International Antitrust

Michael H. Byowitz, John Davies, Gabriela Estruelas, Daryl A. Libow, and Paul Crampton

I. Developments in the United States

A. Judicial Retrenchment

In two noteworthy decisions, American courts demonstrated a reluctance to apply U.S. antitrust laws to international conduct.

In a case of first impression,[1] a federal district court held that the criminal provisions of the Sherman Act, 15 U.S.C.A. § 1, do not reach conspiratorial conduct that occurs wholly outside the United States, even if the foreign conduct has ultimate "effects" within the United States. The case, which draws a novel distinction between civil and criminal application of § 1 of the Sherman Act, has generated substantial controversy and is presently under appeal.

In 1990, Jujo Paper Company (Jujo), a predecessor to Nippon Paper Industries Co., Ltd. (Nippon), manufactured thermal fax paper at mills located in Japan. Jujo did not sell paper directly to U.S. customers, but limited its sales to two Japanese trading companies, Japan Pulp & Paper Co., Ltd. (Japan Pulp) and Mitsui & Co., Ltd. (Mitsui). Japan Pulp and Mitsui, in turn, exported the fax paper to their respective U.S. subsidiaries and those subsidiaries engaged in direct sales to U.S. customers.

Federal prosecutors alleged that Jujo and other fax paper manufacturers attended meetings in Japan where they conspired to increase prices at which the paper would be sold to Japan Pulp and Mitsui.[2] Neither Mitsui nor Japan Pulp attended these meetings. The United States

Michael H. Byowitz is with the law firm of Wachtell, Lipton, Rosen & Katz in New York City, and he is co-chair of the International Antitrust Law Committee. John Davies and Gabriela Estruelas are with the law firm of Freshfields in Brussels, Belgium. Daryl A. Libow is with the law firm of Sullivan & Cromwell in Washington, D.C. Paul Crampton is with the firm of Davies, Ward & Beck in Toronto, Canada. Messrs. Libow and Crampton are vice-chairs of the International Antitrust Law Committee.

1. United States v. Nippon Paper Indus. Co., Ltd., 944 F. Supp. 55 (D. Mass. 1996).

2. The United States also claimed that by agreeing to sell the fax paper in North America at the newly increased prices, Mitsui and Japan Pulp (and their United States subsidiaries) became coconspirators under a "vertical" price fixing theory. The court found that this vertical conspiracy count was defective because it merely alleged that Jujo directed and communicated with Mitsui and Japan Pulp, both of which served as the distribution link between Jujo and purchasers of fax paper in the United States. *Id.* at 63. The *Nippon Paper* court thus concluded that the "case did not involve overt acts by co-conspirators occurring in the United States." *Id.* at 64.

claimed that § 1 of the Sherman Act reached the horizontal agreement between Jujo and other fax paper manufacturers, even though the allegedly conspiratorial conduct took place entirely in Japan.

The court rejected the government's claim that the Sherman Act's criminal provisions reach the extraterritorial horizontal agreement between Jujo and other Japanese fax paper manufacturers. Noting that there is a "strong presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary,"[3] the court distinguished civil antitrust precedent that permits extraterritorial application of the Sherman Act when foreign conduct has substantial effects in the United States, principally by finding that the presumption against extraterritoriality to be stronger in a criminal case.

The *Nippon Paper* court contrasted the interests of civil antitrust enforcement—"as an effective means for regulating business practices"—with the principles of predictability and fairness that underpin the criminal law. The *Nippon Paper* court found that the "interpretive flexibility" in civil antitrust cases was "antithetical" to principles of criminal law: permitting the criminal provisions of the Sherman Act to have extraterritorial effect "would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct."[4] After examining the legislative history of the Sherman Act, the court concluded that the criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States. If upheld on appeal, *Nippon Paper* would exempt conspiratorial conduct that occurs wholly outside the United States from criminal prosecution under U.S. competition law. It must be emphasized, however, that *Nippon Paper* is a controversial trial court decision that is subject to appellate review.

The second case creates a distinction for purposes of extraterritorial application of U.S. law between conduct that is per se illegal and conduct subject to the rule of reason. An importer and distributor of kitchenware products sued a large Korean trading firm and two of its subsidiaries.[5] Plaintiffs had alleged that a design registration system of a Korean trade association, which gave Korean producers the exclusive right to export particular product designs for three years, constituted a horizontal market division scheme. The Ninth Circuit held that the registration system was not illegal per se because it was not a classic market division arrangement.[6] The Court of Appeals, however, also unequivocally pronounced that even if the registration system comprised a market division that would have required per se condemnation in a domestic context, a rule of reason analysis (or balancing) must be applied where a Sherman Act claim is based on conduct that occurs wholly outside the United States.[7]

This conclusion represents a significant departure from the approach set forth in the 1995 Federal Trade Commission/Department of Justice (FTC/DOJ) international operations guidelines. Under the guidelines, jurisdictional considerations are a threshold matter, and have no relevance to substantive analysis of restraints. In the agencies' view, the substantive standards applied to foreign and domestic restraints are identical. It remains to be seen whether other circuits or the Supreme Court will follow the Ninth Circuit's contrary dicta.

3. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795 (1993).
4. *Nippon Paper*, 1996 WL 528426 at *8.
5. Metro Industries, Inc. v. Sammi Corp., 82 F.3d 839 (9th Cir.), *cert. denied*, 117 S. Ct. 181 (1996).
6. *Id.* at 844.
7. *Id.* at 845.

B. Agency Developments

In contrast to recent experience, the federal regulatory agencies displayed a modest international antitrust agenda last year. The FTC conducted extensive hearings (including more than 200 witnesses) on the role of competition policy in the global marketplace. The resulting Staff Report, "Competition Policy in the New High-Tech, Global Marketplace," reaffirmed the prevailing antitrust analysis, but the staff proposed reforms in two narrow circumstances that could critically alter the result in the analysis of many future mergers, if adopted as official policy.

First, the staff recommended that enhanced attention be devoted to the effect of credible, merger-related efficiencies in the assessment of the post-merger competitive dynamics of a relevant market. Under this proposed framework, the assessment of a market could involve a new two-step inquiry: (1) is the merger likely to result in credible efficiencies; and (2) if so, how are those efficiencies likely to change the merged firm's abilities and incentives so as to defer the likelihood of diminished competition in the post-merger market? The parties to the merger would bear the burden of producing evidence of efficiencies (due to superior access to such information) and would be expected to link the expected efficiencies to enhanced competition.[8] Fortunately, the staff recognizes that the parties should not be required to demonstrate that the proposed merger be the least restrictive way of achieving the claimed efficiencies; instead, the FTC would reject efficiency claims if there existed a significantly less restrictive means of achieving comparable efficiencies, and it would be practicable and feasible as a business matter to do so.

Second, the FTC staff exhibited some skepticism about the wisdom of blocking mergers due to purported anticompetitive effects in so-called innovation markets. The staff recognized the lack of a generally accepted economic theory that identifies the optimal level of innovation activity and the disjuncture between the timing and source of anticompetitive conduct and anticompetitive effects as the principal explanations for the difficulty in distinguishing between procompetitive and anticompetitive combinations of innovation efforts. Moreover, the formidable challenges generally confronting a firm intending to monopolize innovation also counsel against widespread application of innovation market analysis to assess a merger's competitive effects.

A joint working group of the FTC and DOJ are presently addressing whether the agencies' merger guidelines should be revised in light of the FTC staff's recommendations.

C. Use of Antitrust to Regulate International Trade Disputes

In April 1995, the FTC/DOJ jointly issued the International Operations Guidelines often viewed as interventionist and insufficiently deferential to the interests of other sovereign nations. One specific concern was the recognition of the propriety of employing prosecutorial discretion in the application of U.S. antitrust laws on behalf of U.S. export commerce. Because of the controversial shift in prosecutorial philosophy, the actions taken and not taken in the high profile market access dispute between Kodak and Fuji in the past year are particularly noteworthy.

The gravamen of Kodak's claim in this dispute is that Fuji's substantial market position in Japan is the product of anticompetitive conduct by Fuji and others that has been tolerated by

8. For example, plant and production economies of scale are generally accepted as integral to a firm's ability to compete, yet other cost savings—like ceasing the provision of free samples to customers—may not be procompetitive at all.

the government of Japan. Significantly, Kodak's claims were filed initially before the United States Trade Representative (USTR) under Section 301 of the Trade Act of 1974, and Kodak clearly indicated that it was not asking the U.S. Government to challenge Fuji's conduct under the antitrust laws. Earlier this year, USTR determined not to pursue sanctions under Section 301 at that time, and instead referred the matter to the World Trade Organization (WTO). Kodak also recently filed a petition with Japan's Fair Trade Commission (JFTC) seeking action against Fuji for violation of Japan's competition law.

Fuji has responded in part by requesting that the DOJ initiate action against certain Kodak practices in the United States which Fuji alleges violate U.S. antitrust laws. Fuji argues that the conduct for which Kodak attacks Fuji in Japan mirrors that of Kodak in the United States.

To be sure, if the results of the WTO and JFTC proceedings are unsatisfactory, it is uncertain whether Kodak could ultimately convince the Justice Department to challenge the conduct at issue or prevail on a claim under the U.S. antitrust laws against Fuji. Nonetheless, Kodak's reluctance to invoke the U.S. antitrust arsenal tends to confirm that unilateral invocation of U.S. antitrust laws is more likely to be used as a last resort (rather than amount to a radical development) in market access cases.

Finally, the European Commission has proposed that the upcoming Singapore Round include a formal working group to address the interface between trade disputes and antitrust regulation. Various prominent U.S. antitrust enforcement officials have, however, publicly questioned whether the WTO should become involved in the harmonization of competition laws.

II. Canada

A. Proposed Amendments to the Competition Act

Proposed amendments to the Competition Act, which have been under active discussion for over a year, have now been formally introduced in the House of Commons. If passed, amendments would be made to the Act's provisions concerning pre-merger notification, misleading advertising, and prohibition orders, and new provisions would be introduced dealing with telemarketing.

With respect to pre-merger notification, the principal amendments would involve: (1) doubling the existing seven- and twenty-one-day waiting periods applicable to short-form and long-form filings, respectively, (2) significantly expanding the information requirements for long-form filings, and (3) providing the Director of the Competition Bureau (Bureau) with the ability to delay a merger for up to thirty additional days (with the possibility of a further thirty-day extension) upon certification that a formal inquiry has been commenced and more time is required to complete the inquiry. These proposals are unlikely to have a significant effect on straightforward transactions, but may increase the likelihood of the Bureau requiring a long-form filing in transactions raising potential issues and will reduce the probability that merging parties will be permitted to close a transaction prior to the completion of the Bureau's review.

Other proposals were postponed for further study. These include repeal of the criminal price discrimination and promotional allowance provisions in the Competition Act as well as creation of a new right of private action before the Competition Tribunal in respect of noncriminal matters. In addition, a proposal to overhaul the provisions in the Act respecting confidentiality and international cooperation was deferred pending resolution of the issues raised by the *Schreiber* decision, discussed below. The postponement of the amendments in this area leaves the law in an unsettled state, with significant uncertainty respecting the ability of the Canadian Competition Bureau to exchange information with foreign jurisdictions.

B. Decision on Request for a Foreign Search and Seizure Could Limit Utility of Mutual Assistance Pacts

In July 1996, Wetston, J., a former Director of the Canadian Competition Bureau, ruled in *Schreiber v. Canada* that the Canadian standard for the issuance of a search warrant was required to be satisfied before the Minister of Justice and the Attorney General of Canada sent a letter of request to Swiss authorities to search for and seize the accused's banking documents and records in connection with a Canadian criminal investigation. That standard confirms that the *Canadian Charter of Rights and Freedoms* (the Charter) requires an enforcement authority before executing a search and seizure to obtain prior authorization from a Canadian court and satisfy the court that there are reasonable and probable grounds, established upon oath, to believe that an offense has been committed and that there is relevant evidence to be found at the place of the search.

This decision, which has been appealed by the Crown, has important implications in the antitrust law context. It would appear to require that a Canadian authority must obtain judicial approval before issuing a request under any mutual legal assistance treaty (such as the Canada/U.S. MLAT) for a search and seizure abroad.

C. Competition Tribunal Issues Order Against the Interac Network

In June 1996, the Competition Tribunal (Tribunal) issued a consent order under the abuse of dominance provisions of the Competition Act in respect of the "Interac" shared electronic banking network. The statement of grounds and material facts filed by the Director of the Competition Bureau indicated that more than ninety percent of shared cash dispensing transactions in Canada take place through Interac and that approximately ninety-five percent of the Automatic Banking Machines (ABMs) linked to Interac are deployed by Canada's principal financial institutions, which control and are the principal charter members of Interac (Charter Members). The main thrust of the Draft Consent Order (DCO) proposed by the Director was to introduce "appropriate competitive discipline" into the relevant markets by "opening direct connection access" to the network for firms other than the nine Charter Members (including nonfinancial institutions), by revising the governance structure of Interac to ensure they have greater representation on the Interac Board, and by removing existing barriers to competition in respect of pricing and the offering of new services.

By confirming a fairly high degree of deference to draft consent orders and underscoring the high standard required for intervenors to meet in order to disturb a draft consent order, the Tribunal's decision in *Interac* likely will add greater certainty to the consent order process and give greater encouragement to parties to resolve matters in that fashion. This represents a welcome shift from the prior experience with consent orders before the Tribunal in the 1980s.

III. Principal Antitrust Developments in the EU

A. Merger Rules

1. *EC Merger Control Regulation Under Review*

Significant controversy accompanied the European Commission's July 1996 proposal to reduce the thresholds determining whether a transaction falls under the scope of the EC Merger Control Regulation. It had proposed to reduce the existing worldwide ECU 5 billion and E.U.-wide ECU 250 million turnover thresholds (approximately U.S.$6.3 billion and U.S.$315 million) to ECU 3 billion and ECU 150 million respectively (approximately U.S.$3.8 billion and U.S.$190 million). Though this proposal was rejected in November 1996 by the European Council of Ministers, the Commission's alternative proposal that transactions with even lower thresholds—ECU 2 billion and ECU 100 million (approximately U.S.$2.5 billion and U.S.$125 million)—should be deemed to fall under the EC Merger Control Regulations where they would otherwise require notification to three or more member state national competition authorities, remains on the table for the next Council Meeting in 1997.

B. Mergers blocked

Last year may signal the beginning of an aggressive era in regulatory intervention. Though only seven proposed mergers have been blocked by the European Commission in total to date, 1996 alone saw three mergers blocked. Two are individually noteworthy. The proposed merger in the platinum sector between South African company Gencor and South African subsidiary of the British Group, Lonhro, was the first merger blocked on the grounds of oligopolistic dominance. The April 1996 decision has been appealed to the European Court of First Instance, providing the Court the opportunity to resolve the controversy as to whether the EC Merger Control Regulation can be used to control mergers in oligopolistic markets.

In the Kesko/Tuko merger, the European Commission found that dominance would be created in the retail market for consumer goods in Finland, where the combined market shares of the parties varied from fifty-five to one hundred percent. Interestingly, this transaction, which fell below the ordinary threshold for reference to the European Commission, was, nonetheless, referred to the Commission for investigation by the Finnish Government by virtue of a mechanism under the EC Merger Control Regulation that provides member states discretion to refer transactions falling below the European thresholds to the Commission. Though this mechanism has only been utilized so far by member states with no merger control regimes, such as Finland or The Netherlands, it could be employed by other sovereigns.

C. Articles 85 and 86—Restrictive Practices and Abuse of Dominant Position

1. *Technology Transfer Block Exemption*

The European Commission adopted a block exemption for technology transfer agreements which entered into force in April 1996 and applies until March 2006. It replaces the separate existing block exemptions for patent licensing and know-how licensing agreements with a single regime. The new simplified rules have a dramatically reduced "blacklist" compared with the previous ones. Significantly, the business community successfully opposed the attempt to prevent licenses with forty percent or more of a market from eligibility for the block exemption. Nevertheless, the European Commission retained the right not to apply the regulation in circumstances which raise competition concerns (particularly if a market share of more than forty percent is involved).

2. *Decisions of Note*

a. Visa/American Express

In January 1996, the European Commission launched an investigation on Visa's intention to ban its members from issuing competing cards. The investigation was started after some competitors, such as American Express, made formal complaints. Following the European Commission's preliminary finding that Visa's plan would have infringed E.C. competition rules, since it would have restricted competition between international card systems as well as between banks which issue cards riding on those systems, Visa agreed to drop its proposal.

b. Transatlantic Air Alliances

In July 1996, the European Commission launched an unusual investigation into the competitive effects of six transatlantic airlines alliances. The investigation included the proposed British Airways/American Airlines alliance, as well as others already in effect. The investigation will be carried out under the seldom invoked Article 89 of the EC Treaty which empowers the European Commission to examine transactions in cooperation with national competition authorities.[9] Most likely, initiating this enquiry is closely linked to the European Commission's discussions with the United States on "open skies" policy. The European Commission prefers to engage with the U.S. authorities armed with detailed evidence about the impact of transatlantic alliances so far.

3. *Telecommunications*

During the course of 1996, there have been a number of European Commission actions aimed at enforcing the existing E.U. policy of gradual liberalization of the national telecommunications markets. In March, the European Commission adopted a directive which will implement full competition by January 1998 in telecommunications markets by removing the existing special and exclusive rights for the provision of voice telephony currently held by a number of incumbent national telecommunication operations. The directive also imposes certain obligations on member states in order to ensure that the market for voice telephony is genuinely open to competition. These obligations include ensuring that sufficient numbers of licenses are available and allocated fairly, that exclusive rights regarding directories are abolished, that interconnection between networks is provided, and that rights of way for the construction of networks are granted.

The *Atlas/Phoenix* case, which the European Commission cleared subject to conditions the agreements between France Telecom and Deutsche Telekom involving the acquisition of a substantial ownership interest in Sprint Corporation (the third largest U.S. provider of long distance telecommunications services), provides an instructive example of how the European Commission will deal with strategic alliances in this rapidly developing market. Because the European Commission considered the initial agreement to raise competition concerns, particularly because France Telecom and Deutsche Telekom continue to enjoy legal monopolies in the telecommunications business in France and Germany, respectively, the companies were required to undertake certain commitments to address concerns that the parties' dominant positions would provide the incentive and the ability to utilize their existing market power to discriminate in other international markets for telecommunications services and favor Sprint in the allocation of telecommunications traffic from France and Germany. Specifically, these remedies relate to the nonintegration into Atlas of the domestic French and German public data networks to ensure nondiscriminatory access to these networks and avoid cross-subsidization which could disadvantage potential rivals. In addition, both governments committed to liberaliza-

9. The original purpose of this provision was to establish a transitional regime that allowed Brussels to apply antitrust rules in a limited manner until the European Commission was granted increased powers. These powers have never been granted in respect of air transport to and from Europe; it is thus doubtful that the European Commission alone could force the parties to alter these alliances as it can merely "record" an infringement and authorize member states to take appropriate measures. It has, however, more recently expressed concern with the modifications to the deal which the U.K. Government is prepared to accept.

tion of restrictions on alternative network infrastructure in anticipation of the expected privatization of both Deutsche Telekom, which will begin with a partial stock offering in November 1996, and France Telekom, which is scheduled to begin with a partial stock offering in the spring of 1997—reportedly leading to the concomitant withdrawal of legal monopoly protection in the telecommunications business by 1998.

D. European Court Judgments

In *Compagnie Maritime Belge Transports S.A. v. EC Commission* (October 8, 1996), the European Court of First Instance found that members of the CEWAL shipping conference had abused their joint dominant position. The Court held that the sine qua non of a collective dominant position were undertakings linked in such a way that the parties pursued the same conduct on the market. The Court found that CEWAL liner conference formed a framework for various committees to which members belonged and the structure was intended to define uniform freight rates and conditions of carriage, such that CEWAL presented itself to the market as "one and the same entity."

In *Tetra Pak International S.A. v. Commission* (November 14, 1996), the European Court of Justice upheld the European Commission's fine of Tetra Pak for abusing its dominant position contrary to EC competition rules. Tetra Pak manufactures cartons and carton-filling machines for packaging of liquid products and currently supplies ninety to ninety-five percent of the aseptic markets and between fifty to fifty-five percent of the nonaseptic markets. The abuses found included the tying of nonaseptic machine to carton sales and predatory pricing of nonaseptic machines and cartons. The Court held that Tetra Pak's activities in the nonaseptic markets, where it was not dominant, could nevertheless infringe the E.U. abuse of dominance rules, because of the link between that market and the aseptic market where it was dominant.

IV. Enforcement in Other Areas

The recent decision of Venezuela's competition ministry to investigate and subsequently order relief in connection with the switch of a local bottler's allegiance from Pepsi to Coke soft drinks demonstrates that antitrust enforcement is increasingly becoming a serious concern outside North America and the European Union.