and quite innovative proposal. In this respect, the Report recommends that a new body, to be known as the National Competition Council, should be established with representatives appointed by the Commonwealth, States and Territories, to be responsible for "overseeing" competition policy in Australia. Of course, the Commonwealth Minister (likely to continue to be the Assistant Treasurer) will have the primary legislative responsibility insofar as changes to legislation that might be needed, and he or she will have to consult with State and Territory counterparts in appropriate circumstances. The Competition Council would be responsible for assisting with the transformation of government-controlled enterprises and activities into a new regime where these will be subject to the general competition laws.

No Fundamental Changes to the *Trade Practices Act*

To ensure that such a transformation can take place as smoothly and with as little suspicion as possible, the Hilmer Committee has recommended that the *Trade Practices Act* remain much as it is. In fact, it was confirmed that if there were wholesale changes made to the legislation there would be little chance

for co-operation from the States and Territories. However much the States and Territories may have chosen to rely on exemptions already possible under the *Trade Practices Act* to escape that legislation's impact on activities, at least the legislation is well known since it has been in operation for almost 20 years and there is a body of caselaw and administrative decisions that are fairly well understood.

A few interesting changes to the *Trade Practices Act* were recommended, although they are not of major importance. The first relates to the banning of all price fixing agreements which apply to goods or services without the benefit of authorization. At the present time, price fixing in relation to services may be authorized under the *Trade Practices Act*.

The Hilmer Committee recommendations are consistent in their treatment of services. While resale price maintenance rules will apply to services, the price discrimination provision in s. 49 of the *Trade Practices Act* is to be removed from the legislation. Price discrimination of an anti-competitive nature will be subject to the operation of s. 46 of the *Trade Practices Act* if the Hilmer Committee has its way. Such a suggestion is not only sound but reflective of what is really happening in the marketplace. When s. 49 was introduced into the legislation in 1974 it had the opposite effect to that intended. In fact, it resulted in increases in prices as players in the market subject to the possible operation of the legislation, and fearing its impact (with small fines at the time, what must be their feeling today with a \$10 m maximum fine!), simply abandoned differentiation in many of their operations. While this has changed over a period of time, s. 49 of the *Trade Practices Act* has been of little use to either the Commission or private litigants and, in the

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author's experience, where price discrimination is argued, one is almost certainly facing a situation where s. 46 might apply.

In addition to extending resale price maintenance to services, the Hilmer Committee has recommended that authorization be made available for this practice. This is consistent with developments overseas and will no doubt please a number of Australia's major companies and many other businesses which manufacture in technical areas such as computers, electronic goods and so on. It will be interesting to see the Government's reaction to this recommendation.

Third line forcing will become subject to a competition test. At the moment it is prohibited *per se* but is capable of authorization. Authorizations will remain an option under the changes suggested in the Report.

Exemptions

There are other recommended changes to the legislation, many of which are of a technical nature, but the most important of the remainder deal with the question of exemptions.

The assumption of the Hilmer Committee is that there should be no exemptions from the *Trade Practices Act* available to State and Territory government instrumentalities. In this respect, there are certain basic principles which have been set out in Chapter 9 of the Report which must be the basis of government action, whether Federal, State or Territory. The four basic principles are very interesting:

(I) There should be no regulatory restrictions on competition unless it is clearly

demonstrated to be in the public interest. Governments which choose to restrict consumers' ability to choose among rival suppliers and alternative terms and conditions should demonstrate why this is necessary in the public interest.

(II) Proposals for new regulations that have the potential to restrict competition should include evidence that the competitive effects of the regulations have been considered, that the benefits of the proposed restrictions outweigh the likely costs, and that the restrictions are no more restrictive than necessary in the public interest. Where a significant restriction on competition is identified, the relevant regulation should be subject to a sunset period deeming it to lapse within a period of no more than five years unless re-enacted after further scrutiny in accordance with Principle III.

(III) All existing regulations that impose a significant restriction on competition should be subject to regular review to determine conformity with Principle I. The review should be performed by an independent body, involve a public inquiry process and include a public assessment of the costs and benefits of the restrictions. If retained after initial review, the regulations should be subject to the same requirements imposed on new regulations under Principle II.

(IV) To the extent practicable and relevant, reviews of regulations undertaken pursuant to Principles II and III should take an economy-wide perspective of the impact of restrictions on competition.

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Consistent with these sets of proposals, the Hilmer Committee has recommended that all exemptions from the Trade Practices Act be removed over a period of time. The shield of the Crown should go; s. 51(1) of the legislation should be repealed; statutory marketing authorities will lose their protection; and the professions will become subject to the Act. The removal of exemptions could have significant repercussions for some infrastructure developments that have been working on the basis that they will have a period of exemption from the operation of the legislation.

Essential Facilities

The recommendations then deal with the question of essential facilities. This is a difficult and controversial area with which courts in Australia have tried to deal, some would suggest unsuccessfully. The *Queensland Wire* case² is one example of the courts dealing with the question of essential facilities. New Zealand courts have also dealt with this problem with greater success, especially some recent cases involving disputes between New Zealand Telecom and Clear Ltd., one of the former's competitors.

The Hilmer Committee felt that the courts were generally the wrong forum in which these disputes should be determined. This is a very important issue facing the development of competition policy as Australia deregulates some of the government utilities and other operations which operate via a natural monopoly or a position close to a natural monopoly.

Under the recommendations of the Report, the Competition Council would have the task of determining whether an essential facility problem

existed and on what terms and conditions the facility would be made available to a user where the owner of the essential facility did not agree to the proposals. Some issues such as price would be subject to arbitration by the new Australian Competition Commission (see below for further details) if agreement could not be reached.

Access to essential facilities would only be created if the owner agreed or, in the event that the owner did not agree, if there was an inquiry and report by the National Competition Council. Before such an inquiry, the Commonwealth Minister would have to be satisfied of the following conditions:

- (a) that access to the facility in question was essential to permit effective competition in a downstream or upstream activity;
- (b) that such a declaration was in the public interest, having regard to:
 - (i) the significance of the industry to the national economy;
 - (ii) the expected impact of effective competition in that industry on national competitors; and
 - (iii) the fact that the legitimate interests of the owner of the facility were to be protected by the imposition of an access fee and under terms and conditions that are fair and reasonable.

A number of matters were to be taken into account as governing the access regime under the proposals put forward by Hilmer. The access declaration would indicate the following:

- (a) the facility or facilities subject to the declaration;

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- (b) the use or class of users benefiting from the relevant access right;
- (c) pricing principles which would govern access to the facility;
- (d) any other terms and conditions to protect the legitimate interests of the owner of the relevant facility;
- (e) any additional safeguards required to protect the competitive process;
- (f) whether arbitration was required to be conducted by the Australian Competition Commission (see below) or whether it may be conducted by others acting under the auspices of that Commission; and
- (g) what, if any, specific penalty should be available for non-compliance with an access right.

The assumption was that if the parties could not agree on price or other terms and conditions that had not been declared, these should be determined by arbitration either by or under the auspices of the Australian Competition Commission. Once an agreement had been reached, it would be placed on a public register to be maintained by the Commission. All declarations would be subject to periodic and open review at appropriate intervals. Renewal would be essential if the agreement was to be maintained. Parties to the relevant access declaration would also be provided with a formal mechanism to petition for revocation or modification of the declarations where there was a material change in market circumstances.

Once a facility was declared under the access regime described, the access rights would constitute an exhaustive statement of the rights of the parties and would take precedence over existing legislation and would prevent any action being brought in the courts in relation to the essential facility.

The Hilmer Committee recognized that there are already areas in which access and related questions were subject to regulation. So, for example, Austel already has an important role to play in relation to access with respect to the telecommunications industry and the Western Australian Government has already set up a regime to deal with the gas pipeline in that State.

Pricing

Linked to the essential facilities doctrine and the way in which it was to be implemented under the legislation, the Hilmer Committee also set down an important regime to deal with monopoly pricing. Again, the National Competition Council would play a major role in that particular context. The Report recommends that the Prices Surveillance Authority and the Trade Practices Commission be replaced by the new Australian Competition Commission, although the role of the new Commission in the area of pricing would be "reduced" when compared to the current regime under the prices surveillance legislation.

It is not possible in this article to go into the ramifications of the control of pricing in Australia. Suffice it to say that the recommendations of the Hilmer Committee are quite sweeping in this regard. However, it is only monopoly pricing or pricing by firms which have a *substantial degree of market power in a substantial market* which will be of concern to the new National Competition Council.

It was the Hilmer Committee's view that monopoly pricing should be addressed primarily through appropriate regulatory and structural reform to

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enhance competition with prices oversight being treated as a second-best option. Prices oversight would only deal with those situations where pro-competitive reforms were not adequate or practical; for example, where there is a natural monopoly situation. Under the policy, oversight of a firm or a natural monopoly will only occur if there is a declaration by the Commonwealth Minister that he or she is satisfied that a declaration is in the public interest and that the firm has either agreed to the declaration or has the necessary power in the relevant market and application of prices oversight has been recommended by the Competition Council after a public inquiry.

Pricing oversight will be limited to monitoring which requires firms to provide certain cost and price data to the Australian Competition Commission at prescribed intervals. Surveillance will be the second string of the oversight policy, requiring firms to provide specified cost and price data to the Australian Competition Commission and seek its recommendation as to whether prices are consistent with principles set out in the relevant declaration. All existing declarations under the Prices Surveillance Authority legislation will lapse within two years of implementation and any declarations under the new regime will have to be renewed every three years.

Importantly, in recommending this approach to oversight, the Hilmer Committee has stressed that the principles of pricing to be applied involved "the efficiency rationale of prices oversight and taking into account the need for a firm to receive a reasonable rate of return on its assets". Clearly, these principles are very different from those which the Prices Surveillance Authority must have regard to under the current legislation.

In addition to the National Competition Council and the Competition Commission being responsible for dealing with questions of oversight, the Hilmer Committee very wisely has recommended that governments work closely together to address national pricing issues. State bodies such as the New South Wales Government Pricing Tribunal would be used to deal with pricing issues arising in that State, and similar bodies in other States should also be used. The principles they should operate under would be developed as consistent principles.

Conclusions

As stated, the Report is a tour de force. Its early implementation will be debated at the Council of Ministers meeting to be held in December. One hopes that there will be a general commitment by all governments to the principles underlying the Report even if there have to be some changes to its details.

Notes

¹ See R. Baxt and H.R. Spier, "Australian Newsletter" (1993) 14:2 Can. Comp. Rec. 21.

² *Queensland Wire Industries Pty Ltd v. Broken Hill Pt Co Ltd* (1989), 167 CLR 177. See also *Pont Data Australia Pty Ltd v. ASX Operations Pty Ltd* (1990), 26 FCR 460; *Dowling v. Dalgety Australia Ltd.* (1992), 34 FCR 109; [1992] ATPR 41.

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INTERNATIONAL COMPETITION LAW

The following articles are reprinted with permission from the November 1993 issue of *Update*, a newsletter published by the Antitrust and Trade Law Committee of the International Bar Association's Business Law Section.

DENMARK

Mergers and Acquisitions in 1992

Again for 1992, as in previous years, the Danish Competition Council has made an investigation of mergers and acquisitions in Denmark. There were 275 mergers and acquisitions in 1992, which is 25% lower than in 1991. The decrease is more than double the average decrease within the EEC. The mergers and acquisitions concerned businesses with a total turnover of DKK 18 billion and a total of 19,770 employees. The investigation, which has been published by the Competition Council, also shows that the average turnover per business is decreasing, as well as the number of employees per business. Although the majority of mergers and acquisitions were within the industrial sector, an increasing number of mergers and acquisitions concerned services, mainly accounting and law firms. Business within trade was the third largest group. Within the industrial sector, the majority of mergers and acquisitions were in the iron and metallic industries, while food stuff was second.

EUROPEAN COMMUNITIES

Postal Monopoly

Most member states of the EC grant exclusive rights to one company in respect of rendering postal services. Mr. Corbeau, a Belgian tradesman, collected mail and delivered it to destinations within Liege. When accused of breaking the national law, he argued it ran counter to Article 90 of the EC Treaty. The Court of Justice ruled that member states may limit competition in this field as long as it is in the general economic interest. That means that the exclusivity is to be confined to the traditional postal services. According to the Court, free competition should exist with respect to additional services like home collection and rapid service.

Import Japanese Cars into France

Asia Motor France and four other parallel importers of Japanese cars have filed a complaint with the Commission, claiming that they were the victims of an unlawful cartel between five Japanese importers involving a self-imposed limitation on Japanese imports and the apportionment of that quota among themselves. Following the reply by the French authorities that the latter five importers had no margin of discretion and that the quota formed part of French public policy, the Commission decided to terminate the investigation. Taking into account the detailed evidence provided showing the voluntary nature of the agreement, the Court of First Instance decided this constituted a manifest mistake. Consequently, it annulled the decision. The Commission will have to take up its investigation

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Ice Cream

Finally, the Commission decision was published in respect of the exclusive purchasing obligation contained in the distribution agreements between two producers of ice cream, Langnese and Schöller, and a number of German retailers. The Commission, which acted upon a complaint filed by Mars, held that said obligation appreciably limited competition. Both Langnese and Schöller have instituted proceedings against the decision before the Court of First Instance. In the interim proceedings, the Court has allowed the parties to rely on the exclusive purchasing obligation against each other until final judgment is delivered.

FRANCE

In its May 4, 1993 decision, the Cour de Cassation held that the French legislation on anti-competitive agreements does not apply where an agreement has "only a limited effect on the relevant market and cannot have an appreciable effect on competition". Through such a decision, the Cour de Cassation reintroduced into French law the EEC law theory of the "appreciable effect" which had been left aside for several years in French competition law.

In its decision No. 93-D-21 of June 8, 1993 ("Société Grands Magasins B"), the Conseil de la concurrence ("Conseil") considered that the fact for a distributor to inform his suppliers, following the acquisition of another distributor and merely owing to his subsequently increased buying power, that he intends to renegotiate the commercial conditions previously agreed with them, could fall within the scope of the prohibition of anti-competitive agreements. Moreover, the Conseil held that in such circumstances, the fact for the distributors to try to

obtain more favourable commercial terms from the suppliers without offering to each of them precisely defined counterparts of services to promote the sales of their products might constitute an abuse prohibited by French competition law (art. 8 of the Ordinance of December 1, 1986) where the distributors hold a dominant position or where the said suppliers are in a situation of economic dependence.

On August 4, 1993 the Minister of Economy, upon the advice of the Conseil, announced his intention to clear a concentration in the weekly news magazine sector. General Occidentale, a subsidiary of Alcatel-Alsthom, will acquire 40% of S.E.D.B.O., a press company. On this occasion, the Conseil defined two relevant markets: the market of the weekly publication of general and political national information and the market of the purchase or advertising space in that kind of magazine.

GERMANY**Acquisition of Minority Interest in Newspaper Prohibited**

In a January 19, 1993 judgment (KVR 32/91), the Federal Court of Justice upheld a Federal Cartel Office decision prohibiting the sale of a 24.8% interest in a small newspaper company (Iserlohner Kreisanzeiger) from the WAZ group to a newly established holding company owned by the wife and grandsons of WAZ shareholders. Even though the shares were only passed from one company of a group to another company, which the Court considered part of the same group, the acquisition was treated as a concentration. The Court held that an intra-group sale could only escape scrutiny if it did not lead to a substantial strengthening of the connection already

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existing between the enterprises. The concentration prohibited had, however, reinforced such a connection, because at the time of the sale a 76% majority requirement applying to strategic decisions had been introduced in Iserlohner Kreisanzeiger's articles of association, and WAZ and Iserlohner Kreisanzeiger had signed a cooperation agreement.

No Dependence on Bottle Case Manufacturer

In another judgment of January 19, 1993 (KVR 1/92), the Federal Court of Justice overturned a decision of the Dusseldorf Court of Appeal awarding damages to the customer of a bottle case manufacturer who stopped selling to this customer after a business relationship of ten months. Even though it took several months for another manufacturer to produce the necessary tools and to commence delivery of this type of bottle case, the Federal Court held that the customer had not been dependent on the first manufacturer. The customer could easily have protected itself from any risk by entering into a long term supply agreement with a notice period long enough to find alternative sources of supply in case the manufacturer chose to terminate the agreement.

IRELAND

Competition Authority Releases a Draft Category Licence for Exclusive Distribution Agreements

In July of this year, the Irish Competition Authority released a draft category licence for exclusive distribution agreements.

A category licence, under the recently-adopted Competition Act, 1991, which came into force on

October 1, 1991, is analogous to a block exemption under EC competition law. Thus, exclusive distribution agreements which have an anti-competitive objective or effect "in the State or in any part of the State" and which satisfy the conditions of the proposed category licence for exclusive distribution agreements, if and when finally adopted, will benefit automatically from a licence. Accordingly, they will not require to be notified to the Competition Authority and obtain an individual licence in order to avoid the consequences of being found to be prohibited and void by an Irish court.

The draft category licence for exclusive distribution agreements has been modelled on the EC Commission's block exemption for exclusive distribution agreements. Indeed, much of the text of the block exemption appears in the draft category licence.

There are, however, a number of significant differences. In particular, the draft category licence provides that the notice period for termination of an exclusive distribution agreement must not exceed one year; it also provides that exclusive distribution agreements will not benefit from the proposed category licence if the exclusive distributor has exclusive agreements in respect of a "substantial range of competing products". These provisions are not contained in the block exemption; neither do they form part of the EC Commission's practice.

Furthermore, interestingly, the draft category licence contains a clause whereby all exclusive distribution agreements which have already been notified to the Competition Authority for the purpose of obtaining an individual licence, but which do not meet the conditions set out in the draft, are thereby refused an individual licence.

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It is not yet clear when the draft category licence is likely to be adopted by the Competition Authority.

ITALY

Italian Antitrust Legislation: Update of the Italian Competition Authority

1. Decisions under Sections 2 and 4 of Law 10 October 1990 No. 287

During 1993 the Authority examined many cases of agreements, restrictive practices and abuse of dominant position under arts. 2 and 3 of the Law. Particularly, we can mention the following agreements for which a preliminary investigation is still pending.

a) Agip Petroli - IP Italiana Petroli, concerning the petrol distribution's reorganization;

b) Aeroporti di Roma - Gruppo Sicurezza, concerning additional security services in Roma Fiumicino and Roma-Ciampino airports;

c) INA - Banca di Roma, concerning assignment of insurance services;

d) Aeroporti di Roma, as to handling services. In this case, the Authority examined the abuse of Aeroporti di Roma's dominant position and recently imposed a fine;

e) SIP (Italian telecommunications company). After a circumstantial report on the dominant position of SIP, the Authority held that the behaviour assumed by this company in relation to commercial business of radiomobile monitors violates art. 3, lett. b) of the Law No. 287/90;

f) Federazione Italiana Spedizionieri, relating to reference tariff relevant to the international carriage of goods by road.

2. Concentration Operations

During 1993 the Authority examined approximately 200 concentration operations, however resolving upon the starting of the investigation, according to art. 16 para. h, of Law No. 287/90, only for two of them:

a) Alitalia - Malev. In this case, the Authority held that the concentration operation does not prevent competition;

b) Emilcarta/Agrifood Machinery, concerning the commercialization of raw materials in order to produce paper and cardboard packages. For the latter operation the investigation is already over and the Authority has prohibited it, according to art. 18, para. 1 of Law No. 287/90.

JAPAN

Control of Merger Between Two Paper Companies

According to art. 15(2) of the Japanese Anti-Monopoly Law, the Japanese Fair Trade Commission ("JFTC") is reviewing the proposed merger between Ohji Paper Co., Ltd. and Kanzaki Paper Co., Ltd. The JFTC is likely to take the view that the above merger may cause substantial restraint of trade in the field of three items of coating paper. Based on the JFTC's view, in July, 1993, Ohji Paper decided to sell its facilities and sales rights to the three items of coating paper to Chuetsu Pulp Co., Ltd. and to reduce its shareholding in Nippon Kami Pulp Shoji Co., Ltd. and Daieishi Tsusho Co., Ltd.

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27 Japanese Companies Paid Settlement Money to the U.S.A.

The U.S. Ministry of Justice announced on July 30, 1993 that 27 Japanese companies (including building and electric construction companies) paid 113 million yen to the United States for their illegal collusive bidding (DANGO) on the construction of building and electric facilities at the U.S. military base at Sasebo, Nagasaki.

In the past, the U.S. government raised two cases, involving the Yokota and Yokosuka Military Bases, as instances of illegal collusion bidding and has received a total of US\$72 million in settlement.

Subsidizing Loss Violates fair Trade Practice

On September 16, 1993 the Tokyo District Court handed down a decision that Nomura Securities Co., Ltd. violated the Anti-Monopoly Law for enticing customers unfairly by paying 362 million yen to a customer as a subsidy for a loss on a security transaction, even though no damage was suffered. The Court also ruled that there was no breach of fiduciary duties by Nomura's directors, whose conduct was within the scope of the "business judgment" rule.

PORTUGAL

Article 13 of Decree Law 422/83 prohibits agreements between companies which restrict competition. Process 7/88, the so-called Belgados case, illustrates the Competition Council's stance in inferring horizontal concerted agreements under Article 13. Belgados was a wholesaler of meat supplying the Lisbon district. There were other defendants as well. The Council found that the defendants had amongst

them 15%-20% of the wholesale meat market in Lisbon.

The Council further found that between October 20 and November 3, 1986 the defendants had similar increases in their wholesale prices due to increases in the growers' prices. The Council asked: "...It matters to determine if the verified parallel behaviour presupposes or not an agreement between companies". In other words, the Council had to decide if the coincidental increases in prices, without other evidence, would support a finding of concerted behaviour. The Council concluded it did, finding that the similarity in price increases and the similarity in timing had to be more than coincidental.

On March 12, 1993, the National Assembly of Portugal delegated powers to the Portuguese government to legislate on matters concerning competition law. It is expected momentarily that new legislation will be approved by the Council of Ministers and published as law. Consequently, future issues of our antitrust update will probably review this legislation.

SPAIN**Two Concentrations Authorized by the Council of Ministers**

The Competition Service of the Ministry of Economy and Finance submitted to the Council of Ministers proposals for two resolutions authorizing different concentrations in accordance with Royal Decree 1080/92, dated September 11.

The first case concerned a voluntary notification filed by Procter & Gamble, the Finaf Group and Arbora Holding Sociedad Anònima, in connection with the

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creation of a joint venture company (Ausonia-Higiene, S.L.) in the field of sanitary products; namely, disposable diapers and female products marketed under the brand "Tampax". The joint venture company would be created by "Laboratorios Ausonia S.A. (an affiliate of the Finaf Group), and Arbora Holding S.A. (this latter, jointly owned by Procter & Gamble and Agrolimen). The Service submitted the allegations to the Competition Court, who determined that the concentration could have an unfavourable impact in the relevant market, which was deemed to be that of the health protection products. But in spite of the anti-competitive circumstances involved, the Council of Ministers decided that the concentration could be authorized provided the groups involved would agree to comply with two major conditions:

- a) Transfer to a third party - by any one of the two companies involved in the concentration - of that part of their business related to disposable diapers. The transfer would have to encompass not only assets, but also the assignment of the relevant trademarks for a period of three years; and
- b) The local Arbora S.A. would have to eliminate from its current distribution agreement with "Tambrands" (owner of the trademark Tampax) the existent exclusivity, thus allowing Tambrands, if it would so elect, to appoint additional distributors in competition with Arbora. In any event, upon the expiration of the existing contract, neither Arbora, nor its shareholders, affiliates or participating companies would be entitled to act as exclusive distributors of the "Tampax" products.

The second case concerned the impact on the Spanish market of the merger taking place in Germany between Fried Drupp AG and Hoesch AG. The

voluntary notification was filed by the Spanish subsidiary of Hoesch, "Hoesch, Industria Espanola de Suspensiones, S.A. (INDUSA). The service considered that the merger could have a negative impact on the relevant Spanish market, which was deemed to be that of specific products related to motor vehicles suspension (stabilizing bars and spiral springs). The Competition Court issued advice in the sense that the geographical market was much broader than the Spanish territory and noting the existence of different favourable factors. Further to such advice, the Council of Ministers decided not to oppose the proposed merger of the Spanish affiliates of the applicant companies.

TAIWAN

Soon after its first anniversary, Taiwan's Fair Trade Commission began work on a bill to amend the Fair Trade Law, Taiwan's competition legislation. In August, 1993 Taiwan's FTC publicized the first draft of the FTL amendment bill.

One of the most important amendments involves repealing the requirement, currently only found elsewhere in Korea, of listing monopolies and oligopolies. There is already a consensus on the requirement's futility. However, the bill would also give the FTC exclusive power to determine in the future whether a firm is a monopoly. As a potential usurpation of judicial power, this proposal could be controversial.

The bill would also liberalize the control of horizontal arrangements. Currently, an FTC approval is required for all such actions. The bill would exempt industry-wide arrangements such as self-regulatory measures from this requirement.

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Another amendment would seek to qualify the use of criminal sanctions. According to this proposal, the FTC would have to assess administrative fines first, before a criminal action could be initiated.

The legislative process for the FTL amendment bill may take several years. The bill may undergo several drafts before its enactment.

UNITED KINGDOM

UK merger control continues to be applied somewhat less dogmatically than in the recent past to a much-reduced level of M&A activity. The UK government led a large majority of Member States who resisted any further inroad into domestic merger controls through any reduction of the turnover thresholds in the EC Merger Regulation. Sir Bryan Carsberg, appointed last year to succeed Sir Gordon Borrie as Director General of Fair Trading, continues to make full use of the monopoly powers in the Fair Trading Act 1973 to investigate sectors of UK industry where competition does not appear to be working effectively; publication is imminent of MMC reports on perfumes and newspaper distribution.

Contrary to the expectations expressed by Commissioner Van Miert, and voiced at the recent IBA conference in New Orleans, the UK does not yet look set to reform its antitrust laws by introducing domestic versions of Articles 85 and 86 of the EEC Treaty. During the summer a deregulation study conducted by the Department of Trade and Industry concluded that there was very little scope for reducing the burden on business of UK antitrust laws, particularly given the substantive, procedural and institutional complexity of UK antitrust law.

In August the Secretary of State for Trade and Industry published the conclusions of the MMC's investigation into British Gas. The MMC recommended the break-up of British Gas, concluding that as long as British Gas owned and operated the central transmission and storage system, it would always have a competitive advantage over other gas suppliers. Unusually, the MMC's reports were published without comment by the Secretary of State, and it remains to be seen whether he will accept the recommendations of the MMC. The recently-retired Director General of Gas Supply, Sir James McKinnon, has recently expressed publicly his doubts about the need for a break-up provided that genuine competition to supply gas emerges in the UK and provided the ambit of British Gas' supply monopoly is further curtailed, as the government currently intends. Nonetheless, the MMC's conclusions are evidence of the failure of the original policy pursued at the time of the privatization of British Gas to rely on the general monopoly powers in the Fair Trading Act 1973 as a means of controlling the activities of the newly-privatized utility with a monopoly in the UK.

UNITED STATES

New Assistant Attorney General

Perhaps the most significant antitrust event in the U.S. since the last issue of the Newsletter was the appointment and confirmation of Anne K. Bingaman as Assistant Attorney General for Antitrust in the Clinton Administration. Ms. Bingaman, a seasoned plaintiffs' attorney with considerable experience in international cases, has already begun to reverse the Republican antitrust policies of the last 12 years

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by "rescinding" the Vertical Restraints Guidelines published by the Reagan Administration in 1985. The Reagan/Bush policy was to approve, on economic grounds, many of the vertical and distribution restraints that the courts had previously found anticompetitive. Ms. Bingaman has also publicly criticized the 1986 Supreme Court decision upholding a summary judgment in favour of the Japanese defendants in a predatory pricing case, and she has reaffirmed her willingness (even eagerness) to bring a case against foreign cartels that impede U.S. exports. There is little doubt that the Antitrust Division under Ms. Bingaman will be much more active than has been the case in the last 12 years.

Predatory Pricing

The aggressiveness at the Antitrust Division, however, will nevertheless have to contend with a Supreme Court, largely chosen by Presidents Reagan and Bush, which has again demonstrated its hostility to claims of predatory pricing. In *Brooke Group v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993), ("B&W") such a plaintiff again saw its case go up in smoke at the High Court. Brooke (formerly Liggett) has sued B&W for allegedly selling its generic cigarettes below cost in an effort to force Liggett to raise its own generic prices and thus to reduce the inroads the cheap generics were making into the sales of very profitable branded cigarettes. The Court decided the case should never have been given to the jury because there was insufficient evidence that B&W had any real chance of recouping the losses caused by the below cost sales, a finding that was necessary, in the majority's view, to support a claim of predatory pricing in violation of the Sherman Act. Three of the Justices dissented.

Extraterritorial Application and Comity

In *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891 (1993),¹ the Supreme Court decided that principles of international comity do not preclude U.S. courts from exercising jurisdiction over, and applying the Sherman Act to, the conduct of British re-insurers who (allegedly) conspired with U.S. insurers to restrict the coverage of commercial insurance available in the U.S. A narrow majority of five Justices said there was no reason for the U.S. courts to abstain from exercising their jurisdiction because compliance with U.S. law did not violate English law. The dissent, joined by four Justices, viewed the issue not as a matter of judicial comity but of legislative jurisdiction and would have dismissed the claims on the ground that, in light of the principles of international law, Congress cannot be said to have exercised prescriptive jurisdiction over the conduct in question. The fundamental difference in philosophy in a narrowly divided Supreme Court will surely provide the focus for much future debate in light of the promised activity of the Bingaman Antitrust Division in the international area.

¹ See Donald I. Baker, "Insurance, Internationalism and Irony: A Closely-Divided U.S. Supreme Court speaks ambiguously on some key questions" (1993) 14:3 Can. Comp. Rec. 13.