FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS

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The United States Supreme Court opened the 1990s with an antitrust decision which strongly echoed the 1960s – when the Government could win even novel *Sherman Act* cases by invoking *per se* rules, rather than having to prove market effects.[1] In *Federal Trade Commission* v. *Superior Court Trial Lawyers Association*, the Court (by a 6-3 vote) provided the most ringing endorsement of *per se* liability since Justice Hugo Black's celebrated *Northern Pacific Railway* decision in 1958:

> The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958). If small parties "were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition into every price-fixing case." R. Bork, *The Antitrust Paradox* 269 (1978).[2]

What is so striking is that this bash-the-culprits approach seems to run in the opposite direction from the Court's antitrust jurisprudence since 1975. In many of its *Sherman Act* decisions, the modern Court has expressed concern about applying *per se* rules to agreements nominally falling within *per se* categories (e.g., "price-fixing" or "boycott") when potential benefits were established. "Easy labels do not always supply ready answers," said the Court in 1978, in holding that the *per se* price-fixing prohibition does not apply to competitors who license their copyrights through a large joint venture on a pooled basis at a set price.[3] Similarly, the Court has held that *per se* "boycott" rules do not apply either to a joint venture which excludes competitors from membership,[4] or to a professional association which had adopted ethical rules restricting competitive bidding among its members.[5] At the same time, the Court has overruled the prior *per se* rule barring vertical territories,[6] and it has come perilously close to doing so with the *per se* prohibitions against tie-ins.[7] In each instance, the Court's majority has looked at what it has called the "more discriminating" tests available under the so-called rule of reason.

In practice, a rule of reason analysis means that the government or private plaintiff must actually establish the anticompetitive effect of the challenged restraint – rather than being allowed to *presume* such evidence by virtue of a *per se* rule. Not surprisingly, every plaintiff prefers a *per se* rule, and almost every defendant prefers to be able to make a rule of reason defense. In some cases the ultimate result is the same,[8] but in many others it is not.[9] This is why the line between *per se* and rule of reason liability is one of the most hard-fought in modern U.S. antitrust jurisprudence. It is this line that the *Superior Court Trial Lawyers* decision gives a solid rhetorical shove in the *per se* direction.

The *Trial Lawyers* case is factually unusual and hence is unlikely to offer specific guidance to the business community. Some commentators have regarded it as a prosecutorial sport by the Federal Trade Commission (FTC).[10] "Reasonable lawyers may differ about the wisdom of this enforcement proceeding," commented the Supreme Court majority dryly.[11] But, wise or unwise, the case was brought, tried, appealed over six years – and took on broad implications going far beyond its unusual facts.

The FTC's case challenged a brief 1983 "strike" by a small group of lawyers who represented indigent criminal defendants in the Superior Court of the District of Columbia (D.C.). The D.C. government, like other governments, is required

by the Sixth Amendment of the *U.S. Bill of Rights* (as construed by the Supreme Court) to provide free counsel to indigent criminal defendants. Such counsel are appointed by the Court, and their appointments are governed by the *D.C. Criminal Justice Act* (*CJA*). Hardly surprisingly, the cause of criminal suspects is not a politically popular one among voters and taxpayers – with the result that pay is low and the work tends to be carried out by inexperienced, idealistic, or just marginal lawyers. In D.C., maximum fees payable for *CJA* service were set by statute in 1970 and had not been increased by 1983 – a period in which the Consumer Price Index had increased 147%. The *CJA* lawyers were still paid at most $30 an hour for court time and $20 an hour for other time. Various bar and judicial groups had criticized these rates as inadequate to assure reasonable representation. Of course, the *CJA* lawyers themselves were troubled on both policy and personal grounds. But traditional lobbying brought no results – just sympathy – from appropriate federal and D.C. officials (including the now infamous Mayor Marion Barry).

Accordingly, in mid-1983, a hundred or so *CJA* lawyers decided to "strike" to draw attention to their plight and to move the D.C. government to amend the statutory rates. Many of them signed a petition (a clear "agreement" in antitrust terms) saying:

> We, the undersigned private criminal lawyers practicing in the Superior court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the *Criminal Justice Act*.

The "strike", which lasted for less than two weeks in September, attracted a great deal of media attention[12] and persuaded the D.C. City Council to raise the maximum rate to $35 per hour for all *CJA* work. Mayor Barry (a former civil rights activist) congratulated the "strike" leaders on their political skills and invited them to a celebratory signing ceremony.

This was not good enough for the FTC. Seeing an ominous "cartel" lurking behind the scruffy protest, the Commission filed an antitrust complaint in late 1983 charging the lawyers' association and four of the "strike" leaders with engaging in "a conspiracy to fix prices and to conduct a boycott."[13] This was, incidentally, one of only three contested restraint of trade complaints filed by the Commission in 1983. The respondents argued from the outset that their "strike" was a form of political speech constitutionally protected against government interference by the First Amendment in the *U.S. Bill of Rights*. They also argued that it fell within the so-called *Noerr-Pennington* doctrine which exempts — in part on constitutional grounds — conspiracies designed to persuade the government to take anticompetitive action.[14]

In accordance with the regular FTC procedure, the case was assigned to an administrative law judge (ALJ) for trial. After discovery and a three week hearing, the ALJ rejected all the respondent's *Noerr* and First Amendment defenses and yet held in their favor on essentially a "no harm no foul" rule, saying that the D.C. Government clearly did not regard itself as injured by this conduct. "I see no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case can be disposed of on a more pragmatic basis – there was no harm done."[15] On appeal, the Commission unanimously reversed. It held, in a very long opinion by Commissioner Azcuenaga, that the defendants' conduct constituted a "coercive, concerted refusal to deal [with the] purpose and effect of raising prices" and as such it was illegal *per se*. The Commission rejected both the respondents' *Noerr* and First Amendment defenses and the ALJ's "no harm no foul" rule as being legally inappropriate.

The trial lawyers then appealed to the Court of Appeals for the D.C. Circuit, where they drew a panel which included a former U.S. Deputy Attorney General (Judge Lawrence Silverman) and a former Assistant Attorney General in Charge of the Antitrust Division (Douglas Ginsburg). The Court of Appeals unanimously reversed the Commission with a majority opinion written by Judge Ginsburg. The Court rejected the trial lawyers *Noerr-Pennington* and flat constitutional exemption arguments, but did recognize that "the SCTLA boycott did contain an element of expression warranting First Amendment protection.[16] Therefore, applying an earlier Supreme Court First Amendment decision, the Court of Appeals held that any restriction on this

particular expression could not be justified unless it were *no greater than essential* to an important government interest. It found that governmental interest was adequately protected by subjecting the lawyers' "strike" to rule of reason treatment — rather than flat *per se* prohibition. Under such a rule of reason inquiry, the FTC would have to make a threshold finding that the "strikers" possessed market power in some relevant market. In essence, the panel stated that the *per se* rule is designed to expedite judicial administration, but such interest in expedition should not override the speech elements inherent in a case. The Court also made clear that a market power inquiry would help sort out the question of whether the boycott's success was based on naked economic coercion or its ability to create political attention and sympathy in the community.

The Supreme Court in turn reversed the Court of Appeals, with Justice Stevens writing on behalf of a six member majority of generally conservative justices. Justices Blackmun, Brennan and Marshall (all of whom are generally more liberal) filed two dissenting opinions.

The majority opinion was clear and strong. Characterization of the conduct as "naked price fixing" controlled the result. Thus, said Justice Stevens:

> Reasonable lawyers may differ about the wisdom of this enforcement proceeding....Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants....These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements. 58 U.S.L.W. at 4148.

The majority went on to stress that:

> There are at least two critical flaws in the Court of Appeals' antitrust analysis: it exaggerates the significance of the expressive component in respondents' boycott and it denigrates the importance of the rule of law that respondents violated.58 U.S.L.W. at 4150.

The majority responded to these "flaws" categorically. First, it concluded that

> "[e]very concerted refusal to do business with a potential customer or supplier has an expressive component....The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude."[17]

Then it went on to hammer hard at the importance of *per se* rules:

> The *per se* rules are, of course, the product of judicial interpretations of the *Sherman Act*, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have "a substantial potential for impact on competition". Citing Jefferson-Parish. 58 U.S.L.W. at 4151.

This categorical result obviously turned on the Court's acceptance of the FTC's "naked price-fixing and boycott" label. According to the majority, no justifications other than efficiency justifications would be allowed to justify subjecting a horizontal restraint affecting pricing to rule of reason treatment.

The dissenters attacked the majority's categorical approach. Justice Brennan noted the rich political history of boycotts in the United States:

> Expressive boycotts have been a principal means of the political communication since the birth of the Republic... From the colonists' protest of the *Stamp and Townsend Acts* to the Montgomery Bus Boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our nation's political discourse....Any restrictions on such boycotts must be scrutinized with special care in light of their historic importance as a mode of expression. 58 U.S.L.W. at 4155-56.

Accordingly, Justice Brennan — and Justice Marshall who concurred with him — would have affirmed the Court of Appeals decision and held that "the FTC cannot ignore the particular factual circumstances before it by employing a *presumption* of illegality in the guise of the *per se* rule." 58 U.S.L.W. at 4154.

The third dissenter, Justice Blackmun, found no need to remand to the Commission for a market power finding. He found that the boycott was "a dramatic gesture not fortified by any real economic power",[18] since the D.C. Superior Court clearly had legal authority to draft other lawyers to step into service.

"The Court's new antitrust majority"[19] which crafted such a zealous *per se* rule may not prove

to be a particularly stable one over time. Indeed the split among the Justices seems unique. In the past, the three dissenting Justices, plus Justice Stevens (the author of the majority opinion) have been the strongest voices for *per se* antitrust rules, while they have also been the strongest voices for a broader First Amendment protection of political speech. By contrast, the more conservative Justices who joined Justice Stevens (especially Rehnquist, C.J., O'Connor, Scalia, and Kennedy, JJ.) have been on the side of judicial flexibility in enforcing the *Sherman Act* [20] and restraint in carving out new First Amendment rights. What this decision demonstrates is that the entire Court, save Justice Stevens, found the First Amendment questions much more important than the antitrust questions. This gave Justice Stevens an opportunity to write a very strong antitrust decision – emphasizing the importance of *per se* liability – with the concurrence of a group of Justices that have almost always been on the opposite side. Such a group may revert to their normal positions when the next "*per se* versus rule of reason" case hits the Supreme Court. In the meantime, the Government, other antitrust plaintiffs, and activist lower court judges have been given a particularly strong *per se* weapon to use in future antitrust cases.

Notes

1. See, *e.g.*, *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).
2. 58 U.S.L.W. 4145, 4150 (U.S. Jan. 22, 1990).
3. *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 8 (1979). See also *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984).
4. *Northwest Wholesale Stationers* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).
5. *National Association of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)
6. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).
7. *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984).
8. See, *e.g.*, *NCAA* v. *Board of Regents*, *supra* note 3; *Professional Engineers*, *supra* note 5.
9. *See, e.g., Continental TV, supra* note 6; and *Broadcast Music, supra* note 3.
10. See *FTC: Watch*, Jan. 29, 1990, at 9; *Washington Post*, Sept. 8, 1983, at A20; *N.Y. Times*, Sept. 1, 1983, at B10; *Washington Post*, Sept. 12, 1983, at A13.
11. 58 U.S.L.W. at 4148.
12. See *Washington Post*, Sept. 8, 1983, at A20; *N.Y. Times*, Sept. 1, 1983, at B10; *Washington Post*, Sept. 12, 1983, at A13; *The Economist*, Sept. 17, 1983, at 25. Local radio and television stations, as well as CBS News, broadcast news reports on the story.
13. The formal charge was that the respondents engaged in "unfair methods of competition in violation of § 5 of the *FTC Act*" but the case was treated throughout as being subject to *Sherman Act* standards. Unlike the Justice Department and private plaintiffs, the FTC has no direct authority to enforce the *Sherman Act*.
14. *Eastern R.R Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).
15. 107 F.T.C. 510, 561 (1986).
16. 856 F. 2d 226, 248 (1988).
17. 58 U.S.L.W. at 4150-51.
18. 58 U.S.L.W. at 4152.
19. *United States* v. *National Assn. of Securities Dealers*, 418 U.S. 602 (1974) (White, J. dissenting).
20. Thus for example in the 1984 *Jefferson Parish Hospital* case, note 7 supra, in which the Court was reconsidering whether to use a *per se* tie-in rule, the Court split generally on liberal-conservative lines. Justice Stevens was joined by Brennan, White, Marshall, and Blackman, JJ. in maintaining the *per se* rule; Justice O'Connor concurred and was joined by Burger, C.J., and Powell and Rehnquist, JJ., in urging rule of reason treatment.

EC ANTITRUST LAW UPDATE

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EC's 18th Competition Report Released

The *European Community's 18th Competition Report* (1988) was issued recently and attests to a busy year in 1988 for the EC Commission. In

1988, the Commission adopted 25 decisions on substantive matters, closed 36 procedures by administrative letter and settled 419 cases without formal decisions. The *Report* reviews a number of efforts undertaken during the report period to strengthen competition policy and market-opening policy to complete the 1992 single internal market. For instance, block-exemption regulations were adopted by the Commission for service and distribution franchise agreements, "know-how" licencing agreements, and for a number of arrangements relating to air transport. With respect to "State aid", the *Report* noted that a more diligent effort could be expected in the future to ensure Member state compliance with the notification rules and to ensure that illegal aid or aid incompatible with the common market would be repaid. The Commission's first survey of State aids indicated that during the 1981-86 period, 82 billion ECU or 3 percent of GDP per annum was given in national aid in the Community (excluding Spain and Portugal). The *Report* also looked at merger trends and concluded that the main motive for the acceleration of merger activities in 1988, particularly minority acquisitions, was due to efforts to strengthen market position. Mergers increased by 34%, minority acquisitions by 76% and joint ventures by 36%.[1]

EC Competition Rules to Apply to Banks

In an effort to facilitate completion of the single market in 1992, the European Community Commission has taken action to apply EC competition rules to the banking sector. The Competition Commissioner, Sir Leon Brittan, recently warned European banks that agreements fixing interest rates should be avoided as this type of agreement is forbidden under Article 85(1) of the *Treaty of Rome*. Agreements fixing interest rates are considered to have an effect on competition similar to that of cartels and, because interest on loans contribute substantially to bank profits, it is felt that these agreements should be closely scrutinized. The EC Commission has also in the past criticized anticompetitive European bank agreements dealing with commissions imposed for services.[2]

New EC Court

The twelve members of a new European Community Court of First Instance have recently been sworn in to deal with 140 cases already allotted to this junior court of the Court of Justice. Hearings are expected to commence early in 1990. The new court will deal with EC staff disputes and hear appeals against the European Commission's competition decisions, however, there will be no immediate shift of dumping cases to the new court and responsibility for dealing with competition references from national courts will also remain with the European Court. The severe delays resulting from the Court of Justice's heavy caseload has been an issue since as early as 1978. To address the problem, provisions dealing with the new court were added to the *Single European Act* which was ratified and entered into force in July, 1987. Formal proposals for a new Court of First Instance were thereafter adopted by the Council of Ministers in 1988. The new court's rules and procedures have yet to be finalized.[3]

Fines for Bid-rigging Offences to Increase

Authorities these days appear to be more willing to use the full extent of their powers to deal with alleged bid-rigging infractions and appear to be more willing to levy severe fines as opposed to reprimands as was the case previously. For instance, the largest fine ever levied by the French Competition Council, FF166 million ($26.8 million), was imposed on 71 public works contractors for rigging 80 tenders for road building and repairs between 1984 and 1986. The Council has the power to issue fines of up to 5% of a company's sales and it is expected that the fines levied in this case will wipe out profits for many of the companies involved. As well, in order to discourage future practices of this nature, the Council has ordered that the outcome of the case be published in the French press.[4]

Settlement Reached with Ford and Coca-Cola

On the European front, the European Community Commission has recently settled its competition differences with the Ford Motor Company and the Coca-Cola Export Corporation (CCEC) in two separate instances of alleged competition infractions by accepting undertakings from the parties in each case. In Ford's situation, the conflict involved the company's reliance on its exclusive design rights on its auto panels. According to the EC Commission, Ford's design rights were being used to circumvent a 1985 regulation requiring auto dealerships to stock and sell third party spare parts of similar quality. While a recent amendment to the United Kingdom's *Copyright, Designs, and Patents Act 1988* now makes it impossible to protect auto panels by copyright, holders of existing registered designs are allowed protection for the remainder of their 15-year protection period. Following negotiations with the Commission's Directorate General IV, however, Ford has agreed to voluntarily reduce its intellectual property rights and rely on an exclusivity period of a maximum of up to 5 years.

In CCEC's case, the Commission made allegations that CCEC had abused its dominant position in the Italian cola drinks market. In response to this allegation CCEC agreed to revise its agreements with large distributors and to refrain from the practice of granting fidelity rebates. CCEC agreements with large distributors will also no longer include exclusivity provisions, target rebates or tying provisions and CCEC has also undertaken not to engage in other unilateral restrictive practices having an anti-competitive effect on the cola industry.[5]

JAPANESE ANTITRUST LAW UPDATE

Bid-rigging Fine Imposed

Also on the topic of bid-rigging, 140 Japanese construction companies which were accused of bid-rigging with respect to a U.S. Navy construction project valued at $134.2 million in Yokasuka, Japan, have recently agreed to pay $34.8 million in compensation in response to demands made by the U.S. Department of Justice. The U.S. has estimated that it lost as much as $77 million as a result of the unfair bids. (Japan's exclusive bidding system for construction projects has been criticized by the U.S. government as a barrier to entry by foreign firms into Japan's domestic market, especially for public works projects, and has been a source of friction between the two trading partners for years).[6]

U.S. Hoping to Gain Access to Japanese Legal System

Two days of private discussions were recently held between members of the U.S. and Japanese Bar Associations to discuss U.S. access to the Japanese legal system. In 1955, to end the dominance of American firms in international law in Japan that occurred after World War II, foreign lawyers were forbidden to work in Japan (except as trainees in Japanese law firms). Although in April, 1987, foreign lawyers were again permitted to practice in Japan, U.S. lawyers do not feel that the Japanese legal system has opened up sufficiently. Presently, foreign firms are not allowed to use their own well-known tradenames and they are barred from arbitration proceedings in Japan. The Japanese bar fears an increase in the number of lawsuits and a shift from a mediative to an adversarial method of dispute resolution while the American bar asserts that the barriers are preventing foreign corporations from receiving first-rate legal services. The issue of U.S. access to the Japanese system has been identified as a high trade priority by the U.S. government.[7]

U.S. Calling for Stricter Enforcement of Japanese Anti-Monopoly Law

In a visit to Japan last October, U.S. Trade Representative Carla Hills called for tougher enforcement of Japan's anti-monopoly laws and criticized Japan's unfair business practices which have caused frustration in the U.S. As well, the U.S. asked Japan to revise its Anti-Monopoly Law

at the annual meeting between representatives of the Japan Fair Trade Commission, the U.S. Federal Trade Commission, and the U.S. Department of Justice last December.

Since that time, in an effort to promote imports in order to reduce its $64 billion global trade surplus and to appease major trading partners, particularly the U.S., the Japanese government ministries and corporate executive organizations have called for stricter enforcement of anti-monopoly laws and increased efforts to close price gaps between domestic and imported goods. For instance, the Japanese government's advisory panel on public regulation has drafted proposals designed to ensure fair and open market competition, particularly in the distribution area. The Ministry of International Trade and Industry (MITI) has stated that the Japanese pricing system, which involves the rigid adherence by retailers to prices set by manufacturers, inhibits downward price adjustments and comes "dangerously close" to violating Article 19 of Japan's anti-monopoly laws.

The Japan Association of Corporate Executives headed by the President of Nissan Motors Corporation, Takashi Ishihara, has suggested that the government should attempt to clarify and relax the systems, business practices and 10,000 regulations currently in existence. It also supports the establishment of a private-sector monitoring committee to promote competition in an effort to eliminate price gaps. (The association also indicated that it will ask Japanese companies to sell their products overseas at prices equal to or higher than those for the same products sold in Japan)

A recent price survey released by MITI has found that prices of imported goods are much higher in Tokyo than in other major cities around the world but MITI has noted that a contributing factor is very high land prices in Japan which make the maintenance of offices and warehouses a very costly proposition.[8]

Notes

1. Leonard Hawkes, Stanbrook and Hooper, Brussels, "18 Report on EC Competition Policy", (January 1990) *18 International Business Lawyer*, 11.
2. *AT&T R.R.*, December 7, 1989, p. 807.
3. 57 *AT&T R.R.*, October 19, 1989, p. 539.
4. *AT&T R.R.*, November 23, 1989, p. 733.
5. 58 *AT&T R.R.*, Feb. 1, 1990, pp. 197 and 199.
6. *AT&T R.R.*, Nov. 23, 1989, p. 732.
7. 58 *AT&T R.R.*, Feb. 1, 1990, p. 195.
8. *AT&TR.R.*, October 19, 1989, pp. 539-41, October 26, 1989, p. 575, November 30, 1989, p. 767, December 21, 1989, p. 862.