FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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Competition policy continues as a high priority matter at the Federal level and, to some extent, at the State level.

National Competition Policy

In previous issues of the *Record* we provided details about the "Hilmer" Committee report on the National Competition Policy.[1] It is an important report and seeks to put a national framework on competition policy involving both the States (provinces) and the Federal Government.

The Federal Government is now wrestling with the implementation of the report which was on the agenda before the Council of Australian Governments meeting on 24 February. However, the prospects do not look all that rosy as, due to other reasons, there is considerable division between the States and the Federal Government. Canadians, having lived through Meech Lake 1 and Meech Lake 2 will not find that surprising. The division stems from Federal/State relations issues, financial considerations and the vexed issue of native land title. It may be that the Council of the Australian Governments meeting will totally go off the rails. That being the case, the Australian Federal Government may have to go it alone on the Hilmer Report to the extent that it can take legislative steps to alter the Act as suggested by Hilmer, extend universal application to the extent that is possible without full state co-operation, merge the Trade Practices Commission and the Prices Surveillance Authority to form the new Australian Competition Commission and, finally, to involve that agency more in access pricing issues. We will keep you posted in future issues of the *Record*.

Access Pricing

Access Pricing has become a very important issue in the Australian context in areas such as gas and electricity and it is being left to the general competition regulator to address, even though it may be buttressed by specific legislation. In the gas area, the *Interstate Gas Pipeline Bill* was tabled in Parliament but has now been withdrawn due to drafting difficulties. That Bill gave the Trade Practices Commission the role of arbitrating any access disputes and associated powers. Similar roles are envisaged for the Trade Practices Commission in other areas. There is a strong aversion here to special regulators, although there is one for telecommunications (AUSTEL), which in

theory will cease to exist in 1997 when the general regulator takes over. A recent report on the shipping conference provisions of the *Trade Practices Act* recommended a special regulator to handle shipping matters. While this suggestion is still being considered by the Government, the Government has not favoured special regulators for quite some time.

Gas

The other very important gas issue is the sale of the interstate gas pipeline that is currently owned by the Federal Government. In this respect, the Australian Gaslight Company ("AGL"), which is one of the main reticulators and in effect is the reticulator that takes gas out of the end of the pipeline being sold, has been granted first right of refusal. The Government has agreed to sell 51% of the shares in the pipeline to AGL and are selling the other 49% shareholding, particularly looking at foreign interests. However, the 51% is subject to a number of prior approvals, including that of the Australian Trade Practices Commission. The Commission is now going through the exercise of determining whether or not it can approve the deal. It has already said that there is a breach of the merger provisions, but feels that undertakings may be able to be put into place and be enforced under the *Trade Practices Act* to overcome competition issues.

The Legal Profession

The Commission's review of the anticompetitive practices of the legal profession should be released in final form by the time the *Record* has gone to press. In the meantime, an important development is that the New South Wales State parliament (where there is a minority government) has passed legislation applicable to lawyers in New South Wales, although it can only be promulgated once the Federal Government passes enabling legislation to allow the federal agencies to exercise state jurisdiction. This has not yet been done, although the state move has acted as a further catalyst to bring lawyers under the Trade Practices Act, which to date, has been difficult because of such issues as constitutionality and the 'regulated conduct' defence.

Litigation

A brief status report on some litigation:

- **Santos:** A long-running battle between Santos and the Trade Practices Commission to stop the proposed purchase of a major competitor in the natural gas industry has ended with the purchase of the target by a third party. Proceedings were discontinued, with each party bringing their own costs. Both the Federal Court and the Commission have conducted a review of the case and lessons to be learnt for the future. The concern about the case related to costs and delays.

- **Gillette/Wilkinson Sword:** This case continues with Gillette taking a number of the procedural and constitutional issues. A substantive hearing is not expected until later this year.

- **Express freight - price fixing case:** This case, involving Mayne Nickless, TNT and a number of individuals, continues with TNT taking many interlocutory points. The hearing is expected later this year.

At the moment, the Trade Practices Commission is dealing with some 26 pieces of litigation covering both competition and marketing practice areas, plus a number of challenges to its powers. There are

also a number of appeals to the Trade Practices Tribunal from the Commission's adjudication decisions. The Commission's litigation workload is extremely high, and this is reflected by an increased legal bill this year amounting to some AU$4 million this fiscal year.

Privatizations

With an increasing move to privatization due to an improved economy and the election in some States of conservative governments, the Trade Practices Commission can expect itself to become more and more involved in privatizations. As indicated earlier, the Commission is heavily involved in the interstate gas pipeline, the 25% sale of Qantas to British Airways and other issues.

Pay TV

Under the *Broadcasting Services Act* in Australia, the competition authority has to approve all Pay TV applications on competition grounds. This process is now underway with a number of companies that have been approved eventually not being able to find the necessary money, leaving the next bidder to go through the process. We now have a situation where the three satellite licences (A, B and C) have been allocated, but there are already extensive competition issues arising as to whether the three can collaborate in a number of aspects. In the meantime, other applications for Pay TV licences using cable and microwave are also being processed.

Enforceable Undertakings

As previously reported, the law has been changed to allow enforceable undertakings rather than substantive proceedings for breach. The enabling provision addressing enforceable undertakings came into force on January 21, 1993 and, since that period, has been extensively utilized. In fact, the Trade Practices Commission has already issued some policy guidelines in relation to the use of such undertakings and when they will or will not be accepted. During the period some 20 formal undertakings were entered into, including some in relation to mergers, all of which are on the public register held by the Trade Practices Commission. While it is still too early to judge whether this new power has been a success, it has apparently been accepted by industry as a way to avoid significant problems.

Notes

[1] See for example (1993) 14:2 Can. Comp. Rec. 21 and (1993) 14:4 Can. Comp. Rec. 19.

BOOK REVIEW — *INTERNATIONAL ANTITRUST LAW AND POLICY* (PROCEEDINGS OF THE 1992 FORDHAM CORPORATE LAW INSTITUTE, BARRY HAWK, ED., TRANSNATIONAL JURIS PUBLICATIONS INC., 1993)[1]

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The proceedings of the 1992 Fordham Institute have recently been published in an impressive volume under the title *International Antitrust Law and Policy*. Barry Hawk established this annual conference on antitrust law at the Fordham University School of Law in 1974. Both the conference itself and the published volume of

proceedings are eagerly awaited events on the annual antitrust calendar. Having grown in size and scope over the past two decades, the conference today is without doubt the pre-eminent forum for discussion of leading edge international antitrust issues.

The international flavour of the event is apparent from a scan of the table of contents. As in the past, there are numerous contributions from the United States and the European Community (including two EC member countries — Germany and the United Kingdom — which have quite distinctive approaches to antitrust regulation), as well as Japan and Canada. Australia and New Zealand were included on the program for the first time in 1992. The chapter by Professor Maureen Brunt (a member of the Australian Trade Practices Tribunal) provides a *tour de force* survey of the past, present and future of competition policy in these jurisdictions. Several chapters deal with the ever-broadening European scene by exploring the introduction of competition regulation into Eastern Europe and the competition aspects of the European Economic Area Agreement involving EFTA and EC countries. Of particular interest is the chapter by Dr. Anna Fornalczyk (President of the Polish Antimonopoly Office) which offers a fascinating glimpse of the role of competition law in the transition from a centrally planned economy to a market economy. Formidable challenges arise from the lack of an established business culture, the need to "create competition" through demonopolization and trade liberalization, and strong political pressures to re-regulate when initial market outcomes are not satisfactory.

Barry Hawk can fairly be described as the "dean" of international antitrust scholarship, and each year he assembles a "faculty" of conference speakers with outstanding credentials. Thus, readers of this volume will find contributions from: renowned antitrust academics (such as Professor Mitsuo Matsushita of the University of Tokyo, who surveys recent and potential future Japanese antitrust developments); leading members of the antitrust bars of many countries (including Donald Holley of Cleary, Gottlieb, Steen & Hamilton, whose "Thirty-Year Retrospective" provides a wonderfully reflective overview of the legislation, cases, institutional changes and other events which have shaped EC competition law and practice); and officials who are, or recently have been, "on the front line" as antitrust enforcers or adjudicators (for example, Commissioner Mary Azcuenaga of the U.S. Federal Trade Commission, and Sir Gordon Borrie, former Director General of the U.K. Office of Fair Trading between 1976-1992, both of whom provide thoughtful perspectives on the work of domestic antitrust agencies in an increasingly dynamic international environment). The volume contains three Canadian contributions including observations from Howard Wetston about recent developments and emerging challenges.

The Fordham conference is organized around themes which vary from year to year. Each topic area is addressed by a series of speakers with distinctive perspectives, followed by a panel discussion and questions from the audience. The published volume follows the same format, including transcriptions of the panel discussions.

One major theme in 1992 was the prospects for convergence or conflict as antitrust becomes increasingly internationalized. The chapters on "Convergence of Procedure and Enforcement" (by former U.S. Associate Attorney General James Rill and Virginia Metallio of Collier, Shannon, Rill & Scott) and on "Positive Comity" (by James Atwood

of Covington & Burling) are valuable additions to a growing body of material generated in the wake of the *Report on International Antitrust* issued by the American Bar Association in 1991.[2]

Merger control in the EC was a theme which continued to receive close attention at the 1992 Fordham conference. (It has been a major topic at the Fordham Institutes for the past few years). While much has now been written about the EC's merger review regime, two papers in this volume are required reading for anyone who wishes to stay abreast of this evolving area. The chapter by Colin Overbury (Director of the EC Commission's Merger Task Force from its inception until his retirement last year) is entitled "Politics or Policy? The Demystification of EC Merger Control". Notwithstanding the fairly widespread view that the Merger Task Force has performed well, this paper contains a frank discussion of "problems" and "criticisms" which have arisen. It is followed by a short but incisive chapter by Professor Frédéric Jenny (the Rapporteur General of the Conseil de la Concurrence in France) which explores the treatment of efficiencies under the EC's *Merger Regulation*. This issue is of considerable conceptual interest as well as practical importance in any merger control regime. Jenny arrives at a surprising finding: based on decisions to date, the EC Commission appears to treat efficiencies not as a defence (which economic theory would tend to suggest) but as a basis for attacking mergers (because they may contribute to the preservation or enhancement of a firm's dominant position). While the *Competition Act* contains an explicit efficiencies defence,[3] it is possible that any dominance preserving or enhancing effects could also be considered in the evaluation of a substantial lessening of competition under the "any other factor that is relevant" heading.[4] Whether the Competition Bureau and/or the Competition Tribunal will be receptive to such an approach remains to be seen.

Like the published proceedings of prior Fordham Institutes, this volume provides more than country updates, a snapshot of the current state of international antitrust and an indication of the latest trends. Most of the chapters are not speeches but well-developed full-length papers with extensive footnoting of research sources. (Footnotes have even been added to the panel discussion chapters during the editing process, although the coverage is uneven). This makes the book a valuable reference tool for any antitrust library. While regrettably there is no index, most chapters contain extensive headings and there is a detailed table of contents which facilitates identification of the topics covered.

One possible improvement for future volumes would be the inclusion of commentaries from the editor and/or panel moderators to synthesize each year's collection of materials. For example, many of the 1992 speakers touched on the issues of extraterritoriality and international convergence of competition laws, but the extent of consensus/debate is not readily apparent to a reader without searching through various chapters. This type of integrative material would further embellish an already outstanding publication which must in any event be considered as required reading for all practitioners, government officials and academics who follow international antitrust law.

Notes

[1] This review has been adapted slightly from a review originally published in the *International Business Lawyer*, Vol. 22, No. 1 (January 1994) and is reproduced here with permission.

[2] American Bar Association Section of Antitrust Law, *Report of the Special Committee on International Antitrust* (1991).
[3] *Competition Act*, R.S.C. 1985, c. C-34, as amended, s. 96.
[4] *Ibid.*, s. 93(h).

INTERNATIONAL COMPETITION LAW

The following articles are taken from Update, *a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).*

DENMARK

More on Lawyers

The Competition Council ("Council") has approached the Ministry of Justice in order to change existing rules on privileges for lawyers. First, it is the opinion of the Council that private debt collection agencies should be entitled to conduct court proceedings in connection with debt collection. This would mean that lawyers should be able to co-operate with other professionals, such as debt collection agencies and auditing firms, which is not possible at the moment.

Finally, the Council wants the rules on mandatory membership of the Danish Bar Association for lawyers abolished.

New Competition Act?

The Danish Minister for Industry has appointed a legislation commission for the purpose of drafting a new Danish *Competition Act* in line with the EU competition rules. It has finally been realized by the Danish government that the Danish *Competition Act* based on control without possibilities of fines or other remedies is not very efficient. As all the other Scandinavian countries have adopted the same principles as the EU competition rules, the government believes that Denmark should have competition legislation equivalent to the other European countries. It will also consider whether merger control should be introduced in Denmark.

EUROPEAN COMMUNITIES

Member States and Competition Law

In three recent cases, the Court of Justice has elucidated the circumstances in which a Member State is in violation of arts. 3 and 5 of the EC Treaty by maintaining in force legislation which obliges or encourages companies to act contrary to the competition rules. The Court held that such a violation does not exist, unless there is a clear link between the legislation and the behaviour of the companies involved. National legislation which allows price agreements to be made is not forbidden, provided that such an agreement is the outcome of discussions of a committee consisting of independent experts acting in the public interest and that the state retains the power to set aside the decision of the committee.

FRANCE

The Conseil de la concurrence ("Conseil") issued its annual report for 1992 last November.

For the first time the report includes comments on the decisions of the Court of Appeal of Paris and the Supreme Court in competition cases.

As regards the application of EEC law, it is recalled that, since Ordinance no. 86-1243 of December 1, 1986 on freedom of prices and competition has been modified by the Act of December 11, 1992, cases may

be referred to the Conseil on the sole basis of arts. 85 and 86 of the EEC Treaty. Previously, EEC law could only be invoked together with French rules of competition.

Further, the report for 1992 contains significant developments with respect to the definition of the relevant market and the concept of anticompetitive abuse of dominant position.

In a decision of October 20, 1993, the Court of Appeal of Paris quashed decision no. 92-D-56 by which the Conseil had imposed heavy fines on major oil companies for anticompetitive practices in the sector of distribution of unleaded 98. The Court considered that the distribution systems of the companies did not contain any vertical restrictions and that no horizontal agreement existed between oil companies.

By arrêté of December 16, 1993, upon the advice of the Conseil, the Minister of the Economy authorized a merger in the field of the manufacturing and distribution of plastic packaging for liquids. CONTINENTAL PET UK Ltd., a subsidiary of CONTINENTAL CAN EUROPE, will acquire 100% of the shares in IMPETUS PACKAGING Ltd., which belongs to the CARNAUD/METAL BOX group. The Conseil considered that the operation will have very limited effects on competition because of the important negotiating power of the customers, such as Coca Cola.

GERMANY

Merger Control Statistics

In Germany, merger control has existed since 1973. In the 20 years since then, the Federal Cartel Office ("Cartel Office") has reviewed 16,780 concentrations (mergers). Only 102 (0.6%) were prohibited. However, in many cases, transactions were changed or abandoned after the Cartel Office voiced concerns. In 15 cases, companies asked the Minister of the Economy to authorize a concentration that the Cartel Office had prohibited. Only six such authorizations were granted.

Acquisition of GM's Allison Transmission Division Prohibited

On April 15, 1993, the Cartel Office prohibited the acquisition of GM's Allison Transmission Division by Zahnradfabrik Friedrichshafen AG. The merger would have led to combined market shares of 80% and more than 90% in the (fairly narrowly defined) markets of automatic transmissions for commercial vehicles of more than six tonnes and of automatic transmissions for construction vehicles. Even though Allison had no subsidiary and no production in Germany, it had significant sales. The Cartel Office prohibited the transaction as a whole and did not limit this prohibition to Germany on the ground that Allison's production capacity in the US would significantly reinforce the very dominant position the acquirer already had in Germany.

A Prohibition that is only Based on National Law Cannot be Justified Ex Post Facto with EC Rules

In a decision of May 18, 1993, the German Federal Court upheld the annulment of a Cartel Office decision prohibiting certain practices in the travel agency market. The Cartel Office had based its decision on section 18 of the German law against restraints of competition. The courts found that this provision was incorrectly applied. One of the parties argued before the court that the Cartel Office's decision could nonetheless be upheld, because the prohibited practices violated arts. 85 and 86 of the EC Treaty. This argument was rejected because

the Cartel Office had not considered whether there was an effect on trade between EC member states.

IRELAND

Aer Lingus Decision

On December 21, 1993 the European Commission decided to allow the Irish government to inject IR£175 million equity into the troubled national carrier, Aer Lingus. The key question was what conditions the Commission would attach to the approval of this state aid.

The conditions are tough and unusual. They are designed to strike a balance between allowing Aer Lingus the opportunity to recover its financial equilibrium and ensuring it does not achieve this by simply transferring its problems to its competitors.

The three key conditions are:

- Aer Lingus capacity on Dublin-London Heathrow route must not exceed levels over those of the last 12 months;

- no expansion of the current Aer Lingus fleet;

- the proposed low-cost Aer Lingus Express must be a separate entity.

This was an important case in that it further developed Commission guidelines not just for Aer Lingus, but for the several other airline state aid proposals pending in Brussels.

Irish Supreme Court Appeal of the 'Angel Dust' Case

On April 1, 1993 the Irish High Court, in a case involving the use of 'angel dust' in cattle growth contrary to EU Directives, declared unconstitutional a section of the *Irish European Communities Act, 1972*, which had been used for 20 years to implement EU Directives into Irish law. The result of the High Court decision was that in excess of 500 Ministerial Regulations, thought to have implemented EU Directives in Ireland, were nullified.

In addition to appealing the decision to the Irish Supreme Court, the Irish government introduced special legislation in July, 1993 retrospectively validating the Ministerial Regulations which were in question.

The matter was finally closed on November 18, 1993 when the Irish Supreme Court found that the power to make regulations contained in the 1972 Act was immune from constitutional challenge.

JAPAN

Penalty Assessed to Four Companies for Illegal Collusive Bidding

On December 14, 1993 Mr. Kazuyoshi Kondo, Chief Judge of the Tokyo High Court, ordered four companies (Dainippon Printing, Toppon Moor, Hitachi Information System and Kobayashi Recording Paper) to pay a penalty of four million yen each for violations of art. 3 (Unfair Restraint of Trade) of the Japanese Anti-Monopoly Law ("AML"). This decision is the third case whereby a company has been found criminally liable for violation of the AML for illegal collusive bidding.

AZABU Building Sued Mitsui Trust for Violation of Anti-Monopoly Law

The Asahi Newspaper (December 18, 1993) indicated that AZABU Building Co., Ltd. has brought charges

before the Fair Trade Commission asserting that the Mitsui Trust Bank has violated art. 19 of the AML.

Since the economy has weakened, many Japanese developers are facing financial difficulties. It was alleged that the Mitsui Trust, the main bank of AZABU, abused its superior position to AZABU's detriment, constituting an unfair trade practice of art. 19 under the AML.

Merger between two Mitsubishi Petrochemical Companies

On December 24, 1993 two Mitsubishi petrochemical companies, Mitsubishi Kasei and Mitsubishi Yuka, announced that they will merge on October 1, 1994 to form a new company called "Mitsubishi Chemical Co., Ltd."

The Japanese petrochemical industry is depressed at present. The petrochemical companies in the Mitsui Group are also planning to merge. The Japanese Fair Trade Commission will attach great importance to this trend and examine the proposed mergers.

NETHERLANDS

At the time of publication, the government will have formally adopted two further Royal Decrees containing generic prohibitions based on the *Economic Competition Act of 1956*, prohibiting all forms of market sharing and restrictive tendering agreements respectively. The new Royal Decrees will have the same structure, similar categories of exceptions to the prohibitions, the same procedure for exemptions, and the same transitory regime as the earlier Royal Decree prohibiting horizontal price fixing, which entered into force on July 1, 1993.

Under the transitory regime of the Royal Decree on horizontal price fixing, some 50 requests for exemptions of existing horizontal price fixing schemes were filed prior to the entry into force of the Decree. The Secretary of State for Economic Affairs stated in the Official Gazette its intention to adopt negative decisions in most cases. The first formal decisions refusing exemptions are expected shortly.

In September 1993, the Secretary of State presented a draft bill to Parliament concerning a partial reform of the existing *Economic Competition Act* ("Act"). The most important changes are the following: extension of the scope *ratione personae* of the Act, so that all free professions will be covered; extension of the scope *ratione materiae* in that concerted practices will henceforth be caught by generic and individual prohibitions adopted pursuant to the Act; disclosure of advices rendered by the Advisory Committee on Economic Competition; extension of the investigatory powers of the Ministry's officials; and increase of maximum fines. The partial reform is meant to anticipate the replacement of the existing Act by a new act, probably to be modelled after the EC competition rules in the future.

NEW ZEALAND

Gas Merger Refused

In a November 1993 decision, the Commerce Commission ("Commission") withheld approval for the Natural Gas Corporation ("NGC") to acquire 100% of the largest gas utility in New Zealand ("Enerco"). This was the first significant takeover proposal to come before the Commission since deregulation of the gas industry early in 1993.

Both NGC and Enerco are listed companies, with NGC already having an 18% shareholding in Enerco

(which strongly opposed the merger). NGC has a "natural" monopoly in gas transmission through its ownership of the pipeline from the main production fields. It also has a significant retailing business, a legacy from the regulated era. Enerco operates as the gas retailer in the major population centres of Auckland and Wellington. The takeover proposal thus involved both vertical and horizontal aggregation.

The key issue was market definition and, specifically, whether gas was a discrete product market or part of a wider energy market. NGC asserted the latter and that the merged NGC/Enerco would not be dominant in that market. Economists were engaged by both protagonists. In the upshot, the Commission adhered to the view it has expressed in earlier cases (on gas pricing) and in discussion papers, and opted for a discrete gas market. It ruled that the merger would strengthen NGC's existing dominance in gas wholesaling by removing Enerco as a potential competitor in the deregulated environment. The Commission further ruled that each gas retailer remained dominant in its supply area (despite the removal of statutory franchises) and that the merger would strengthen the dominance of NGC and Enerco as retailers.

As required by the merger provisions in the *Commerce Act 1986*, the Commission then assessed the public benefit which NGC asserted would result from the merger. The Commission found the bulk of these to be speculative or hypothetical (eg. removal of a "double-monopoly" in gas supply) and not to outweigh the economic detriment flowing from the foreclosure of a major, albeit prospective, source of the competitive initiative which deregulation was designed to produce. NGC is to appeal the decision to the High Court.

PORTUGAL

On January 1, 1994 Portugal's new, comprehensive antitrust law, Decree Law 371/93 ("DL 371") went into effect. These comments, of a comparative law nature, situate Portugal's new antitrust law into the philosophy of the legislation of the common market. These observations were the subject of a discourse by the Portuguese Secretary of State of Distribution & Competition and are only a summary.

1. It is the intention that the law apply to all economic activities except credit institutions, financial institutions and insurance companies inasmuch as the Bank of Portugal and the Institute of Insurance in Portugal are sufficient regulatory bodies for the aforesaid categories.

2. The norms laid down by DL 371 are to be interpreted in accordance with the Common Market principles and concepts. Portugal's first antitrust law was enacted in 1983. Thereafter in 1989 the Council of the Common Market enacted legislation concerning mergers on a community scale.

Adopting much of the philosophy of Regulation EEC 4064, DL 371 also establishes a threshold requirement for the application of its merger control:

- obtention or reinforcement of a 30% quota in the national market; or

a volume of business superior to 30,000,000,000$00 (approximately US $18,000,000 at rate of exchange in December 1993).

3. Introduction for the first time into Portuguese law of a law on "Abuse of Economic Dependency". Its declared object is to prevent large companies, but not necessarily those occupying a dominant

position, from exploiting to their advantage and to the disadvantage of their clients, their large resources; eg., the so-called hypermarkets.

4. The powers of the Competition Commission have been substantially reinforced, having the same powers as the "... organs of the criminal police."

SPAIN

Price Fixing by the "Union of Bread Boutiques" of Asturias

By Resolution of September 13, 1993 the Court on Defense of Competition ("Court") has declared that forbidden practices by art. 1.1 a) and b) of Law 16/1989 were carried out by the "Union of Bread Boutiques" of Asturias, and by its Secretary, consisting of the following:

- concerted actions taken by the bread boutiques of Asturias in order to fix prices forbidden by art. 1.1 a) of the Law;

- agreement by the bread boutiques not to manufacture bread on Sundays (except milk buns) (forbidden by art. 1.1 b) of the Law).

The Union of Bread Boutiques alleged that the publication of prices in the Asturian press had been made by "a private person"; in fact, the Secretary to the Union ("Secretary"). According to the Court, it is difficult to conceive that the Secretary to the Union would contract and pay for an announcement in the press publishing the prices without a previous agreement in this regard.

The Secretary produced a document showing the procedure followed to enforce the agreement to fix prices. In effect, the Secretary indicated that he personally acted by means of "telephonic conversations" with the members in order to fix prices in the absence of the President and legal counsel to the Union.

Finally, the agreement not to manufacture bread on Sundays, other than milk buns, is specifically included in the incorporation Act of the Union: "... it is agreed by a majority vote that (i) no bread shall be produced on the two days of strike... and (ii) only milk buns will be manufactured on Sundays". This casts no doubt on the existence of an illegal agreement.

TAIWAN

The goal of any competition law is to prevent artificial means to corner the market. Accordingly, art. 7 of Taiwan's Fair Trade Law defines concerted actions. Art. 14 further requires such actions among competitors to be approved by the Fair Trade Commission ("FTC") under a "rule of reason" approach. Otherwise, such actions will be illegal; there are both administrative fines and criminal sanctions, including imprisonment of up to three years for individuals.

Under this European approach of cartel control, the FTC's attention has been largely focused on how cartels can be legalized and regulated. However, recently the FTC and criminal investigators of Taiwan's Ministry of Justice are investigating a bid rigging case which may turn out to be the largest and most important case.

Thus far, all that is publicly known is that more than 60 companies in Taiwan are alleged to have engaged in rigging bids on cable and wire contracts awarded by Taipower, a state-owned Company and Taiwan's power supplier.

UNITED KINGDOM

The UK Monopolies and Mergers Commission ("MMC") has come under criticism from the financial press and the Department of Trade Ministers over recent complex monopoly investigations into the supply of perfumes and newspaper publishing and wholesaling in the UK.

In *Perfumes*, despite finding industry-wide practices which restricted competition in dealer selection and the recommending of resale prices, the MMC made no adverse public interest findings. Without identifying clear countervailing benefits, the MMC cleared the distribution and pricing policies of the perfume manufacturers referring to the degree of non-price competition, fluctuating profits, and the industry's low concentration ratio. In *Newspapers*, the MMC cleared ostensibly restrictive practices by newspaper publishers on the basis that overall they helped achieve efficient supply. Not satisfied by this, the UK Department of Trade and Industry proposed prohibiting refusal to supply on the grounds that an area is already adequately served and initiated a consultation procedure to allow the industry to put forward voluntary solutions.

The system of permitted resale price maintenance, known as the Net Book Agreement, is being re-examined by the Office of Fair Trading to see whether the Restrictive Practices Court should be asked to review its 1962 judgment that collective resale price maintenance for books was, exceptionally, not against the public interest. Recently the European Commission and the Court of First Instance have both held the Net Book Agreement void under art. 85 insofar as it affects trade between Member States of the European Union. Recent developments in the UK book industry also suggest that a further review is timely. A decade after its influential report in 1982 which led to the establishment of the post of Hearing Officer, the House of Lords has again reviewed EC antitrust procedures. One of its key recommendations is to give greater independence and resources to the Hearing Officer who would have a new power to adjudicate on procedural issues, such as access to documents, arising during cartel proceedings, with a right of appeal to the Court of First Instance. The report makes a number of welcome recommendations, but the current political climate in the European Union does not suggest that reforms will be achieved easily or quickly.

UNITED STATES

Justice Department Focuses on Innovation; International

In November 1993, the Antitrust Division of the Department of Justice filed suit to block the proposed sale of General Motors' transmission division to the German-owned ZF Friedrichshafen AG. The two companies are the only competitors in the U.S. market for certain heavy truck transmissions and account for nearly 80% of the U.S. market for transit bus transmissions, according to the complaint. General Motors abandoned the sale after the suit was filed.

Assistant Attorney General Anne Bingaman has, on several occasions, pointed out that the dominant market share which would result from this combination was not the only thing that attracted the Justice Department lawsuit. It was noted that the reduced technology innovation that would result from the elimination of competition between the two firms was of "particular concern."

In addition to high technology innovation, the Bingaman Antitrust Division has made it clear that emphasis will be placed on the international antitrust area. A new position has recently been created—Deputy Assistant Attorney General for Policy and Legislation, focusing on international antitrust—and the first person to hold that post is a recognized expert on international competition law, Diane P. Wood of the University of Chicago Law School.

Antitrust Case Against Colleges is Dropped

The Justice Department dropped its case against the Massachusetts Institute of Technology ("MIT") after the Third Circuit Court of Appeals overturned a trial court ruling against MIT. The other defendants had settled earlier. The government had claimed that the practice of certain colleges and universities to exchange information about scholarships and the financial circumstances of applicants and to adopt a consistent policy toward such issues was tantamount to a price-fixing scheme. The Court of Appeals held that a full rule-of-reason analysis was required and that the *per se* rule applicable to price-fixing arrangements was not appropriate. MIT agreed, as part of the settlement agreement, not to discuss individual grants to individual students. Some observers feel that the outcome of this case makes it easier for antitrust defendants to argue that their conduct had "social welfare justifications" and therefore was not unlawful.