

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

APPOINTING AN ANTITRUST THINKER TO THE U.S. SUPREME COURT

By: Donald I. Baker
Jones, Day, Reavis & Pogue
Washington, D.C.

The Supreme Court is the crucial law-maker in the American scheme of antitrust law. Congress legislated only in very broad and general terms when it prohibited agreements in restraint of trade, attempts to monopolize and monopolization, and corporate acquisitions "whose effect may be to substantially lessen competition" in any relevant market. Congress has thus left to the Supreme Court the task of giving these broad terms practical content and boundaries. In a sense, the process began with the 1911 *Standard Oil* case in which the Supreme Court determined that a *Sherman Act* prohibition on "every contract, combination . . . or conspiracy or restraint of trade" meant only every unreasonable restraint of trade.¹ Later, the Court has had to determine boundaries for what is "unreasonable" or likely to "substantially lessen competition." The antitrust field is further complicated by a mixture of populist and efficient-centered premises which tend to produce uneven results in cases.

Because the Supreme Court is so critical to antitrust evolution, the nomination to the Court of a leading antitrust thinker is an important event. Chief Judge

Stephen Breyer of the First Circuit Court of Appeals clearly qualifies: he taught antitrust and regulated industries courses at Harvard Law School for a decade after serving an important post in the Antitrust Division of the Justice Department in the mid-1960s. He also worked hard in the mid-1970s on the competitively-sensitive and politically-difficult task of deregulating the airlines.

As a judge since 1981, Stephen Breyer has brought a sense of order, clarity and practicality to his decisions in the antitrust field. Attention to efficiency implications and a willingness to plow new ground, if necessary, have been hallmarks of his antitrust opinions.

He is not a populist. In an important antitrust case involving the electric power industry, he stressed that

a practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' only if it harms the competitive process It harms that process when it obstructs the achievement of competition's basic goals — lower prices, better products and more efficient production methods.²

His practical thinking is well illustrated in an important 1984 case which dealt with a fundamental conflict over health care

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reimbursement.³ A group of Massachusetts' doctors (ironically led by a doctor named Kartel) challenged the Blue Shield rule that required participating physicians to accept the Blue Shield reimbursement as the entire payment for a patient service under their plan — and not to engage in a practice of “balance billing” of additional charges directly to the patient. The lower court had accepted the doctors' claim of an illegal “price-fixing” agreement by which Blue Shield was imposing price ceilings on the doctor-patient relationship. Judge Breyer wrote a unanimous opinion reversing the lower court. He asserted firmly and clearly that the right way to analyze the arrangement was to treat Blue Shield as the purchaser of the transaction and that, as such, it was entitled to announce and enforce the terms in which it would deal with participating doctors. “The relevant antitrust facts are that Blue Shield pays the bill and seeks to set the amount of the charge.” The plaintiffs strongly argued that Blue Shield had “market power”, a point Judge Breyer did not dispute, but he noted that market power was being used for the benefit of consumer, which is a general antitrust goal. He concluded on a note of obvious relevance today:

The rising cost of medical care, the possibility that patients cannot readily evaluate (as competitive buyers) competing offers of medical service, the desirability of lowering insurance costs and premiums, the availability of regulation to prevent abuse — all convince us that we ought not create new potentially far reaching law on the subject.⁴

Most of Judge Breyer's antitrust opinions were unanimous reversals of District Court decisions, and most have tended to strike down populist results brought about by trial judges or juries. In one particularly illuminating example, he rejected a plaintiff's claim of predation based on a competitor's sales above incremental cost:

There is general agreement that the antitrust courts' major tasks is to set rules and precedents that can segregate the economically-harmful price-cutting goals from the ordinary price-cutting sheep in a manner precise enough to avoid discouraging desirable price-cutting activity. . . . Some courts have written as if one might look to a firm's “intent to harm” to separate “good” from “bad.” But “intent to harm” without more offers to vague a standard in a world where executives may think no further than “Let's get more business”, and long-term effects on consumers depend in large measure on competitors' responses.⁵

For these reasons, “we conclude that the *Sherman Act* does not make unlawful prices that exceed both incremental and average costs,” regardless of the defendant's motives.⁶

Moreover, in his academic writing, then-Professor Breyer reflected concern about what he called “the problem of the honest monopolist” and the temptation to equate injury to a competitor with injury to competition that has caused the Supreme Court to interfere unnecessarily from time to time in the business of an enterprise that owes its position to imagination, skill or hard work.

The objects of the antitrust law — low prices and improved products — would be better achieved by insisting that ‘exclusionary conduct’ means conduct that not only (1) tends to exclude competitors [from the relevant market], but also (2) is more restrictive than necessary to achieve the very object sought by the antitrust laws themselves.⁷

On the other hand, Judge Breyer has not always been in the defendant's corner, and is not likely to be in the Supreme Court. This is well illustrated by a decision he wrote less than three months ago involving a recurring kind of antitrust dispute, namely a suit by a discontinued automobile dealer against its manufacturer. In this case⁸, the plaintiff, BMW's dealer in Puerto Rico, had two

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antitrust claims: the first, a price discrimination claim under the *Robinson-Patman Act*, was that BMW-Germany had charged him higher prices than BMW-North America had charged allegedly "competing" dealers in the mainland U.S.; and the second, under §1 of the *Sherman Act* was that BMW had injured him by imposing a maximum price ceiling on what he could resell its cars for. Judge Breyer, reversing a long and detailed District Court opinion, sustained jurisdiction on both counts. The *Robinson-Patman* claim turned on the question of whether BMW-Germany and its wholly owned North American subsidiary were a single "person" for the purposes of the *Robinson-Patman Act*: Judge Breyer, in a novel decision, held that the Supreme Court's *Sherman Act* ruling in *Copperweld Corp. v. Independence Tube*,⁹ (i.e., that a parent and wholly owned subsidiary are to be treated as a single entity and hence incapable of conspiring under §1 of the *Sherman Act*) should be applied to the *Robinson-Patman Act*, rather than having the Court embark on a detailed inquiry as to whether the particular parent (BMW-Germany) actually controlled its U.S. subsidiary. In so doing, Judge Breyer has simplified the judicial task in *Robinson-Patman* cases — but also turned a rule favoring defendants into different role where it favors plaintiffs.

On the *Sherman Act* count in the *BMW* case, Judge Breyer noted the economic shakiness of the maximum *per se* price-fixing rule, because sometimes it "protects consumers from the exercise of a retailer's monopoly power" — but nevertheless reversed the dismissal because "at this stage of the proceeding, we must view the plaintiff's complaint in a favorable, not unfavorable, light." Given this procedural posture, "we therefore read the complaint as implying that the agreement . . . inhibited Caribe from selling to these potential BMW customers who would have

preferred higher quality services, even if it meant somewhat higher Caribe prices." Such an argument (Judge Breyer noted wryly) seemed inconsistent with Caribe's *Robinson-Patman* claim that it had lost sales because it had been undercut by other dealers who allegedly had received lower prices from BMW.

It is the nature of multi-member bodies that their decisions tend to be driven by their least-committed members — those are the "swing" voters who let particular facts associated with any particular case, rather than theory or predilection, drive their decisions. The U.S. Supreme Court is no exception. In the antitrust area, the "swing" Justices have tended to be Chief Justice William Rehnquist and two recent appointees — Justice Anthony Kennedy (appointed in 1987 by President Reagan) and Justice David Souter (appointed by President Bush in 1990). Justice Ruth Bader Ginsberg (appointed by President Clinton in 1991) seems to be likely to fall into the same category based on her decisions during a decade on the Court of Appeals in Washington. The interesting question is whether Judge Breyer, if confirmed, will bring more structure to the Court's antitrust jurisprudence by persuading this group to a less *ad hoc* vision (or explanation) of antitrust issues than we have seen in the recent past, with its zig-zag course of plaintiff and defendant victories.

What may prove at least as important is that Judge Breyer in his academic writings has been a particularly sophisticated thinker about the problems of applying competition policy to complex network-industries that are being increasingly deregulated. Even as a judge, he has written law review articles on the antitrust and economic policy problems of airline reservation systems, long-distance telephone networks, and airlines under deregulation.¹⁰ The application of what is now a century-old statute

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dealing with unreasonable restraints of trade and monopolization to the emerging and changing world of electronics and fiber optics is especially daunting; and if Stephen Breyer can lead the way to economically rational and predictable results, he will have done much to make U.S. and North American markets viable in the years ahead.

The last time that a President nominated a distinguished U.S. antitrust thinker to the Supreme Court it was Robert Bork — whose 1987 nomination failed narrowly in the Senate on issues that were far removed from economics or the controversies surrounding Senator Sherman's statute. The same fate seems unlikely to befall Stephen Breyer, a centrist supported by leading senators of both parties.

Notes:

¹ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

² *Town of Concord v. The Boston Edison Company*, 915 F.2d 17 (1st Cir. 1990).

³ *James P. Kartel, M.D. v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984).

⁴ 849 F.2d at 928.

⁵ See *Barry Wright Corporation v. ITT Grinnell Corporation*, 724 F.2d 227, 232 (1st Cir. 1983).

⁶ *Ibid.*

⁷ "The Problem of the Honest Monopolist", *Antitrust L.J.* 194 (1976).

⁸ *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, et al.*, ATRR (BNA) 366 (March 25, 1994).

⁹ 467 U.S. 752 (1984).

¹⁰ See "Antitrust Deregulation and the Newly Liberated Marketplace", 75 *Calif. L. Rev.* 1005 (1987); "Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust" (1988); "Regulation and its Reform" (1982).

AUSTRALIAN NEWSLETTER

By: R. Baxt, Arthur Robinson & Hedderwicks
Melbourne, Australia and
H.R. Spier, Trade Practices Commission
Belconnen, Australia

The Impact of Section 52 of the Australian Trade Practices Act: Can you Misrepresent in Trade and Commerce by Being Silent?

Section 52 of the Australian *Trade Practices Act* provides, *inter alia*, that a corporation shall not, in trade and commerce, engage in "conduct that is misleading and deceptive or is likely to mislead or deceive". This section which is contained in Part V of the Act (which is headed "Consumer Protection") has been one of the most effective weapons used by businesses against each other. Indeed, a leading commentator on our legislation has described it as "a plaintiff's exocet".¹

In this respect, it is important to note that it is not only positive conduct that may be potentially misleading and deceptive. The failure to disclose information has been recognized by the courts as potentially damaging to businesses and the possible basis of actions under section 52 of the Act.²

In a more recent decision of the Full Federal Court, *Demagogue Pty Ltd. v. Ramensky*³, the Court held that the failure to disclose certain information amounted to misleading and deceptive conduct. In that case, the Court was dealing with a consumer type situation rather than the kind of situations we wish to discuss in this article. The *Ramensky* case concerned the failure to disclose particulars of a vehicular access in respect of land where some units were being built which Mr. and Mrs. Ramensky wished to buy.

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Now, in *General Newspapers Pty Ltd. v. Telstra Corporation*⁴, the Full Federal Court has laid down what may turn out to be important parameters on how far silence may be relied on successfully in commercial dealings. In denying the applicant's claim against Telstra under section 52 (it was alleged Telstra had failed to reveal certain information about the way in which it wished to conduct a tendering process), Deane and Einfeld JJ. accepted the following summary of when silence may be of relevance in a section 52 context from *Kimberley NZI France Ltd. v. Torero Pty Ltd. & Ors.*⁵ In that case, French J. noted the following:

If in a particular case silence would, as a matter of fact, constitute misleading or deceptive conduct, s. 52 by virtue of its prohibition of such conduct imposes its own statutory duty to make disclosure.

The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that that fact does not exist.⁶

In denying this claim, the majority recognized that when one evaluated a claim under section 52 in a commercial context, the Court would have to take into account the fact that commercial people "understand or should understand, that they will not ordinarily be informed of information which is regarded as confidential. ... The common understanding of commercial people must therefore be taken into account in determining what is misleading or deceptive or likely to be so."⁷ The majority reviewed some of the earlier cases, including the *Demagogue* decision referred to earlier and added the following important qualifications on the application of section 52 in the context of silence in commercial dealings:

[Section 52] does not require arm's length negotiations to be completely open or require full disclosure at all times. The particular facts of the case must be considered in the light of the ordinary incidents and character of commercial behaviour.

Thus, in the ordinary course of commercial dealings, a certain degree of 'puffing' or exaggeration is to be expected. Indeed, puffery is part of the ordinary stuff of commerce. So also is a certain degree of 'put off', evasion or obfuscation by commercial people seeking to resist disclosing information which is confidential. Discussions in commerce are so understood.⁸

Another interesting and earlier case in which a New South Wales court criticised attempts to extend the reach of section 52 to include a duty to disclose additional information where the "other party" was an experienced businessman or banker was *Lam v. Ausintel Investments Australia Pty Ltd. and Ors.*⁹ In this case, the court was concerned with extending the obligations imposed on a financial organisation to disclose information where the other party to the agreement was an experienced businessman and banker. The other party, it was stated by Gleeson CJ., should have made his own enquiries in relation to the particular transaction. If a fiduciary or similar relationship existed between the parties (as for example between a trustee and beneficiary, solicitor and client, principal and agent, and guardian and ward), the case should and would be treated quite differently. Where the relationship is one between parties who were clearly dealing with each other at arms length in a commercial situation "[in] which they have conflicting interests it will often be the case that one party will be aware of the information, which if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as

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dishonesty or even sharp practice. It would normally only be if there were an obligation of full disclosure that a different result would occur."¹⁰

One's enthusiasm for these decisions should be tempered by the fact that there are cases in which, even in the commercial context, the Courts have gone the other way. Perhaps the most important of these, is the unreported decision (except so far as the digest summarized the facts of the case and his decision) of McDonald J. in the Victorian Supreme Court in *Natwest Australia Bank Ltd. v. Tricontinental Corporation Ltd. & Anor.*¹¹

The claim by Natwest was based in part on section 52 of the Act. Natwest alleged that Tricontinental had failed to disclose the existence of two guarantees on the part of Pro Image, the company for whom Tricontinental was trying to arrange a loan as the syndicate leader and manager. Claims under section 52 were also brought by Natwest against the solicitors instructed by Tricontinental. McDonald J. noted that to ground a case under section 52 it is not necessary to show an intention to mislead or deceive, nor is it necessary to show that there has been a failure to take care. In denying its obligation to disclose the relevant information in this case Tricontinental argued that, in the absence of expert evidence as to the practice and duties of lead bankers in such circumstances, the Courts should not impose a duty on Tricontinental to disclose the existence of the relevant guarantees.

McDonald J. rejected Tricontinental's defence in these words:

Whether a duty exists to disclose a particular fact relevant to determining whether the non-disclosure of that fact by a corporation constituted misleading or deceptive conduct ... is a question

to be determined by the Court having regard to all the relevant circumstances. There may be cases where a Court would be assisted by expert evidence as to some particular commercial practice. This is not such a case. The facts not disclosed were, of themselves, important facts and material facts to the consideration of Natwest as to whether it would [join the syndicate] and provide a credit facility to Pro Image in the sum of \$10 million. The existence of these material and important facts were known to Tricontinental. I am satisfied that in the circumstances of this case Tricontinental was under a duty to disclose the fact of the existence of the two guarantees to Natwest ...

It is interesting to note that even though McDonald J. held that it was not necessary to show whether a defendant was engaged in negligent conduct (i.e. failed to take reasonable care), it was important to look at the relationship between the parties at the relevant time. Other important factors in evaluating such a question were "the nature of the commercial enterprise that was being engaged in between them and the role being undertaken by Tricontinental in that enterprise, the knowledge of Tricontinental as to the facts not disclosed and the importance or materiality of such facts as to Natwest determining whether or not it would join the syndicate."

The Court dismissed the claim against the solicitors because in their case it had not been shown that they were under a duty to disclose the relevant information. Whether such a duty existed would depend on all the facts and was not confined to a particular special relationship that might exist. This judgment also contains some interesting observations about causation and the links between the failure to disclose and the alleged loss or damage being sustained.

There have been many cases including *Winterton Constructions Pty Ltd. v. Hambros Australia Ltd.*¹²,

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*Warner & Anor v. Elders Rural Finance Limited & Ors*¹³, *Lawson & Anor v. Ampol Limited*¹⁴, *Farrow Mortgage Services Pty Ltd. (in liquidation) v. Edgar & Ors*¹⁵, *Grubic & Anors v. Commonwealth Bank of Australia*¹⁶ in which plaintiffs have successfully relied on silence as a trigger for action. Although one should not be too concerned about this in truly consumer transactions, where commercial situations are involved perhaps the law may be going too far.

With the introduction of provisions in the State and Territory Consumer Protection legislation which parallel section 52, the potential for these types of provisions in business transactions becomes even wider.

Notes

¹ See Pengilley, (1987) 15 Australian Business Law Review 247.

² See *Rhone-Poulenc etc. v. UIM Chemicals etc.* (1986), 12 FCR 477. For a discussion of other cases see Healey and Terry, "Misleading and Deceptive Conduct", CCH Aust 1991, at 195ff.

³ (1993), 39 FCR 31.

⁴ (1993), ATPR at para 41-274.

⁵ (1989), ATPR Digest at para 46-054.

⁶ *Ibid.* at 53195.

⁷ *Ibid.* at 41690.

⁸ *Ibid.*

⁹ (1990), ATPR at para 40-990.

¹⁰ *Ibid.* at 50886.

¹¹ (1993), ATPR Digest at para 46-109.

¹² (1993), ATPR at para 41-205 (see in particular the judgment of Hill J. and note his comments at 40887).

¹³ *Ibid.* at para 41-238.

¹⁴ *Ibid.* at para 41-204.

¹⁵ (1993), ATPR Digest at para 46-104.

¹⁶ *Ibid.* at para 46-111.

INTERNATIONAL COMPETITION
LAW

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

AUSTRALIA

Major Changes to Australian Law

The Australian Federal and State Governments have endorsed wide ranging proposals to dramatically extend the Australian *Trade Practices Act*.

Under the proposals:

The Act is to apply to all business activity in Australia. To date, State trading enterprises have not been subject to the Act. This is to change. State and Territory businesses are to be made subject to the Act, thereby introducing competition law to one of the most significant areas of the Australian economy.

Public monopolies are to be restructured in accordance with a set of principles which will introduce competition.

A new legal regime is to be established to provide a right of access to essential facilities, such as electricity grids and railways, on fair and reasonable terms.

The Trade Practices Commission and the Prices Surveillance Authority are to be merged to form a new Australian Competition Commission.

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A number of technical changes are to be made to the Act. These include strengthening of the prohibition on price fixing arrangements, relaxation of the *per se* prohibition on third line forcing, permitting resale price maintenance to be authorized on public interest ground and repealing section 49, a section based on the US *Robinson Patman Act*, which prohibits price discrimination in relation to goods.

The changes, which are based on the Hilmer Report published late last year, are expected to be implemented over a two-year period with the first of the legislation to be introduced in August this year.

CANADA

Gemini - Computer Reservation System

Air Canada has abandoned its appeal of the Competition Tribunal decision ordering the dissolution of the Gemini reservation before the start of the appeal hearing. Air Canada and Canadian Airlines have also resolved all outstanding related litigation in the Canadian courts. The CAN \$246 million investment of American Airlines in Canadian Airlines has been completed.

Sumitomo Canada Limited - Foreign Directed Conspiracy

On November 19, 1993, Sumitomo Canada Limited pleaded guilty and was fined CAN \$1.25 million by the Federal Court of Canada for implementing a foreign-directed conspiracy between Sumitomo Chemical Col Ltd of Japan, the parent company of Sumitomo Canada, and Bayer A.G. of Germany. The conspiracy involved the sale of chemical insecticide

Fenitrothion to Canadian provincial governments in 1987-8. This is the first conviction under the criminal offence of foreign-directed conspiracy under the *Competition Act*.

A.C. Nielsen Co. of Canada Limited - Abuse of Dominant Position

On April 5, 1994, the Director of Investigation and Research filed in the Competition Tribunal an application under the abuse of dominant position provisions of the *Competition Act* alleging that the A.C. Nielsen Co. of Canada Limited is abusing its dominant position in the business of providing scanner-based marketing research to Canadian manufacturers of consumer packaged goods. Nielsen has exclusive contracts with most of Canada's major supermarket chains and drugstores to acquire their scanner-based data. The Director's application resulted from a complaint by Information Resources Inc. of Chicago who wants to enter into the Canadian market to provide scanner-based market research. The Director is seeking orders prohibiting Nielsen from entering into or enforcing its exclusive contracts with major supermarket and drugstore chains.

EUROPEAN COMMUNITIES

Selective Distribution Systems

In its recent Grundig decision the Commission has extended the exemption from Article 85 of the *EC Treaty* of a distribution network for consumer electronics. The products in question can continue to be distributed solely by wholesalers and specialized retailers who fulfill the qualitative selective criteria laid out by the manufacturer. Important in the decision is that the Commission finds a prohibition for the dealers to advertise the products at a "cash

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and carry price" justified.

The Court of Justice also rendered a decision concerning a selective distribution system, namely that of Cartier watches. It stated that a manufacturer can validly limit the warranty services for its products to the watches bought from its recognized dealers. Furthermore, the Court said that the inapplicability of Article 85 to selective distribution of luxury products is not challenged by the fact that in non-EC countries the distribution system is not governed by such a system so that watches acquired there can freely enter the common market outside of the selective distribution system.

The Helsinki Agreement

The Court of First Instance has dismissed the appeal against a Commission decision on an agreement concerning the acceptance by traders in France of Eurocheques drawn on foreign financial institutions. This so-called Helsinki Agreement between Europay (former Eurocheque International and Eurocard) and the Groupement des Cartes Bancaires (CB) obliged the Members of the Groupement to charge a commission to the traders affiliated to them on the collection of Eurocheques drawn on a foreign bank. This commission came on top of the interbank commission that was due by the drawee bank on the basis of the earlier so-called Package Deal Agreement which was exempted by the Commission. Therefore, the members of the Groupement mutually deprived themselves of the freedom to be satisfied with only the interbank commission. The Court found that such a commission was not indispensable for the purpose of promoting the acceptance of Eurocheques in France and therefore not exemptible from the application of Article 85 of the *EC Treaty*. However, the fine imposed by the Commission was

lowered by the Court of First Instance because the Commission wrongly qualified the agreement as one of vertical price fixing, where the parties in fact only fixed a certain limit for the commission that had to be charged to traders.

FRANCE

By decision no. 93-D-59 of December 15, 1993, the Conseil de la Concurrence (Conseil) sanctioned 24 firms for anticompetitive practices in the sector of sale and purchase of advertising space. The Conseil considered that agreements concluded between these firms lead to a lack of transparency in price conditions and did not allow advertisers and buyers of advertising space to have a complete knowledge of the actual conditions of purchase of advertising space.

ORANGINA, the French distributor of PEPSI-COLA, petitioned the Conseil for interim measures. According to ORANGINA, the fact that COCA-COLA sells its 33 centilitres bottles at the same price as its 20 centilitres bottles in bars, hotels and restaurants constitutes predatory pricing.

By its decision no. 94-MC-01 of January 26, 1994, the Conseil refused to take interim measures but considered that, subject to a full hearing, the above practices might constitute an abuse of dominant position by COCA-COLA.

By decision no. 93-D-56 of December 7, 1993, the Conseil fined BANDAÏ 30 million French Francs for abuse of its dominant position. BANDAÏ is the exclusive importer of NINTENDO video games in France and holds about 70% of the French market.

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The practices sanctioned by the Conseil consisted of discriminatory conditions of sale, price fixing and threats of refusal to sell.

A new Act concerning "the repression of counterfeiting of intellectual property rights" was adopted on February 5, 1994 and came into force on February 8. It increases criminal sanctions in case of infringement of trademarks, patents, registered designs and copyright (a maximum of two years imprisonment and/or a fine up to FF. 1,000,000). It also provides for additional sanctions such as closing of the business premises.

Moreover, the infringement of a trademark now constitutes a violation of customs legislation.

GERMANY

County's Participation in Waste Disposal Joint Venture Prohibited

In a judgment of November 9, 1993, the Düsseldorf Court of Appeal ruled that a county's 52% participation in a waste disposal joint venture violated section 1 of the German Law against Restraints of Competition ("GWB"). The county had entered into an agreement with the joint venture pursuant to which the latter would manage waste disposal in the county. The agreements had the effect that the county would cease to be a player on the demand side of the waste disposal market. By transferring its functions to the joint venture, the county eliminated competition between waste disposal companies. The court held that the county could not involve private parties without conducting an open tender procedure. Otherwise, it would discriminate against those private competitors that had no access to the bidding.

Utility Abuses Dominant Position by Tying Modification of Agreement with Commune to 20-year Extension

The electricity price paid by consumers to utilities contains a so-called municipality contribution which is passed through by the utilities to the communes and cities. The legal framework was changed in 1992 allowing higher contribution in certain cases. A utility in Hesse refused to amend its agreement with a commune to increase the contribution to be passed on to the latter, but insisted the commune sign a new 20 year agreement with it. In a decision of December 15, 1993, the state cartel authority prohibited this behaviour. The amount of the municipal contribution was of no interest to the utility, since the utility simply collected it on behalf of the municipality. By tying the higher municipal contribution to an extension of the existing agreement, the utility was abusing its dominant position. It also hindered competitors (neighbouring utilities) which would have had to wait for another 20 years before they could have done business with the commune.

IRELAND

Reform of *Competition Act*

On April 19, 1994, the Minister for Enterprise and Employment, Mr. Ruairi Quinn, outlined proposed changes to the *Competition Act, 1991*.

The Minister proposes to redress the effects of a decision of the Competition Authority in the Woodchester case in August 1992 which found that mergers and take-overs which had been cleared by the Minister under the *Mergers, Take-Overs and Monopolies (Control) Acts*, may also be notifiable to

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the Competition Authority. In future, any merger and take-over proposals which are notifiable to the Minister under the *Mergers, Take-Overs and Monopolies (Control) Acts* will receive a "one-stop shop" examination by the Department of Enterprise and Employment. The Department will examine the proposed agreements following the same criteria used by the Competition Authority and will have regard to precedents set by the Authority. If the Department considers the Agreement to be contrary to these precedents, the Minister can refer it to the Competition Authority for a full investigation.

Under the present legislation, mergers between small and medium-sized enterprises may require notification to the Competition Authority. The Minister said that there was no intention or wish to obstruct such co-operation and he expected that the Competition Authority would facilitate such agreements. Regulations setting out this procedure will be introduced after the passing of the Act.

A major criticism of the *Competition Act* is that enforcement of its provisions lie principally with private individuals taking actions in the courts. The Minister proposes to give the Competition Authority pro-active powers. There will be a designated "Enforcement" member with the power to carry out investigations at the request of the Minister or on its own initiative and to pursue actions in the courts. Sufficient resources will be made available to the Enforcement member to ensure effective policing of the Act's provisions.

JAPAN

Guideline for Abolishment of the System of Exemption - The Retail Price Maintenance

The Japanese Fair Trade Commission (JFTC) made a guideline for reviewing the abolishment of the system of exemption for the *Anti-Monopoly Law* (AML) for retail price maintenance (the *Nihon Keizai Shimbun* May 1, 1994).

The JFTC is expected to submit a report by the end of 1995 that the System of Exemption for Retail Price Maintenance be abolished in principal by 1998.

In this connection, although the JFTC excluded a part of inexpensive cosmetics from the Exemption of Retail Price Maintenance in April 1993, in May 1994 the JFTC approved the stomach medicine manufactured by TAISHO Pharmaceutical Co., Ltd. known as "TAISHO KAMPO ICHO YAKU" as a product exempted from the AML for Retail Price Maintenance.

The Ministry of Construction Set Forth A New Guideline

The Ministry of Construction will announce a new guideline that if any construction company violates the AML for collusive bidding, such construction company may be ordered to stop its business activities for 15 days or more by the Ministry of Construction or the Municipal Government (the *Nihon Keizai Shimbun*, May 12, 1994).

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THE NETHERLANDS**Antitrust Update**

In February, 1994, the Secretary of State for Economic Affairs presented its initial proposals for a totally new Act on Economic Competition, in the form of a request for advice addressed to the Social and Economic Council, the State's highest advisory body in economic matters.

According to the request for advice, the Secretary of State intends to propose a new Act copying Articles 85 and 86 of the *EC Treaty*. The enforcement of the Act should be entrusted to a semi-independent cartel office, similar to the German, French and British cartel offices. The powers and functions of the new Dutch cartel office will resemble those of the EC Commission, including the power to impose fines.

Particularly worth noting is the Secretary of State's intention to provide for an exemption clause containing the substantive criteria of Article 90(2) of the *EC Treaty*, instead of a *de jure* exception as laid down in the said *Treaty* article.

So far, the Secretary of State proposes not to adopt any national merger control regulation.

NEW ZEALAND**Negotiated Enforcement Action**

Late in 1992, the Commerce Commission launched a major investigation under the *Commerce Act* into alleged collusive conduct amongst milk processing companies in 1990-91, at a time when the "town milk" industry was in a transitional phase prior to full deregulation. The investigation culminated with

the Commission threatening to take wide-ranging antitrust enforcement proceedings against several companies and individuals for blocking competitive initiatives in the industry.

In what was a novel move in New Zealand, the major company involved in the investigation negotiated a settlement with the Commission, involving consent to judgment for a single breach and agreement as to the penalty to be recommended to the High Court. Since 1990, the maximum penalty has been NZ\$5 million. Agreement was reached at \$200,000, the largest fine yet imposed under the Act. The Commission then reached agreement with five other companies, involving lesser penalties. This negotiated basis for enforcement action was then put before the High Court for imposition of the recommended penalties, if the Court agreed, and for judicial approval of the process.

In a written judgment shortly after the hearing, the High Court imposed the agreed penalties and gave its blessing to such negotiated enforcement actions in the future. The Court noted that whilst "plea bargaining" has no formal status in New Zealand, antitrust proceedings are civil rather than criminal and the analogy with settlements of other civil actions was appropriate. The negotiated penalties were commensurate with the nature and gravity of the infringement which had been admitted, the defendants' co-operation and the avoidance of costly litigation.

The Commission has since noted that the settlement, and the judicial approval of the process, has added "another string to the Commission's bow" in antitrust enforcement.

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Progress in Phone Rivalry

Later this year, CLEAR Communications, currently confined to providing a long distance service, will enter the local call market for fixed telephone services. For the first time, there will be competition in the local call market for the former state-owned monopoly, New Zealand Telecom. This development arises in part from the Court of Appeal's judgment in proceedings initiated by CLEAR in mid-1991, alleging that NZ Telecom was abusing its dominant position in the market by unreasonably refusing interconnection with its local telephone service network. The Court found such conduct had occurred and also rejected the pricing mechanism proposed by NZ Telecom which had found favour at first instance. In its place, the Court of Appeal has provided guidance as to future resolution of pricing and interconnection issues, whilst noting that it is not a pricing tribunal.

NZ Telecom is appealing the decision to the Privy Council but in the meantime CLEAR and Telecom have reached an interim interconnection agreement which allows CLEAR to commence limited local call operations.

A feature of the New Zealand regime is that, with the exception of light-handed regulation in the form of financial disclosure requirements, the development of competition in telecommunications relies solely on general competition law. CLEAR and other competitors of NZ Telecom in fixed and mobile telephony have a stated preference for the "hands-off" approach but seek the establishment of an expert dispute resolution body rather than needing to go to court.

With the deregulated environment under close scrutiny, the Privy Council's decision will be awaited with interest. However, this may not be the end of the legal actions initiated by CLEAR in its endeavours to wrest market share from the now US controlled NZ Telecom. While considerable progress has been made in moving from state-regulated monopoly, there is still a long way to go.

PORTUGAL

Portugal has a new antitrust law and one of its innovating articles is a prohibition on the abuse of economic dependency. What exactly is the object or purpose of this provision and what is its origin?

As to its object, we can summarize the concept of economic dependency by stating that in an competition law context, the entity sought to be regulated is the entity that can exercise over another entity a total dominion so that the entity dominated in commercial reality has little alternative. The relationship has been described as requiring the presence of an "obligatory party". But this theoretical description does not, as a practical matter, advance a great deal of our understanding. Rather, a more complete perception of this unusual article can be garnered by discovering its origin, and here we shall find that the source of art. 4 of Portugal antitrust law is the French law, more specifically Ordonnance no. 85-1234. What then was the French experience, which has so considerably affected Portuguese legislation? The mundane answer is the emergence of 13 consumer megamarkets in the 1980s which inverted the traditional power of producers over distributors so that, now, through the appearance of these sprawling supermarkets, the latter, in the name of passing on lower costs to the consumer, began to impose harsh conditions on their suppliers.

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Typical abuses attempted to be prohibited were the insistence of the megamarkets in seeking "bonuses" or "reimbursements" for fictitious costs, or "premiums" for carrying products in choice areas, e.g. shelves with easy access to the shopper.

Seen from this angle, the abuse of economic dependency becomes similar to the abuse of a dominant position with this difference: while the latter addresses itself to a particular market, the former refers to the relationship between two parties and the "dependent", although a producer, is in fact, a producer without bargaining power.

The consumer and the producer are now equally protected by Portuguese law.

SPAIN

Spanish Tobacco Monopoly: The European Commission Gives It A Break

The dossier opened by the EC against the tobacco monopolies is waiting for a decision of the European Court of Justice that will allegedly show the way to go.

About a year ago, the Spanish authorities received a letter whereby the Commission showed concern about the exclusive rights granted to tobacco retail selling outlets. But little else happened, except for the "pour la gallerie" Italian action against an apparently minor smuggling operation but with strange and spectacular reflection in newspaper headlines.

Two reference rulings that may result from the initiative of Italian courts may pave the way for future actions as Commission sources acknowledge

that the situation is not clear. In fact, the interpretation prevailing in Spain is that national monopolies may be legal pursuant to the principle of subsidiarity. This interpretation would allow member States to organize their internal commercial channels as they may think fit, provided this does not imply or result in a discrimination against products or citizens from other EU countries. This is the interpretation made by "Tabacalera", the Spanish monopoly.

Whether this interpretation can apply to commercial monopolies is the query to be clarified, and a ruling against Tabacalera may put an end to widespread commercial practice deeply enrooted in our society. The "Estancos" (tobacco retail outlets) are a common part of our urban life.

The Spanish commercial monopoly is based on the granting to interested parties of an administrative concession having different franchise features (use of "Tabacalera's" logo, purchase from Tabacalera only, selling restrictions, etc.). This may be to the advantage of the Spanish monopoly, but the solution seems to be still distant in the future, as the court case moves quite slowly.

A Concentration Under EC Scrutiny

The European Commission is reviewing different aspects of the take over of the Spanish food oil group "Elosúa" by the French Eridania Beghin-Say Group.

The case arises from the acquisition by Medeol, a subsidiary of the French group controlled by the Italian "Ferruzzi" consortium. A preliminary review led the Commission to believe that the transaction

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may fall under the applicable EU Regulation, thus inviting "interested third parties" to submit their views to the Commission.

The transaction involved the sale to Eridania of 20% of the total stock still controlled by Mr. Marcelino Elosúa, resulting in Eridania controlling the two major Spanish food oil companies (Koipe and Elosúa), the merger resulting in the largest world concern in this sector.

Eridania purchased the stock with the consent of the Spanish authorities and has issued to the Spanish government an offer to sell half of the stock and political rights in the concern. News in the local press indicates that the government may be willing to accept.

If the EC gives final clearance, Elosúa may increase its capital to solve its financial difficulties and Koipe may subsequently absorb Elosúa, then allowing for the entry of new shareholders.

The final picture may show Eridania controlling about 40% of the total stock. A similar percentage of the capital may be held by the "national group" (including the Spanish government), while the rest has been offered to another private group headed by a leading group in the construction industry. Sources from the latter indicated that in the event they decide to accept the invitation, the necessary investment would not be regarded as a simple financial investment but as an important business sector within their group.

TAIWAN

Taiwan's cabinet, the Executive Yuan, recently approved the bill submitted by the Fair Trade

Commission (FTC) to amend the *Fair Trade Law* (FTL). This amendment process for the FTL, which was enacted more than two years ago, may take several years.

The most important amendment would be to repeal the requirement that the FTC publish a list of monopolies and firms having 20% or more of market share from time to time. This has been considered a futile exercise by the government and private sector alike.

To prevent any abuse of process, the FTS also proposed to amend the FTL so that all criminal prosecutions will require a prior decree of the FTS providing administrative sanctions to enterprises under investigation. In other words, administrative liability has to be found first. On the other hand, the FTC has recommended the repeal of the requirement that administrative sanctions follow a cease-and-desist order; no warning shot would be needed in the future, argued the FTC.

The FTC is also considering the adoption of guidelines that would enable it to approve price-related horizontal arrangements if they are transparent and actually protect consumers. The classic example that the FTC has in mind is a price list for mending flat tires by the association of tire shops.

One recent enforcement action by the FTC was against Taipei City's Department of Rapid Transit (DORT). The DORT allegedly favoured a contractor by unfairly writing specifications and qualifications that only it could meet. This is the first case against a semi-government agency for an FTL violation.

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UNITED KINGDOM

The Deregulation and Contracting Out Bill, which is expected to be enacted at the earliest this summer, contains some significant changes to UK competition law which in practice will extend the powers of the Director General of Fair Trading (DGFT) considerably at the expense of the Monopolies and Mergers Commission (MMC).

Monopolists challenged by the authorities may in future avoid a full MMC investigation if they can offer acceptable undertakings, and the examination of single-firm anti-competitive practices will no longer require a formal investigation and report by the DGFT before accepting enforceable undertakings or making a reference to the MMC. Furthermore, the acceptance of undertakings in lieu of MMC merger references will no longer be limited to structural matters. Behavioral undertakings will be permitted for the first time. Although the DGFT will effectively become investigator, prosecutor and judge, his powers will be checked by statutory procedures ensuring transparency and due process. The Bill also makes certain changes to the *Restrictive Trade Practices Act* but, of course, these stop short of the substitution of the legislation by a domestic version of Article 85, to which the government remains ostensibly committed.

The MMC completed the investigation of a number of complex monopolies in diverse sectors. Its report on Private Medical Services contains some interesting developments on the application of UK monopolies legislation to persons who are not suppliers of the services under investigation. The MMC found a complex monopoly in which consultants set their charges by reference either to the British Medical Association's published

Guidelines or to the benefit maxima published by BUPA, a provider of health insurance, specifying to its subscribers the level of coverage offered. However, only the consultants and the BMA were treated as members of the complex monopoly group. BUPA was not sufficiently closely connected to the consultants (and therefore fell outside the group) because, although it knew of the consultants' practices, the publication of its benefit maxima was a reasonable step taken by BUPA as an insurer. By contrast, the BMA had prepared its Guidelines in response to the wishes of consultants and effectively acted as their trade union. The MMC recommended it should cease to publish these since this enabled consultants to charge higher fees and therefore operated against the public interest.

More recently, in *Ice Cream*, the MMC cleared the practice of freezer exclusivity in manufacturers' distribution arrangements in the "impulse" ice cream market. This requirement did not operate against the public interest because, *inter alia*, it helped to make ice cream widely available, and there was no restriction on other suppliers doing the same and no evidence of excessive profits. The report may, however, fall out of line with the European Commission's current investigation of similar practices. The Commission has yet to rule on the issue, but in examining a recent takeover it identified freezer exclusivity as a serious barrier to market entry.

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UNITED STATES

First Circuit Holds Foreign Manufacturer and U.S. Subsidiary Are One Entity For *Robinson-Patman Act* Claims

In an opinion authored by Chief Judge (now Supreme Court nominee) Stephen Breyer, the First Circuit Court of Appeals (Court) held that BMW AG (a German corporation) and its wholly-owned U.S. subsidiary, BMW North America (BMW NA), were a single entity for purposes of analyzing allegations of *Robinson-Patman Act* price discrimination. *Caribe BMW, Inc. v. Bayerische Motoren Werke, AG* (No. 93-1653) (1st Cir. 1994). The case involved the claim of a direct buying retailer (Caribe BMW) that it was forced to purchase cars from BMW AG at prices that were higher than those offered by BMW NA to retailers who compete with Caribe. Because the *Robinson-Patman Act* only prohibits discriminatory sales by a single "person", the plaintiff's complaint on its face presented the court with the legal question whether a parent and its wholly-owned subsidiary are a single "person" for *Robinson-Patman Act* claims. The Court offered three reasons for its decision to answer that question affirmatively: (1) it is consistent with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, (467 U.S. 752 [1984]) that a parent and its subsidiary cannot conspire in violation of section 1 of the *Sherman Act*; (2) there is no *Robinson-Patman Act* purpose served by engaging in a case-by-case analysis of whether the manufacturer actually exercises control over the subsidiary's pricing decisions (the approach adopted by other courts of appeal); and (3) it avoids the "potential anomaly" of prohibiting a direct buying retailer from bringing a price discrimination claim if the manufacturer and its wholly owned subsidiary are not a single person.

In another holding, the Court remanded the case to the District Court to consider whether the forum selection claims of Caribe's contract with BMW AG, which provided that "exclusive jurisdiction for disputes concerning the ... termination of this agreement as well as all and any rights and duties arising out of this agreement is ... Germany" prohibited the plaintiff's complaint in a U.S. court. This District Court had used this clause to dismiss the plaintiff's pendent state law claims, but because it had dismissed the antitrust claims for failure to state a claim, it did not consider its application to the antitrust claims.

Department of Defense to Play Bigger Role In Analyzing Mergers In Defense Industry

A public-private task force organized by the Department of Defense (DOD) has concluded that the Department should play a greater, and more coordinated, role in Department of Justice and FTC evaluation of mergers in the defense industry. It is widely recognized that because the DOI has and will continue to reduce its procurement expenditures, significant consolidation in the defense industry is expected. While the task force report recognizes that "competition among firms in the defense industry is significantly different" than competition among firms in other industries, the report concluded that the Horizontal Merger Guidelines used by both enforcement agencies "are flexible enough to take into consideration the special circumstances of the industry," and thus no "exemption" from the antitrust laws is called for. Nevertheless, the report encourages more DOD participation in evaluating certain defense industry mergers.
