FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. SUPREME COURT CONSIDERS EXTRATERRITORIALITY

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Hartford Fire Insurance Co. v. *State of California* currently before the United States Supreme Court, is no ordinary case even by American standards. Nineteen State Attorneys General have used the matter to call into question the whole business of reinsurance as practiced in London and elsewhere. In fact, the case raises critical questions about both (i) the extent of the U.S. *McCarran-Ferguson Act* antitrust exemption and, (ii) the jurisdiction of U.S. courts to impose U.S. antitrust rules on overseas actors far removed from American shores. In addition, the *Hartford Insurance* case will also tell us a lot about the United States and the special role that competition plays in the American system.

The American courts have treated the *Sherman Act*, our basic anti-conspiracy statute, as "the Magna Carta of free enterprise", the guarantor of entrepreneurial freedom and protection from economic bullying. Indeed, many foreigners have regarded U.S. antitrust law as some American obsession under which "competition", however loosely defined, would sweep aside reason, order and good government in the name of "consumer sovereignty" or "economic liberty".

The Conflict

American and foreign perspectives on competition law have collided with each other in the *Hartford Insurance* case. On one side are the insurers, including the London reinsurers, who argue that they are just joint venturer partners who must confer regularly about risks and returns on an open and honest basis. On the other side are the elected representatives of many American insureds, the State Attorneys General, who argue that a small but powerful group far from Los Angeles and Louisville should not be able to "conspire" with respect to whether coverage will be offered in the American insurance markets or not.

In early 1985, the basic reality was that the insurance industry was suffering heavy losses on U.S. liability coverages, apparently in large part because the insurers had not anticipated that American judges and jurors would impose such open-ended liability verdicts on the same scale that was seen. People and enterprises in trouble can generally see the need for change much more easily than those who are comfortably profitable; and the stark reality was that North American liability insurers were in trouble. It was their financial trouble that led to the set of circumstances challenged in *Hartford Insurance*.

At the outset of this matter, the primary insurers,

Hartford Fire Insurance, Aetna, etc. were suffering very high losses. The insurance, Commercial General Liability (CGC), involved insuring business enterprises against risks of liability to third parties. Since the primary insurers were suffering, so were the reinsurers who, by the nature of their business, were obliged to pick up proportions of the losses.

In response to this bleak world, the primary insurers allegedly decided the solution to the problem was to switch the basis for CGL insurance from "occurrence" to "claims made" insurance, and to exclude "pollution" and "seepage" coverage altogether. The "claims made" feature meant that an insurer would only be liable for claims made during the term of the policy, thus eliminating "long tail" claims filed years after the expiration of insurance coverage.

The primary insurers then allegedly turned to the reinsurers who share the big CGL risks, in an effort to urge the latter companies to switch from "occurrence" to "claims made" coverage. The reinsurers, many of whom were in London, apparently were attracted to the proposed change with its "tail shortening" and "risk narrowing" features; and they allegedly agreed that they would only provide "claims made" coverage to U.S. primary insurers. The reinsurers' agreement to the proposal was alleged to be a "boycott" designed to prevent other U.S. primary insurers from offering "long tail" and "pollution included" coverage.

It is important to note that the *Hartford Insurance* case has never been tried and nothing has been proven anywhere. Instead, the matter has passed up through the Ninth Circuit Court of Appeals en route to the U.S. Supreme Court on the strength of the plaintiff's allegations. Basically, the appellate courts have been asked to determine whether the States have a cause of action under the U.S. antitrust laws if the plaintiffs' claims were ultimately accepted in a court of law.

Assuming that the plaintiffs succeed in the U.S. Supreme Court, the case then would go back to the District Court where a jury of 12 average citizens would be charged with determining the worth of the "conspiracy" and "boycott" allegations.

The Basic Reality

Insurance is a complicated business at the heart of which is the concept of risk-sharing. The bigger the risk, the more participants and coordination are required to manage the process.

In the insurance area, the U.S. Congress recognized that unalloyed antitrust was probably a bad idea. Accordingly, it passed the *McCarran-Ferguson Act* of 1945 to allow cooperation among insurers so long as their activities constituted "the business of insurance", was "regulated by state law" and did not constitute "any agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation".[1]

The *Hartford Insurance* case addresses the meaning of the exempting concepts and whether they apply to overseas reinsurers. In this respect, the case can be divided into three sets of critical issues which were the focal points of oral argument before the U.S. Supreme Court:

1. Does the fact that the London reinsurers were indisputably "not regulated by the states law" require that all participants be deprived of the statutory antitrust exemption?
2. Is it an exercise of "boycott, coercion or intimidation" for (a) a small group of primary insurers to argue to reinsurers that coverages are too broad and (b) for the reinsurers to agree to the primary insurers' recommended changes and

apply them to all primary insurers?

3. Is it improper for a U.S. court to evaluate the legality, under American law, of an alleged agreement by foreign partners not to reinsure any (a) long tail coverage, or (b) pollution or seepage risks in the United States?

1. The Exemption Forfeiture Issue

Under American antitrust law, an exempt organization such as a labour union or an agricultural cooperative will often lose its immunity from antitrust laws if it is found to have conspired with a non-exempt organization such as a competing enterprise to unreasonably suppress competition. This principle was followed in the *Hartford Insurance* case by the Ninth Circuit Court of Appeals which noted:

> [A] state does not have the power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state. . . . . *A fortiori*, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states. . . . . Consequently, *McCarran-Ferguson Act* immunity does not attach to the foreign defendants . . . .
>
> [T]he primary insurers, the American reinsurers, and the American insurance brokers . . . are subject to regulation by the states and therefore prima facie immune. . . . . Membership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable. [citing cases] . . . . The domestic defendants offer no rebuttal to these authorities. We conclude that the domestic defendants' immunity was lost when they conspired with the foreign defendants.

This sweeping statement would mean that use of the London reinsurance market (or any other overseas reinsurance or retrocessional insurance market for that matter) would automatically deprive all American insurers of the statutory antitrust immunity applicable to the cooperation among themselves. Such a result, one might think, would make U.S. primary insurers more reluctant to use the London market if they could get reasonable reinsurance within the United States. Moreover, reinsurance in London was a significant aspect of the U.S. insurance market in 1945 when the *McCarran Act* was passed, and it seems unlikely that such a dramatic immunity-narrowing idea was intended by the Congress.

In any event, the U.S. Solicitor General (who supported the States on the "boycott" and "comity" points) abandoned them on the exemption issue. In fact, the Solicitor General's brief stated that:

> By its terms the *McCarran-Ferguson Act* exempts from the federal antitrust laws "the business of insurance to the extent that such business is . . . regulated by State law." 15 U.S.C. 1012(b). The language of the statute focuses on the nature of the activity at issue — whether it is "the business of insurance"— rather than the nature of the entity at issue. . . . .
>
> [W]hen primary insurers merely agree on the insurance rates and forms that they plan to offer, they are engaged in "the business of insurance." So long as this activity is regulated by the States, it is immune from the federal antitrust laws under McCarran-Ferguson. If primary insurers consult with domestic or foreign reinsurers to determine whether the reinsurers would be willing to provide reinsurance under the proposed forms or rates, that interaction does not, without more, strip the primary insurers of antitrust immunity. . . . . Accordingly, the court of appeals was wrong to conclude that the domestic insurers lose their antitrust immunity merely by including foreign reinsurers in agreements that would otherwise be immune.

At the oral argument stage, a number of Justices raised questions on this issue, noting some language in an earlier case (*Group Life & Health Insurance Co.* v. *Royal Drug Co.*[2]) where the Supreme Court had held that the *McCarran-Ferguson Act* did not protect reimbursement agreements between an

exempt insurer and a drug company. Counsel for the domestic reinsurers responded, with a reference to the Solicitor General's brief, and stressed that this case, unlike *Royal Drug*, clearly involved "the business of insurance" which, overall, is regulated by state law even if some of the participants are not directly regulated.

The Solicitor General's position seems more likely to prevail in the end; otherwise the Supreme Court would have repealed the *McCarran-Ferguson Act* for the participants in a good many major insurance transactions.

2. The Boycott Question

In practical terms, this matter reflects the heart of the case because it concerns the fine line between "negotiation" and "coercion". The Ninth Circuit Court of Appeals found that the "boycott" exception was satisfied and, therefore, denied *McCarran-Ferguson* immunity:

> The *Sherman Act* applies to persons or companies in the insurance business if they agreed to a boycott or engaged in acts of boycott or coercion. The allegations of the plaintiffs, here accepted as true, charge agreements by the defendants to boycott nonconforming insurers and acts of boycott and coercion. No immunity for such agreements and acts exists.
>
> The defendants' position is that they could confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable. But they are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks.

The primary insurers did not try to duck this issue in their briefs to the Supreme Court. Rather, they stressed that,

> ...these allegations involve precisely the kind of discussions and agreements that Congress recognized are essential to the business of insurance and fall within the very heart of the McCarran immunity. Historically, and of necessity, primary insurers and reinsurers confer and agree upon the terms of primary insurance for which reinsurers are willing to issue reinsurance. . . . . And because the placement of reinsurance typically involves a number of reinsurers, standardized primary insurance forms acceptable to large groups of reinsurers are vital to the efficient operation of the insurance market.

According to the defendants, these arrangements are nothing but "an agreement among defendant primary insurers and reinsurers based on the business judgment and economic self-interest of each company as to acceptable terms and conditions of insurance." As such, the defendants argued that "coercion" simply was not present.

The States took a very different view in their argument:

> [We] do not allege that voluntary agreements on fixed terms of coverage constitute a boycott. Conspirators, however, also acted to insure that non-conspiring competitors adhered to the fixed terms. To that end, defendants took a series of coercive steps, including the denial of reinsurance for CGL and property insurance and withdrawal of statistical and rate-making support for excluded products. This enforcement conduct . . . is a classic boycott.

The Solicitor General joined the States in this position, stressing that the primary insurer defendants "allegedly agreed to force insurance companies that were <u>not</u> parties to the agreements to accept terms that those companies did not wish to adopt by denying them access to reinsurance

except on those terms. In other words, Hartford and its allies allegedly conspired to prevent Hartford's competitors from offering the type of insurance that Hartford did not want to offer."

The opposing positions of the parties led to a barrage of questions during oral argument. In a particularly illuminating exchange, Justice Scalia (a philosophic conservative who is frequently skeptical about antitrust) said that he could understand why the primary insurance companies have an interest in getting reinsurers to agree to reinsure certain kinds of insurance and to use certain kinds of forms. "But why," he asked, "is it important for insurance companies to have reinsurers agree not to reinsure certain kinds of insurance and certain kinds of forms?" Counsel responded that the American insurers had a necessary interest in the solvency of the reinsurers. A few minutes later, Justice Scalia commented on the question of whether the defendant primary insurers had possibly "coerced" the Lloyds reinsurers when he stated: "That contention was not made . . . because, on its face, it would be laughable."

At the end of the day, the "boycott" part of the case was likely to turn on whether various Justices who did not ask any questions believed that (i) the primary insurer defendants (a small part of the American primary insurance industry) were mere advocates and (ii) the London reinsurers were simply independent consortia making business judgments based on the newly emerged evidence on the North American CGL market.

Of course, the "boycott" immunity question should not be equated with antitrust liability. A Supreme Court majority might conclude that the "boycott" threshold was satisfied and, hence, there would be no *McCarran-Ferguson* immunity, but then stress that the plaintiffs would still have to show real injury to the competitive insurance markets before they could establish *Sherman Act* liability under the so-called "rule of reason" for unreasonably restraining competition by any agreed changes in insurance forms and coverages. The fact that the primary insurers who were charged with conspiracy represent only a small share of the U.S. primary insurance CGL market would dictate against liability under the fact-intensive "rule of reason". Unfortunately for the insurers, the key factual determinations on liability might well be made by a jury of confused citizens struggling to understand how insurance and reinsurance markets work.

3. The International "Jurisdiction" and "Comity" Questions

The Supreme Court granted certiorari in order to consider this fundamental question:

> Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws, in the light of this Court's teachings and contemporary understanding of international law, when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

This is the first time that the Supreme Court has squarely faced a contentious extraterritorial antitrust jurisdiction question since *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*[3] where it had upheld U.S. jurisdiction over a U.S. company's Canadian subsidiary found to have restrained the export sales of another American company. However, much has happened since 1962, which is why the Supreme Court's *Hartford Insurance* decision is awaited with so much anticipation and concern in many foreign capitals.

Five key post-1962 developments should be mentioned. First, the Ninth Circuit Court of Appeals established the celebrated *Timberlane* doctrine, under which a U.S. court weighs a set of traditional comity factors in determining whether to exercise U.S. antitrust jurisdiction over an overseas dispute.[4] Secondly, Congress has enacted the *Foreign Trade Antitrust Improvements Act* of 1982[5] which is designed to narrow U.S. antitrust jurisdiction over overseas activities related to exports. Thirdly, a number of leading friendly governments including the United Kingdom, Canada and Australia have enacted so-called "blocking" and "clawback" legislation designed to bar or at least to complicate extraterritorial enforcement of U.S. antitrust laws. Fourth, many foreign countries have enacted (or greatly enhanced) antitrust rules and enforcement. Fifth, commercial markets for goods and services have become a great deal more international which increases the prospects for adverse competitive and possible assertions of antitrust jurisdiction in different countries. Many of these changes were discussed in the Hartford Insurance briefs filed in the Supreme Court on behalf of the overseas reinsurers as well as the governments of Canada and the United Kingdom as *amicii.*

The Court of Appeals had determined the *Foreign Trade Antitrust Improvements Act* of 1982 reflected a Congressional desire to have broad antitrust subject matter jurisdiction in non-export cases and, thus, the only issue left was whether comity considerations would cause the U.S. court to decline to exercise such jurisdiction. The court then considered the celebrated *Timberlane* test which lists seven factors to be considered in deciding whether a U.S. court should exercise jurisdiction in an antitrust case:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States compared with conduct abroad.[6]

After reviewing these factors, the Court of Appeals said,

> A single factor points towards abstention: the conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance. Every other factor — nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness — points to the appropriateness of exercising jurisdiction. . . . . No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it . . . . The comity factors of *Timberlane* indicate that the court's jurisdiction of the subject matter that exists must be exercised.

In response, the reinsurer defendants emphasized the long history of self-regulation under broad parliamentary oversight (embodied in the various *Lloyds Acts*) that characterizes the London reinsurance market and stressed the intrusive injunctions which the States were seeking:

> Disregarding the unique blend of law, custom and policy through which the London reinsurance market operates and the British Government regulates, plaintiffs seek through this action to impose on [reinsurance defendants] a program to be crafted in San Francisco for the underwriting of reinsurance in London. . . . These remedies threaten to undermine the unique risk-spreading mechanism of the London marketplace, which permits many large and novel risks to be presented for insurance and reinsurance there.

On the other side, the Solicitor General (supporting the States) took a broad view of U.S. jurisdiction

and a narrow view of comity as a source of restraint on the U.S. courts. Comity should be a basis for denying jurisdiction only where "a true conflict [exists] between domestic and foreign law." The Solicitor General's brief stated: "We submit that a conflict for comity purposes exists if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government."[7]

The British Government takes the precisely opposite view: "That argument is erroneous because it attempts to impose the standards of the defense of foreign sovereign compulsion on the analysis of the international comity issue." More broadly, the British Government argued that:

> This case raises important questions relating to mutual respect between close allies and deference to principles of international law and comity. . . . The British Government urges the Court . . . to rule that, consistent with the demands of international law and comity, the U.S. courts should not exercise subject matter jurisdiction over those antitrust claims in this case which are directed against business activity being conducted in London by the British insurance and reinsurance industry for a legitimate purpose in a manner consistent with the British Government's regulatory and competition regime.

Surprisingly little of the oral argument was devoted to the jurisdiction and comity questions. In fact, counsel for the London reinsurers was asked very few questions at all. The most precise came from Justice Scalia who wondered: "Why couldn't we just say that the *Sherman Act* applies fully but that [the foreign reinsurers' conduct] is not an unreasonable restraint of trade?" Counsel replied, "Some might not be comfortable with that disposition on this record." (Presumably, she was talking about the risk of jury determinations on the "reasonableness" issue.)

The Deputy Solicitor General argued briefly that, "Comity is not an invitation to other nations to determine which of our laws they like or dislike, and it's not a device for ceding to other nations the determination of which of our laws apply to them." No Justice asked him any question on this subject during his oral argument.

In fact, *Hartford Insurance* is not a particularly good case for testing jurisdiction and comity principles. Counsel for the States emphasized the States' allegations that "50% of Lloyds' business is done in North America." Moreover, the coverage changes at issue were precisely designed for the North American market. Thus, the challenged activity seemed to fall squarely within the concept of having a "direct, substantial and reasonably foreseeable" effect on the U.S. market which is the type of test that the Congress had developed to define the boundary of U.S. jurisdiction in the *Antitrust Improvements Act* of 1982.

Under these circumstances, the Supreme Court is likely to write an opinion which re-echoes the longstanding "effects doctrine", thus allowing U.S. courts to exercise antitrust jurisdiction over foreign activities by foreign actors where there is a significant effect on U.S. internal and import markets. How much room the Court allows for comity based on governmental conflicts will be significant because the next case may be a lot closer on the "effects" issues.

Conclusion

The Supreme Court's decision in the *Hartford Insurance* case is likely to set an important standard

for permissible (and impermissible) communications among insurers and reinsurers under the *McCarran-Ferguson Act*.

Whatever insight the decision offers on international jurisdiction and comity rules will be important for future cases in the lower courts. At the same time, however, we are probably not going to have to wait for another 30 years before the Supreme Court revisits these issues. The international business world is simply becoming too rapid, too interdependent and too contentious to allow prolonged judicial silence from America's highest court.

* Copyright Donald I. Baker, 1993.
1 15 U.S.C. §1012-13.
2 440 U.S. 205 (1979).
3 370 U.S. 690 (1962).
4 *Timberlane Lumber Co.* v. *Bank of America.* 49 F.2d 597 (CA 9 1976).
5 15 U.S.C. §6(a).
6 *Supra,* note 4 at 614.
7 The Solicitor General does explain that comity considerations may be broader at the relief stage. Therefore, "if [the States] prevail on the merits, the district court, applying comity principles, may well confine any relief awarded to monetary damages", rather than to enter injunctions in the operation of the foreign reinsurance markets.

AUSTRALIAN NEWSLETTER

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Developments in Australian competition policy are extensive and fast moving. In fact, as this note is being written there is a federal election campaign raging and the opposition parties have just released a new competition policy statement. Although similar to the government's existing competition law, the statement offers some new approaches including:

1. a strong commitment to take action against unions when they are involved in anti-competitive conduct;

2. a strong commitment to expose all government business enterprises, both federal and state (provincial), to the *Trade Practices Act* and the Trade Practices Committee to monitor the activities of such bodies especially those that are natural monopolies; and

3. to create a new body called the Competition Commission which will encompass the Trade Practices Commission, enforce the new law and be provided with increased funding.

For its own part, on January 21, 1993, the government brought into effect amendments which substantially change the merger law by increasing fines, introducing the standard of unconscionability to determine whether transactions should be prohibited and making undertakings to the TPC legally enforceable by the TPC. The government has also hinted that it will institute mandatory pre-notification procedures should it win re-election.

In addition, the government has created a committee to look at competition policy in general. This body, called the National Competition Policy Review Committee, has been examining competition policy defined broadly and obtaining submissions from interested parties. The committee is scheduled to report to the government in May of this year and has just issued a background paper designed to raise issues for discussion including the content, scope and implementation of a national competition policy

The main focus of the review is to examine competition policy in terms of its reach, structural adjustment requirements and issues such as natural monopolies. It is expected that whoever is elected will move to implement the recommendations of the committee.

Litigation

It is an extremely litigious time for competition policy in Australia. There are some very interesting and unusual matters.

Davids/QIW case

This is an unusual case involving the intervention of the federal Attorney General in a matter where the Trade Practices Commission declined to move and relates to a proposed merger of two grocery wholesalers in the State of Queensland. The Commission took the view that there would be no breach of the dominance law existing at the time since the market was probably the wider grocery market and, if that was the case, the proposed merger would not result in dominance because there were so many large retailers already. Alternatively, even if there was a specific grocery wholesaling market there would still be no dominance due to the upstream and downstream effects of large retailers.

The target company took exception to the Commission's view and attempted to institute its own proceedings for a declaration that the proposed merger violated competition law. Since there is no provision for this type of action, however, the federal Attorney General was urged to become involved and the matter is now in court and the parties are awaiting the decision. Although the applicable standard has now changed from dominance to substantial lessening of competition, this case will still be judged on the dominance criteria. One interesting side light in this whole debate was the view of the judge at first instance that the remedy of divestiture is impractical in a merger case and hence an interim injunction was an appropriate remedy at that time.

The Santos/Segasco case

In this case, Santos, a major natural gas producer, wished to acquire the only other significant natural gas producer in the market. Before proceeding, Santos came to the Commission on a confidential basis but insisted on extremely limited market place enquiries. Based on its initial assessment, the Trade Practices Commission gave a heavily qualified view indicating it would not intervene based on its limited information. Santos then made its bid for Segasco and after further enquiries the Commission reversed its tentative approval and opposed the merger. At trial, the court ruled that it should not interfere with the securities market and that the Commission should rely upon divestiture. This ruling was later upheld in the full Court and the matter is now proceeding towards a full trial. During these legal proceedings, Santos had withdrawn its formal Part A offer under companies law but still indicated it was "interested" in the acquisition. As the formal offer had been withdrawn, however, the Commission applied to court for the case to be discontinued. The court refused this application on the basis that it felt that there was still a live issue since Santos had indicated it was still "interested" in the acquisition. At present the case is scheduled to be heard in June of this year.

Gillette/Wilkinson Sword

As in many other jurisdictions, the Trade Practices Commission has taken action against the Gillette/ Wilkinson Sword merger. While the matter is in court at present, Gillette has challenged the validity of the Commission's power to seek information from it based on jurisdictional arguments and has also launched a constitutional challenge to the order for the application seeking divestiture. In this respect, there is a provision in the Australian Constitution that the government cannot acquire property without just compensation and Gillette is arguing that to seek divestiture is tantamount to acquiring property and therefore, there must be just compensation.

Non merger litigation

The Commission has the following cases in court at various stages of action.

- TNT and Mayne Nickless: allegations of price fixing in relation to express freight. This is a major case with enormous ramifications and has been heavily contested by the parties.
- Sims Metal and others: a price fixing case in scrapped metal.
- Toyota dealers in Western Australia: a price fixing and resale price maintenance case in relation to new Toyota cars.
- Pioneer Concrete: a predatory pricing and misuse of market power case in Queensland in the cement industry.
- Tourism operators in Cairns: a boycott and price fixing case in relation to tourism operators who pressured others to stop offering discounts.
- Health Funds in Tasmania: an alleged agreement between health fund operators in Tasmania not to offer discounts to the Department of Veterans Affairs where that Department was effectively privatizing its client base.

Another interesting case in which the Commission is involved is the battle between Australian Telecom and a new operator, Optus, that has been allowed into the telecommunications industry by the government. Both parties engaged in extensive comparative advertising and the Commission is already in court against Telecom for its alleged breaches of the misleading advertising provisions. Investigations into the Optus advertising campaign are proceeding.

Broadcasting services

In the dying days of the current Parliament, the Opposition forced amendments to the *Broadcasting Services Act*. These changes have meant that any application for a Pay TV licence has had to be vetted by the Trade Practices Commission. In some cases, if the Commission opposes the granting of a licence on competition grounds and there is no countervailing public benefit, the licence is not to be issued to the applicant.

Fees

The Government has introduced fees for formal applications for authorization and notifications under the Act. These fees are:

• Merger applications	AU $15,000
• Non Merger applications	AU $7,500
• Notifications	AU $2,500

INTERNATIONAL COMPETITION LAW

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

AUSTRALIA

Australia Adopts New Merger Test and Increases Penalties

Amendments to the *Australian Trade Practices Act* which came into force on January 23, 1993, have far reaching consequences for those contemplating mergers and acquisitions in Australia.

Until January 23, 1993, the antitrust test for mergers and acquisitions was the "dominance" test similar to that applying in the European Community. That test still applies in relation to mergers effected prior to January 23, 1993.

Mergers effected on or after that date are to be assessed under a new test. Section 50(1) now prescribes a "substantial lessening of competition in a market" test similar to that which applies in Canada and the USA.

Acquisitions which have the likely effect of substantially lessening competition in a market are prohibited unless authorized by the Trade Practices Commission.

The Act sets out a non-exclusive list of matters which "must be taken into account" in determining whether an acquisition is likely to lessen competition substantially in a market. The factors are as follows: (1) the actual and potential level of import competition in the market; (2) barriers to entry; (3) the level of concentration in the market; (4) the degree of countervailing power in the market; (5) the likelihood that significant and sustainably higher prices or profit margins would result; (6) the extent to which substitutes are, or are likely to be, available; (7) the "dynamic characteristics" of the market, including growth, innovation and product differentiation; (7) the likelihood that a "vigorous and effective" competitor would be removed from the market; and (8) the nature and extent of vertical integration in the market.

Similar provisions apply in relation to overseas acquisitions which result in changes in control over a corporation operating in Australia.

At the same time as the new merger test was adopted, the penalties for breach of the *Trade Practices Act*, including in relation to mergers, increased dramatically. Penalties in relation to corporations increased from AU$250,000 to AU$10 million, and in relation to individuals from AU$50,000 to AU$500,000.

DENMARK

Danish Public Railways

Under section 15 of the *Competition Act*, the Competition Council can send a published notice seeking information on restrictions of competition. Such a notice has been forwarded to the Danish Public Railways based on a complaint from a private ferry operator between Denmark and Germany, asking the Railways to set up separate accounts for the harbour in Gedser Denmark. The complaint was based on excessive fees charged by the Railways for using the harbour.

Legal Profession under Scrutiny

The Competition Council has analyzed competition within a number of professions, including the legal profession, and will now start negotiations with the Danish Bar concerning a number of alleged anti-competitive rules concerning the legal profession. A complaint has been filed by a private debt collection agency, alleging that the Danish Bar rules make it impossible for debt collecting agencies to enter the market.

EUROPEAN COMMUNITIES

Distribution of Tickets

The Commission has held that the ticket distribution system as applied during the 1990 World Cup in Italy violated Art. 85(1) EEC. By granting one tour operator an exclusive right to supply stadium entrance tickets for the purpose of putting together package tours, others were unable to offer such tours.

Another Commission decision concerned the "recommendation" adopted by the International Union of Railways as regards travel agents authorized to sell train tickets. According to the Commission, the control of the appointment of travel agents, the rules as to the commission granted to them, as well as the requirement that they should not favour competing means of transport were contrary to Art. 85(1) EEC.

Procedural Cases

The Court of First Instance has held that an action against a Commission decision can only be brought if that decision affects the legal position of the addressee, and only against the verdict (decision point).

By rejecting a request to adopt interim measures obliging BMW to supply motorcars to Automec or to permit Automec to use the BMW trademark, the Commission did not infringe Community law, according to the CFI.

The CFI rejected a request of some of the defendants in the Cement-case to give them full access to the file as well as the text of the Statement of Objections sent to the other defendants. It held that the refusal of the Commission did not have immediate and irreversible effects.

FRANCE

The Ordinance of December 1, 1986, relating to the freedom of prices and competition has been modified by Act No. 91-1442 of December 31, 1992, "relating to the time limits for payments between undertakings". The new provisions concern the motivation and the criteria to be applied in the determination of fines to be imposed for anti-competitive practices, the obligations of undertakings as to the content of invoices and general conditions of sale, refusals to sell and time limits for payments.

By an order of January 6, 1993, the Minister of Economy and the Minister of Industry authorized the acquisition of Parker Ltd. (Parker) by The Gillette Company (Gillette). In France Gillette already owned Waterman. Together Gillette and Parker will represent 42.5% of the French market in writing instruments. The authorization is subject to an undertaking by the parties to maintain the activity of the Waterman business in France in order to assure the industrial and commercial development of the Waterman brand.

In its December 8, 1992, decision No. 92-D-67 "Société APPLICAM", the Conseil de la concurrance

examined whether the use by a company of its industrial property rights resulting from a patent may be said to be an abuse of dominant position.

GERMANY

Merger Control

A market share of 20% is not sufficient by itself to block a merger even if the strongest competitors only have shares of 5% or less. In general, the fact that the competitors are much smaller may indicate market dominance, but this rule is less important if the leading company's share is not so high in absolute terms (Bundesgerichtshof decision, April 28, 1992).

The issue of the relevant geographic market was also addressed by the Berlin Court of Appeal (Kammergericht) in a June 28, 1991, decision. For the purposes of German merger control, this market will never be larger than Germany. On the basis of the effects doctrine laid down in section 98(2) of the German *Act Against Restraints of Competition*, competition in foreign markets will only be taken into account to the extent that foreign companies sell in Germany or appear to be potential competitors in this market.

Discrimination by Art Fair Organizer

The Frankfurt/Main Court of Appeal held that since galleries had no adequate and reasonable opportunities to go anywhere else, the organizers of the Frankfurt modern art fair were under an obligation not to discriminate. A gallery obtained an injunction because the refusal to admit it to the fair had not been explained sufficiently (decision of March 17, 1992).

IRELAND

EC Competition Law Invoked in Irish "Cold War"

In an important judgment delivered on May 28, 1992, the Irish High Court found to be compatible with EC competition rules agreements between H.B. Ice Cream Ltd (H.B.) and retailers on the Irish market. H.B. is an ice-cream manufacturer dominant in this market. According to the agreements, H.B. supplied freezer cabinets to the retailers, free of charge, for the storage and display of H.B. products only ("freezer exclusivity"). Most retail outlets had room for one cabinet only, or were unwilling to install a second.

When retailers began stocking the products of Masterfoods Limited t/a Mars (Mars) in H.B. cabinets, H.B. sought and was granted a restraining injunction. The significance of the judgment lies in the detailed analysis and subsequent rejection by the Court of Mars' argument that the freezer exclusivity clause was prohibited by EC competition rules.

The Court held that the clause was not an anti-competitive agreement prohibited by Art. 85 of the Treaty of Rome. It found that the clause was largely intended to ensure that H.B.'s competitors did not obtain an advantage over it by obtaining free cabinet space and that this was not inherently anti-competitive. Furthermore, retailers were not prevented from obtaining a cabinet and stocking whichever brands they wished.

The Court accepted that H.B.'s freezer exclusivity clause created a "crucial difficulty" for new entrants to the market but did not amount to an abuse by H.B. of its dominant position, contrary to Art. 86 of

the Treaty of Rome. The clause had a straightforward commercial justification and was universal in the industry in many other countries.

The Court's decision is currently on appeal to the Supreme Court.

JAPAN

The Surcharge (Kachokin) Imposed on Violating Companies in 1992

The Japanese Fair Trade Commission ordered the payment of a surcharge for price cartels totalling 193.8 million yen in 1992 which is the third highest surcharge since 1977 when Japan introduced the surcharge system.

In 1991, the Japanese Anti-Monopoly Law (AML) was amended to increase the rate of surcharge from 3% to 6% of the sales for the period violating the AML for unreasonable restraint of trade.

Amendment of Anti-Monopoly Law Penalty to Become Effective

The AML was amended to increase the maximum penalty for corporations violating the AML (unreasonable restraint of trade, private monopoly and substantial restraint of competition by the trade association) from 5 million yen to 100 million yen, effective January 15, 1993.

NEW ZEALAND

In the ongoing battles for access to the largely deregulated telecommunications market, the High Court has found for Clear Communications (Clear), which is seeking to arrest market share from formerly state-owned Telecom New Zealand. The Court held Clear was a competitor first and a customer second. Telecom was misusing its dominant position by asking too much from Clear for connection to the local network.

The new year saw release of the report from a government commissioned review of the *Commerce Act* undertaken by departmental officials. The review team has recommended, among other things, that:

> The public test for approval of anti-competitive trade practices or mergers should not be amended.
>
> There should be no specific exemption for anti-competitive practices or mergers in primary product industries whose production is largely exported. It is, however, suggested that the absolute prohibition against price fixing should be relaxed to permit collective producer pricing to a strong buyer (such as producer board).
>
> It would be undesirable to extend the application of the Act to regulate labour markets.
>
> The voluntary pre-merger clearance regime introduced at the beginning of 1991 should be retained but some procedural changes are suggested.
>
> Differences in merger regulation procedures between Australia and New Zealand in the context of the Closer Economic Relations trade agreement, are unlikely to create an impediment to trade.

The government's response to the review is currently awaited.

POLAND

Polish antitrust law requires that the establishment of a new company be notified to the Antimonopoly Office when such a company could gain a dominant position in the market. The Antimonopoly Office may force a company which is dominant to be divided or dissolved. Therefore, it is necessary to define the meaning of a "dominant position". The *Antitrust Act* says that a company is considered to be dominant when it does not face any essential competition (on the part of other companies) in domestic or local markets. In addition, it presumes that a company whose market share exceeds 40% holds a dominant position in that market. The Antimonopoly Court (which deals with appeals from the Antimonopoly Office's decisions) has concluded that a lack of other important competitors in the market is important in deciding whether a company has become "dominant". This situation may even occur in a market where small size companies carry on business if one large company is in a position to cover comprehensively the market. It need not have even 40% of the market if it is big enough, for example, to set prices for all customers.

PORTUGAL

Continuing our analysis of Decree Law 422/83 which constitutes Portugal's fundamental antitrust law, we can turn our attention to those acts which shall be considered per se behaviour in restriction of competition.

Article 3 forbids the imposition of minimum prices. Article 4 defines the imposition of minimum prices in these terms.

> It is considered the imposition of minimum prices the practise which consists in proceeding, directly or indirectly, to the vertical fixing of prices by any means which has as its object or effect or confers to any economic agents situated in the subsequent levels of the economic circuit a minimum character to the prices of sale or to the margins of commercialization as well as maintain or practise such prices or margins.

Art. 13 of the same decree law prohibits horizontal fixing of prices. Art. 13 states:

> 1. It is considered restrictive practices of competition those agreements between companies, decisions of associations of companies and agreed-upon practices, whatever be the form they take, that have as object or effect to impede, falsify or restrict competition, all or in part, in the national market of goods and services, especially those that are translated into:
>
> a) Fix or recommend, directly or indirectly, prices of purchase or of sale and, equally well, other conditions of transactions effectuated in the same or different levels of the economic process.

Two cases illustrating the Competition Councils' attitude toward Articles 3 and 4 will be considered in the next issue.

SPAIN

Implementing Provisions on Voluntary Notification of Concentrations

The *Official Bulletin, Royal Decree No. 1080/1992* enlists provisions concerning notifications to be served on the Competition Service of the Ministry of Economy and Commerce in connection with mergers and other forms of concentrations.

The *Royal Decree* is basically procedural in nature. It assures the confidentiality of the information supplied to the bodies in charge of granting the exemptions provided for in the law.

Article 14 of the *Competition Law* establishes that any concentration or taking of control of one or several undertakings by any person or entity must be notified to the Service of Defense of Competition if the proposed project affects or may affect the Spanish market and meets any of the following two parameters:

a) The acquiring person or entity or the resulting concentration would reach a market share in a product or service of 25% or more in all or a substantial part of the Spanish market; or

b) Total sales in Spain of all the participants, in the last fiscal year, exceed 20.000.000.000 Pesetas.

The project must be notified in advance or not later than three months following its execution. Lack of prior notice would not preclude the closing of the deal, but could eventually result in subsequent damaging governmental orders, such as orders to amend the commercial patterns of the concentrations or even to unwind the project if it is not approved.

UNITED KINGDOM

A recent Green Paper may lead to the introduction into UK law of a domestic version of Article 86 of the Treaty of Rome which prohibits abuse of a dominant position. Current UK rules enable abuses of market power to be prohibited only after an investigation and adverse finding by the UK Monopolies and Mergers Commission (MMC). Three options for reform are put forward, each of which envisages that fines and private actions for injunctions and damages should form some part of the revised system. Broadly the options are: the retention of the current rules but with the introduction of fines and damages where infringements continue after a reference to the MMC; the introduction of a domestic version of Article 86 and EEC-type fines of up to 10% of turnover; or, a domestic version of Article 86 but coupled with the existing rules on monopolies. This last dual system option would, it is suggested, deal more effectively with industry sectors where competition seemed not to be working but where the market flaws could not be attributed to the abuse of a dominant position which would be caught by Article 86.

UK merger control gives UK authorities jurisdiction to review mergers (a concept very widely defined) involving at least one UK business on the basis of an assets or market share test. If a merger creates or enhances market share in the UK *or in a substantial part* of it, it is subject to review. In December last year the House of Lords overturned the High Court and Court of Appeal and found that an area covering the county of South Yorkshire, and northern Derbyshire did, as the MMC had concluded, constitute a substantial part of the UK even though it held only around 3% of the population of the UK and represented less than 2% of the UK by surface area. The judgment restores wide discretion to the UK competition authorities in deciding whether the market share criterion is satisfied.

UNITED STATES

Attempted Monopolization

On January 25, 1993, a unanimous Supreme Court rejected a long line of cases in the Ninth Judicial Circuit which held that anti-competitive or predatory conduct alone is sufficient to infer a specific intent to monopolize and, in turn, a dangerous probability of success. In *Spectrum Sports, Inc.* v. *McQuillan*, the Court made it clear that no short-cuts would be

allowed in the plaintiff's case. Independent proof of a dangerous probability that the defendant would succeed in monopolizing a market and that the defendant harboured a specific intent to do so is required to prevail in an attempt-to-monopolize case.

Private Right of Action Against Dumping

The little-known *Antidumping Act* of 1916 may be successfully used for the first time in its 77-year history. A federal district court in Michigan has entered a default judgment on liability and has ordered a jury trial on damages in a private action for damage from injurious dumping (*Helmac Products Corp.* v. *Roth Corp.*, E.D. Mich. Jan. 6, 1993). The default judgment on liability was entered because of the destruction of certain relevant documents by the Canadian defendant. The 1916 Act provides an injured U.S. domestic industry with the right to sue for triple damages, plus attorney's fees, where the defendant sells articles in the United States "at a price substantially less than the actual market value or wholesale price" of such articles in the exporter's home country. The statute specifically requires that the defendant be shown to have "the intent of destroying or injuring an industry in the United States, or preventing the establishment of an industry in the United States." The law has long been considered unenforceable because of this very high level of proof of intent, but by obtaining a default judgment because of discovery abuses, the plaintiff avoided the need for such evidence.

CORRECTION

In the IBA Update reprinted in the *Record* of December 1992, an error appeared in the EEC section. The paragraph on the Quantel Decision indicates that the EC Commission regards as acceptable the protection of a vendor against competition by a purchaser. In fact, in that Decision, whereas the Commission accepted the protection of the purchaser against competition from the vendor, it expressly excluded vendor protection.