Appendix 1: Foreign Monopoly and Merger Law

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Appendix 1:
Foreign Monopoly and Merger Law

This Appendix consists of brief descriptions of the monopoly and merger laws of several nations. These descriptions are not intended to provide a complete statement of any one nation's antitrust statutes and case law. Rather, they are included in this volume to permit the reader to observe the widely divergent approaches to the regulation of economic concentration.

These summaries may not contain the latest case law developments or statutory amendments. It is hoped, however, that they provide a sound starting point for investigation of the regulatory regimes of the nations included in this collection.

AUSTRALIA

LAW


Synopsis
The Trade Practices Act (the Act) of 1974 inaugurated an era of aggressive antitrust policy in Australia. Modeled on the Sherman and Clayton Acts, Part IV of the Act makes a wide variety of anticompetitive practices illegal. Although the Australian economy is composed largely of small- and medium-sized firms, Sections 46 and 50 of the Act demonstrate the Australian government's desire to control economic concentration. The former forbids monopolistic behavior; the latter forbids anticompetitive mergers.

The Act does not make acquisition of market control illegal. Once a corporation gains power to determine prices or control production or distribution of "a substantial part of the goods or services in a market" however, it is subject to the per se prohibitions set forth in Section 46. Specifically, a monopolist cannot:

1. eliminate or substantially damage a competitor in any market;
2. prevent the entry of a person into any market;
3. deter or prevent a person from competing in any market.
Certain conduct is exempted from the monopolization prohibition, including practices relating exclusively to the export of goods or supply of services outside of Australia.

Section 50 seeks to prevent anticompetitive mergers. Patterned after Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976), this section provides that:

A corporation shall not acquire, directly, or indirectly, any shares in the capital, or any assets of a body corporate if—
(a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to control or dominate a market for goods or services; or
(b) in a case where the corporation is in a position to control or dominate a market for goods or services—

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to control or dominate [any market in which the corporation is a competitor].

For purposes of Section 50 only, a *market* is defined as a substantial market for goods or services in Australia or in a state.

Under Part VII of the Act, a corporation can petition the Trade Practices Commission (Commission) for authorization of a proposed merger. If authorization is obtained, the applicant is protected against subsequent actions alleging that the authorized merger violates the Act.

The Commission is a five-member panel charged with administration of the Act. In addition to granting authorization for proposed mergers and other potentially anticompetitive agreements, the Commission can investigate alleged violations of the Act and bring charges against alleged violators in the Australian Industrial Court. The Commission does not have power to enforce its own orders.

The Trade Practices Tribunal (Tribunal) is a quasi-judicial body that reviews Commission decisions regarding authorization applications. The Tribunal applies the same tests as the Commission in its review of authorization applications. If necessary, the Tribunal may modify or set aside the Commission's decisions. As with the Commission, the members of the Tribunal are appointed by the governor general and enjoy substantial independence from the legislative and executive branches of government.

Exclusive jurisdiction for violations of the Act lies with the Industrial Court. If a violation is established, the offender is subject to an injunction, a fine of up to $50,000 in the case of a person and $250,000 in the case of corporations, and liability for damages resulting from violation of the Act. If a merger is found to be illegal, the acquiring firm can also be ordered to divest itself of the acquired assets or shares.

In actions brought by the Commission or the minister of business and
commerce, any of these remedies can be requested. In actions filed by private parties, the plaintiff can request either injunctive relief (except in the case of allegedly anticompetitive mergers) or compensation for damages directly resulting from the defendant's anticompetitive acts.

The Act does not make any restrictive trade practice a crime. However, because the civil fines imposed by the Act are similar to criminal penalties, the Australian Federal Court has required that parties alleging violations of the Act bear a standard of proof greater than the preponderance of evidence standard normally required in civil litigation.

CASES


SECONDARY SOURCES

Pengilley, Section 45 of the Trade Practices Act—the Law and Administration to Date, 8 Fed. L. Rev. 15 (1976–77).

BELGIUM

LAW


Synopsis

Article 1 of the Belgian Act of 27 May 1960 on Protection Against the Abuse of Economic Power (the Act) defines economic power as the power of individuals or corporations, acting alone or in concert, to exert a "dominating influence" over merchandise supplies or prices, capital markets, or service prices. However, under Article 2, an "abuse of economic power" exists only when persons holding economic power "prejudice the public interest" by engaging in practices which distort or restrict competition, economic freedom, or the development of production or trade. No well-defined categories of abuse are enumerated in the Act, and the mere holding of a dominant market position is not considered a per se violation. Rather, a dominant position must be used to the detriment of "the public interest" as determined by the competent authorities.

A very detailed multilevel investigative procedure is established for determining whether an abuse of economic power exists. The reporting commissioner conducts the initial investigation; the Council for Economic Disputes (the Council) serves as the administrative tribunal with the authority to
decide not to proceed; and the minister of economic affairs can institute proceedings, aid in the investigation, and participate in a final decision for the Council. If this procedure results in an affirmative finding of abuse of economic power, then the minister suggests proposals for conciliation, makes recommendations in the event of noncompliance with the proposals, issues a cease and desist order if the recommendations are not followed, and institutes, at his discretion, civil or criminal proceedings should any of the above methods fail to achieve the desired result. Actual enforcement of the Act has had limited success, since most actions brought thus far have involved limited private interests rather than at the general public interest, and thus have not been covered by the Act.

The 1970 notification statute requires that the minister of economic affairs, the minister of finance, and the secretary of state for regional economy be notified of any transfer to non-Belgians of a one-third capital interest in a Belgian enterprise having funds of at least B.Frs.100 million. Additionally, the minister of finance must authorize any public offer for purchase or exchange of Belgian securities made by Belgian individuals living abroad or by Belgian companies under foreign control. Failure to obtain proper authorization can lead to a public notice by the minister which prohibits anyone from aiding the transaction. These notification requirements are limited to mergers and acquisitions by foreign participants, thus giving the government a means of controlling foreign direct investment.

SECONDARY SOURCES

COMPETITION LAW IN WESTERN EUROPE AND THE USA, (Gijlstra & Murphy, eds., 1976) (with looseleaf supplements).
[1974] COMM. MKT. REP. (CCH) ¶ 21,521 et seq.

BRAZIL

LAW

Antitrust Law No. 4134 (1962); Regulations to the Antitrust Law, Decree 52–025 (1964).

Synopsis

Brazilian Antitrust Law No. 4134 (the Act) seeks to "eliminate abuses of economic power referred to in Article 148 of the Federal Constitution." Article 2 of the Act prohibits the following conduct:

1. Manipulation of markets or elimination of competition, by means of agreements, accumulation of companies or shares, mergers or other
associations, concentration of capital, accumulation of managerial control, cessation of business activity, or obstruction of the formation or operation of other companies;

2. Arbitrary increases in profits of natural or actual monopolies by raising prices without need for expansion or other just cause;

3. Creation of monopolistic conditions [defined below] or excessive speculation for the purpose of promoting a temporary increase in prices by cutting back on productive capacity, any form of attempted monopolization, withholding goods from a market with a view toward creating a shortage, or use of artificial means to cause price fluctuations;

4. Formation of economic groupings of companies which restrict free actions of buyers and sellers by discriminating as to prices or services to the purchase of a product or service;

5. Unfair competitive practices, such as demanding exclusive promotional advertising or making prior agreements as to prices or other benefits when dealing with government officials.

Monopolistic conditions is defined as those conditions "in which a company or group of companies so controls the production, distribution, and sale of a product or service that it exercise a preponderant influence on prices."

The statute requires registration of corporate agreements. Article 72 requires that documents referring to the establishment, transformation, merger, or association of companies, or changes in the articles of incorporation, cannot be registered without broad disclosure of relevant information regarding the share ownership, operation, purpose, and location of the corporate enterprise. Disclosure of financial information concerning the partners and directors of the enterprise is also required.

Article 74 prohibits certain types of contracts entered into without prior government scrutiny and approval:

Unless approved and registered with CADE [described below], any contracts, agreements, or conventions of any kind . . . shall be void if made for any one of the following purposes:

(a) to put production on par with consumption;
(b) to control a market;
(c) to standardize production;
(d) to stabilize prices;
(e) to divide markets between companies, whether of production or distribution;
(f) to restrict distribution in such a way as to harm equivalent or substitute goods.

Chapter II of the statute establishes a federal government agency—the Administrative Council for Economic Defense (CADE)—that is charged
with enforcement of Brazilian antitrust laws. CADE is given extensive investigatory powers. A general counsel is established to assist CADE with legal advice and to insure that CADE’s regulations and pronouncements are enforced.

CADE is divided into five sections. The Economic Group performs economic, statistical, and general quantitative analysis. The Control Group supervises nationalized enterprises. The Auditing Group supervises the accounting of all Brazilian firms. The Administrative Group provides basic administrative and support services for CADE. The Regional Inspectorates are charged “with the task of representing and assisting CADE in the performance of the attributes conferred upon them by law and these regulations.”

CADE has sole responsibility for investigations into, and prosecutions of, “abuses of economic power.” State and local authorities are not permitted to conduct their own investigations; rather they must submit their allegations to CADE for enforcement. Individuals can also bring possible violations of the antitrust laws to the attention of CADE. However, the statute vests exclusive authority to prosecute and enforce the law in CADE. Thus, Brazilian antitrust laws do not recognize a private right of action for antitrust violations.

The remedies available to CADE in enforcing the law are quite substantial. Fines can range from five to ten thousand times the highest minimum wage in the country on the date of CADE’s decision. The fine is assessed even if the defendant agrees to terminate the illegal activity. In addition to the fine, CADE can require that the company correct its practices and come into compliance with the law within a certain period of time. If the defendant does not comply within this time period, or if after being corrected the defendant again engages in the illegal activity, CADE can impose another fine—double the previous fine. Moreover, if a defendant’s pledge to refrain from illegal conduct is broken, the statute provides for a mandatory expropriation of corporate assets.

Enforcement of fines requires judicial process. In lieu of collecting a fine, CADE can petition the Federal District Court of the state where the defendant company is located for imposition of government control over the company. The government-appointed administrator is obligated to take steps necessary to eliminate the abuses that required government intervention. Once the abuses are eliminated, the government administrator may be removed and the corporation returned to private administration.

Government directorship does not affect the normal operation of the defendant firm; the only change in operation is the placement of a government official at the pinnacle of power. However, should the majority of those responsible for the administration of the company refuse to cooperate with the government administrator, a judge can order the government administrator to assume full responsibility for the company. Further, a judge can dismiss any company official who attempts to prevent the government administrator from carrying out his or her duties.
Combines Investigation Act, R.S.C. 1970; as amended S.C. 1974-75-76 c. 76, 1977 c. 28; Foreign Investment Review Act, S.C. 1973, c. 46, as amended; Bill C-13, an act to amend the Combines Investigation Act (introduced into Parliament on November 18, 1977; the Bill would have to be reintroduced to be considered again).

Synopsis
The Combines Investigation Act (the Act) defines a merger as any acquisition by one or more persons, whether by purchase or lease of shares or assets, or any control over or interest in the business of an competitor, supplier, customer, or any other person whereby competition is or is likely to be lessened contrary to the interest of consumers, producers, or the general public. A monopoly exists when one or more persons substantially control the business in which they are engaged, and have operated, or are likely to operate, such business against the public interest.

Sections 5 to 14 describe the functions of the director of investigation and research. Private citizens can apply for an inquiry by the director if they believe that someone has or will commit a merger. The Director will commence an inquiry when he receives such an application, has reason to believe such an inquiry should be instituted, or has been directed by the minister to make such an inquiry. The director can require production of a business' tax returns. The director also has broad powers to search properties and to seize evidence relevant to his inquiry. This evidence is admissible in any hearing.

Sections 16 through 22 establish the Restrictive Trade Practices Commission (RTPC), provide for submission of evidence by the director, authorize publication of RTPC reports, and establish the right of an investigated party to be represented by counsel. The RTPC hears evidence of the director and the defenses of the parties involved. The RTPC then makes a report to the minister containing a review of the evidence, a conclusion as to the effect on the public interest of the arrangements, and a recommendation as to remedies. The RTPC has substantial investigatory powers.

The director can make a general inquiry into monopolistic conditions on his own initiative or when authorized by the minister.

Section 33 provides that every person who is a party or privy to or knowingly assists in a merger or monopoly is guilty of an indictable offense and is liable to imprisonment for up to two years or to a fine not exceeding $5,000 or both. Section 20 grants judges the power to prohibit or to dissolve a merger or monopoly.

Under Bill C-13 the Competition Board is substituted for the Restrictive Trade Practices Commission. The Board has as its objective the examination
of trade practices referred to it. The Board can examine mergers and monopolies as well as other trade practices. Violation of the merger provisions of the Act is no longer considered a criminal offense under Bill C-13.

Bill C-13 also replaces the previous director of investigation with the competition policy advocate. The Canadian Cabinet appoints the advocate and deputy competition policy advocates. The advocate's functions are essentially the same as the director's, but his quasi-judicial responsibilities include a greater number that are reviewable by the Competition Board. The advocate also has a more active role in presenting the government's position before administrative bodies.

In lieu of proof "beyond a reasonable doubt" of detriment to the public, the bill substitutes a "preponderance of the evidence" standard. The Board, if the advocate meets this standard, can prohibit or dissolve any merger that substantially lessens competition.

A merger is defined broadly as any acquisition or establishment by a person of any control over or interest in the whole or any part of the business of another, whether in a trade, industry, or profession. A joint venture is included within the definition of a merger if it includes the creation of a new corporation.

The provisions of the proposed law are applicable to both conglomerate and vertical mergers. Only horizontal mergers whose effect is to place more than 20 percent of the market in the hands of the acquirer are subject to review by the Board.

The participating companies to a proposed merger can defend the propriety of their merger on grounds that it will increase the efficiency of the Canadian economy. If the Board is satisfied that a merger has brought about or will probably bring about a substantial increase in efficiency, it cannot issue a remedial order. However, even if the merger increases efficiency, the Board must rule against the merger if it would create monopoly in the relevant market. Bill C-13 also addresses the coordination of merger review under the Act with merger review under the Foreign Investment Review Act.

The purpose of the Foreign Investment Review Act (FIRA) is to allow foreign direct investment or takeover of Canadian businesses only if such action significantly benefits the Canadian economy. The Review Act lists several factors to consider in deciding whether to approve a foreign acquisition. These factors are directed toward determining whether foreign control will promote efficiency or competition in the Canadian economy.

The FIRA applies to acquisition of control of any Canadian enterprise except Crown corporations, certain tax-exempt enterprises, associated business enterprises, and small business enterprises. The FIRA also applies to establishment of all new businesses.

All companies seeking foreign acquisitions or direct investments covered by the FIRA must give notice to the Foreign Investment Review Agency (the Agency). The minister, a member of the Queen's Privy Council appointed by
the governor to administer the FIRA, can also demand such notice if he believes such foreign proposals or actual investments have occurred. After the Agency is notified, the minister will assess whether the foreign investment is or will likely be of significant benefit to Canada. If the minister finds the investment is of significant benefit, then he will make a recommendation to approve the investment to the governor in council. Involved parties have the right to represent themselves before the governor. If the governor decides the investment is of significant benefit, he shall allow the investment. But if he does not make such a finding, the governor in council must deny the proposed investment. Section 13 provides that investments are allowed if the governor in council issues no order within sixty days after he is notified by the agency of the proposed or actual investment.

Sections 15 through 18 provide for investigations. These sections grant the minister broad powers with respect to searches, seizures, and obtaining relevant evidence.

Sections 19 to 23 concern remedies available to the minister to obtain compliance with his orders. The minister can obtain an injunction against a company violating his order. The minister can also seek an order by a superior court to render an investment nugatory or an order to comply with the undertaking. Anyone who does not comply with a superior court order is subject to a contempt citation.

Sections 24 to 27 establish penalties for offenses under the FIRA. Failure to give notice of a proposed investment is an offense punishable by a fine of no more than Canadian $5,000. Any obstruction of an investigation under the FIRA is an offense punishable by a fine of no more than Canadian $5,000 or imprisonment of not more than six months or both.

REGULATIONS


Sections 3 through 5 give interpretations of noneligible person, gross assets and gross revenue, and notices. The regulations also describe the information the applicant must provide to the Agency. The regulations require the applicant to summarize its proposal, give detailed information on the financial status of the acquiring and acquired businesses, and provide details of the applicant's plans for the Canadian business enterprise. The information sought is designed to facilitate a determination of whether a foreign investment significantly benefits Canada.

CASES

monopoly under the Combines Investigation Act by arguing its anti-competitive acts are not detrimental because of economic gains from a merger or monopoly unrelated to the merger's effects on competition. A court in a merger or monopoly case must weigh the detriment of lost competition against the value of economic gains from the merger or monopoly to determine whether such merger or monopoly is detrimental to the public.

R. v. F. W. Woolworth Co. Ltd., 46 D.L.R.2d 345, 18 C.C.C.2d 23, 3 Ont. R. 2d 630 (C.A.) (1974), rev'g. 11 C.C.C.2d 562, 11 C.P.R.2d 229, 21 C.R.N. 8, 371 (Ont. H.C.T.)—Prohibition order under Combines Investigation Act must relate to the offense for which conviction was obtained. Such an order should be made only if the evidence shows a deliberate and flagrant disobedience and the likelihood of continuation in the absence of prohibition.


R. v. Canadian General Electric Co. Ltd., et al., 75 D.L.R.2d 664, 34 C.C.C.2d 489, 15 Ont.R.2d 360, 29 C.P.R.2d 1 (H.C.J.) (1976)—Detriment to the public, a necessary element of a monopoly violation, must be shown to flow from the operation of the shared monopoly and not from collateral acts which may be the subject of another charge.

ADMINISTRATIVE PROCEEDINGS

Reports by Restrictive Practices Commission

Prior to the 1970s, none of the reports relating to mergers of the Restrictive Trade Practices Commission resulted in convictions of corporations. On January 14, 1971, the RTPC issued a report that found that the substantial control of the large lamps business in Canada by Canadian General Electric Company Limited, Canadian Westinghouse Company Limited, and Sylvania Electric (Canada) Ltd. resulted in a monopoly situation; therefore, such business operated to the detriment of the public. The report recommended periodic review of the customs duties on electric lamps to ensure that the tariff was not used to insulate Canadian manufactures from competition by outside suppliers to the disadvantage of users in Canada. On September 2, 1976, the accused were convicted of two counts of monopoly. On April 13, 1977, fines totaling $550,000 were imposed for monopoly and other offenses as follows: Canadian General Electric Co. Ltd. $300,000; Westinghouse Canada Ltd. $150,000; G.T.E. Sylvania Ltd. $100,000.
In other proceedings referred directly to the Attorney General of Canada, four charges of merger and monopoly were brought against K. C. Irving Ltd., a newspaper chain. On January 24, 1974, the accused was convicted and fines totaling $150,000 were imposed on April 2, 1974. An order of divestiture was issued on July 10, 1974. The accused successfully appealed the convictions, sentences & order. The Crown lost its appeal to the Supreme Court of Canada on November 16, 1976.

REPORTS UNDER THE FOREIGN INVESTMENT REVIEW ACT

Since the institution of FIRA, most foreign takeovers have been approved. If the Cabinet finds some combination of the following factors, the proposed merger will usually be approved:

1. the merger increases employment;
2. the merger constitutes a new investment;
3. the merger will increase resource processing or use of Canadian parts and services;
4. the merger will increase exports;
5. the merging corporation is owned partially by Canadian interests;
6. the merger will improve productivity and efficiency;
7. the merger will enhance technological development;
8. the merger will improve product variety and innovation;
9. the merger will have beneficial impacts on competition; or
10. the proposed merger is compatible with industrial and economic policies.

Thus, as the FIRA has been enforced so far, only extremely unattractive foreign mergers have been disallowed.

List of Disallowed Cases
Fiscal 1975/76. During this period, 22 out of 132 foreign takeovers were disallowed. The following lists the applicants who were disallowed and the nature of their business:

1. Ambassador Bridge Inc./Canada Transit Co., which operates the Canadian side of the Ambassador Bridge.
2. Avco Financial Services Canada Ltd./certain assets of La Corporation de Finance Bonaccord Ltée, a finance company.
3. Canadian Canners Ltd./Robert G. Tamblyn Paper Box Ltd., a producer of folding paper boxes.
4. Ciba-Geigy Canada Ltd./Stewart Seeds Ltd., a producer of cereal and corn seed.
5. Corbetts Ltd./Maurice Rousseau & Cie. Ltée, a distributor of automotive replacement parts, accessories, and supplies.
6. De Lavel Turbine Inc./Williams Machines, Ltd., True Forge Ltd., and certain assets of material Processing Division of Havlik Enterprises Ltd., engaged in custom machine work.
7. Kibun Co. Ltd./North Sea Products Ltd., a processor of fish.
9. Larochelle et Frères Ltée/La Boulangerie Racine Ltée, a bakery firm.
10. Meyer Laboratories Inc./Neo Drug Co., which packages and distributes ethical drugs.
11. Micco Equipment Co./Ferguson Supply Ltd., and Arctic Terex Ltd., distributors of off-highway machinery and equipment.
12. Perolin-Bird Archer Ltd./British-American Chemical Co. Ltd., a manufacturer of industrial chemicals.
13. Quebec Ready Mix Inc./Carrière Hebert Inc., an operator of a quarry.
15. Sonotone Corp. (Canada) Ltd./Burgess Battery Division of Gould Manufacturing of Canada Ltd., which manufactures dry cell batteries, flashlights, lanterns, and rolled zinc.
16. Syntex Ltd./Mowatt & Moore Ltd., a manufacturer of pharmaceutical products.
17. Turbex Ltd./certain assets of George Laird & Son Ltd., which sells fuel oil and home comfort equipment.
18. UPS Ltd./Delivero (Canada) Ltd., which delivers small parcels.
19. UPS Ltd./Grenoble Distribution Ltd., which delivers small parcels.
21. WCI Canada Ltd./the appliance business of Westinghouse Canada Ltd., a manufacturer and distributor of major household appliances and electrical industrial equipment.
22. WCI Canada Ltd./the appliance division of Westinghouse Canada (second submission), a manufacturer of major household appliances and electrical industrial equipment.

Fiscal 1976/77. During this period, 19 out of 172 foreign takeovers were disallowed.

1. Blackwood Hodge (Canada) Ltd./Tobin Tractor (1957) Ltd., which sells, services, and rents construction and industrial equipment.
2. Brady Industries Ltd./Bray-Dor Industries Ltd., which fabricates, installs, and repairs industrial doors.
4. C & J Clark Canada Ltd./Calderone Shoe Co. Ltd., which retails footwear.
5. Carisbrook Industries Inc./the Crawford-Collingwood Ontario Division of Indian Head Inc., a manufacturer of pillows and cushions.
8. Dresser Industries, Inc./Jarco Services, Ltd., which leases hydraulic bumper jars to the petroleum industry.
9. E.G. & G., Inc./Radionics Ltd., which distributes and services electronic testing and research equipment.
10. Fuji Photo Film Co. Ltd./R & H Products Ltd., a distributor of photographic equipment and supplies.
11. General Mills Canada, Ltd./Regal Toy, Ltd., a manufacturer of toys.
12. Gulf Oil Canada Ltd./Mosbacher Oil & Gas Ltd., engaged in exploration for, and the development of, petroleum and natural gas fields.
13. Hayes-Dana Ltd./Western Wheel & Parts Ltd., which sells and services heavy-duty truck components.
14. Lafarge Concrete Ltd.-Lafarge Beton Ltée/Argus Aggregates Ltd., which crushes and processes aggregates.
15. N.V. Indivers/Canadian Vac-Hyd Processing Ltd., which sells and services computer peripheral equipment.
17. State Electric Co. Ltd./D. Thompson Ltd., and D. Thompson (Western) Ltd., which are electrical contractors.
18. Welltech Inc./Gamache Well Servicing Ltd., Prairie Gold Servicing Co., Well Servicing Holdings Inc. and Dow Well Servicing Ltd., which engage in oil and gas well completion, servicing, and workover.

Fiscal 1978/79. During this period, 25 out of 323 proposed foreign mergers were disallowed.

1. Baker Material Handling Corp./Otis Elevator Co. Ltd.'s facilities to distribute imported forklift trucks.
2. Bank Building and Equipment Corp./Cooper Appraisals Ltd., which is engaged in general property appraisal.
4. CFMG Inc./which will acquire the fuel, heating, and home comfort equipment business of S. Anglin Co. Ltd.
5. Colorcraft Corporation/Triple Print Film Labs Ltd., which is engaged in mail-order photo-finishing.
6. Comshare Inc./Comshare Ltd., which operates a computer service bureau.
7. Creusot-Loire Steel Corp./Brace-Meuller-Huntley (Canada) Ltd., which warehouses machine and tool steels and aluminum bars.

10. Ex-Cell-O Corp./Davidson Rubber Co. Ltd. and Associates, which manufacture automotive instrument panel crash pads and armrests.

11. Gelco Corp./B.D.C. Ltd., which provides a courier service.

12. Hillbrand Industries Ltd./Terra-Flex Ltd., which designs and manufactures trackmounted off-highway vehicles.

13. Hongkong and Shanghai Banking Corp., The/Marmid Financial Services Ltd. and M.M. Builders Funds Ltd., 1. which is a holding company and 2. which is engaged in construction financing.

14. Kaiser Engineers Inc./Henry J. Kaiser Company (Canada) Ltd./La Compagnie Henry J. Kaiser (Canada) Ltée, which is a consulting engineering business.

15. Louisiana-Pacific Canada Ltd./Salmo Forest Products Ltd., which operates a sawmill.

16. Meadows, Thomas, & Co. Canada Ltd./Allan & Johnston Ltd., which is a customs broker.

17. National Distillers and Chemical Corp./Emery Industries Ltd., which sells specialty chemicals.

18. Norton Simon Inc./Avis Transport of Canada Ltd., which rents and leases cars and trucks.

19. Parker-Hannifin Corp./Joly Engineering Ltd., which manufactures precision mechanical components.

20. Pentos Ltd./certain assets of The Master's Collection, namely facilities to publish religious recorded music and to distribute religious musical records, tapes, and sheet music.

21. Produits Petroliers Champlain Ltée/retail business of Petrole Moderne Ltée, which wholesales and/or retails gasoline and fuels.

22. Robin Hood Multifoods Ltd./Fred Martin Agencies Ltd., which imports sporting goods, supplies, and equipment.

23. Seismograph Service Corporation/Central Development Exploration Ltd., which collects seismic data.

24. Unilever United States, Inc./1. Nacan Products Ltd. 2. Lepage's Ltd. 3. Foodpro National Inc., 1. which produces adhesives, resins, and specialty starch products; 2. which produces and sells adhesives and allied home care products and decoration aids; 3. which produces additives and imports and sells stabilizers, emulsifiers, natural smoke extracts, and soya proteins.

25. United Technologies Corp./Otis Elevator Co. Ltd., which manufactures elevators.

SECONDARY SOURCES

J. Langford, Canadian Foreign Investment Controls (1975).
Merger Policy, 22 Antitrust Bull. 673 (Fall 1975).

EUROPEAN ECONOMIC COMMUNITY

LAW


Synopsis
Multinational enterprises operating in the European Economic Community come under the ambit of the general competition laws: Articles 85 and 86 of the Treaty of Rome and subsequent regulations and directives. Article 85 prohibits agreements between undertakings and concerted practices that may affect trade between member states, and which are designed to prevent or distort competition in the Common Market. Article 86 prohibits abuse of a firm's dominant position in a substantial part of the Common Market. Both articles list examples of the behavior they prohibit.

The Commission of the European Communities (Commission) has proposed a regulation concerning prior notification of mergers of corporations with turnovers in excess of 1.25 billion units of account. This regulation was expected to help deal with the competitive threat of multinational corpora-
tions. The Council of the European Communities (Council) has declined to adopt the regulation.

The Commission has been working with the OECD to develop guidelines for multinational corporations, specifically in the area of service of documents, enforcement of decisions, and competitive behavior. It has also formulated a regulation that would allow the creation of a European Company—a community-wide corporation formed under standards promulgated by the Commission. This regulation has not been adopted by the Council.

The Court of Justice and the Commission have used Articles 85 and 86 of the Treaty of Rome against foreign corporations if these corporations' acts threaten competition in the Community. Though the Commission has espoused the "effects doctrine" as a means of obtaining jurisdiction over foreign corporations, the Court of Justice has only allowed jurisdiction over these firms in two types of circumstances: first, if the foreign corporation acts directly within the Community to restrain competition; or second, if the corporation's subsidiary commits an act in restraint of competition within the Community, and the subsidiary is not wholly independent of the parent.

Article 86, dealing with abuse of dominant position, has been applied to mergers with at least one firm in the Community where the merger will distort competition in the Community. This use of Article 86 greatly affects foreign corporations, since they often engage in such mergers.

The procedure and remedies for competition cases are found in several Commission regulations. Two regulations are most important. Regulation 17/62 gives the Commission the necessary powers to investigate threats to competition and to fine those corporations that violate the competition laws. It also confirms the Court of Justice's jurisdiction under Article 173 to review Commission decisions in this area.

Article 3 of Regulation 17/62 grants the Commission power to issue cease and desist orders. Whether this power encompasses divestiture orders has not been decided by the court of Justice. In Europemballage & Continental Can Co. v. E.C. Commission, [1973] E.C.R. 215, the court ordered Continental Can Co. to divest itself of an acquired company because the merger violated Article 86. However, the court reversed the Commission on the merits, never reaching the issue of divestiture. The regulation allows both member states and individuals to bring alleged violations of the competition laws to the attention of the Commission. Regulation 67/67 grants block exemptions from competition laws in certain circumstances.

In Multinational Undertakings and the Community, Bulletin of the European Economic Communities, No. 15 (Supp. 1973) the Commission explained its policies toward multinational corporations. It has tried to fit foreign corporations into the framework of the general competition laws, according them extra surveillance due to their propensity to harm competition more than smaller national firms. Although the Commission desires to work from a free enterprise theory of competition, it realizes that the size of multinational corporations mandates a considerable degree of control over
them. The Commission also desires that European firms grow in order to meet the competitive threat from foreign corporations. The Commission, however, does not discriminate on the basis of nationality in the application of competition laws to multinational corporations. The Court of Justice, although allowing the Commission leeway to formulate policy in the area, insists that standards must be promulgated to protect the rights guaranteed under the Treaty of Rome.

CASES


Imperial Chemical Industries v. E.C. Commission, [1972] E.C.R. 619. Non-Community firm engaged in price-fixing with various Community firms claimed the concerted action was carried out by its subsidiary in the Community. The court ruled it had jurisdiction over the non-Community parent firm because its subsidiary was not autonomous from the parent.


United Brands Co. v. E.C. Commission, [1978] E.C.R. 207. In this case, involving certain pricing and distribution practices of the multinational corporation United Brands concerning the sale of bananas in the Community, the court held that a corporation cannot seek to eliminate a competitor if such elimination would have effects on the pattern of competition in the Common Market.

SECONDARY SOURCES

European Commission, Multinational Undertakings and the Community, Bull. of the European Communities (Supplement 15/73 November 8, 1973).

Appendix I - 301


FEDERAL REPUBLIC OF GERMANY

LAW

Act Against Restraints of Competition (ARC), Third Chapter: Market-Dominating Enterprises, §§ 22–24b.

Synopsis
Prior to the passage of the ARC in 1957, the German legal tradition's theory of freedom of contract legitimized private restrictive agreements. The first legislation to address restrictive business practices, the Cartel Ordinance of 1923, granted a generally unexercised power to act against coercive practices. The period of National Socialism highlighted the Cartel Ordinance's ineffectiveness as cartels became the compulsory means for obtaining the government's planned economy objectives.

During the postwar allied occupation, the United States, Britain, and France each instituted laws against restrictive business practices in accordance with the Potsdam Agreement's mandate to eliminate "excessive concentration of German economic power." These laws were replaced in 1957 by the ARC.

In 1966 the first amendment to the ARC strengthened its enforcement provisions, especially with respect to vertical agreements and market-dominating enterprises. In 1973 the second amendment to the ARC instituted stricter abuse control over market-dominating enterprises and certain mergers. In 1976 the third amendment to the ARC extended merger control to newspaper enterprises of only local or regional significance.

Currently the legislature is considering a fourth amendment to the ARC to render more effective the provisions covering merger control, abusive practices of market-dominating firms, the ban on discrimination, nonbinding price recommendations, export cartels, and the exempted areas of banking, insurance, and public utilities.

The ARC applies to all restraints on competition, including mergers, having an effect on German territory. There are statutory exceptions, such as
public transportation enterprises, to the application of the statute. However, the ARC applies to other partly or wholly owned state enterprises unless there are express provisions to the contrary.

The general provisions of the ARC concerning market-dominating enterprises apply to monopolies. Market domination exists if an enterprise is not exposed to significant competition, or if it occupies a superior market position as defined by general criteria including the financial resources of the enterprise. The Federal Cartel Office (FCO) is authorized to prohibit abusive market-dominating conduct; it employs the "comparative market" concept as a test for abusive conduct. Abusive behavior exists if the market-dominating enterprise acts in a manner that would be impossible if it was exposed to substantial competition. Demands of specified prices or terms and conditions of sale are such abusive practices. In addition to prohibiting abusive practices, the cartel authority may declare the related contracts void. The FCO can prevent market-dominating enterprises from charging prices exceeding a specified limit. The FCO, however, cannot itself establish prices, terms, and conditions in place of the enterprises.

Mergers do not per se restrain competition. ARC Section 24 authorizes the FCO to prohibit mergers between or among enterprises if the merger is expected to result in or strengthen a position of market domination. However, if the participating enterprises prove that the merger's detrimental effect on competition is outweighed by its overall economic advantages, or is justified by an overriding public interest, the federal minister of economics may grant permission for the merger, subject to possible restrictions and requirements.

The ARC establishes regulatory jurisdiction over mergers through the "effects" test or theory. Mergers occurring abroad are considered to have domestic effects if foreign participants have subsidiaries in Germany or if at least one German enterprise participates in a merger that influences the structural conditions for domestic competition.

ARC Sections 23 and 24(a) require reporting of most consummated mergers, as well as certain proposed mergers. These notification requirements operate independently from the FCO's prohibitory power; that is, notification can be required although no remedial action will be taken. The FCO can thus observe concentration activity regardless of the possibility of market domination. Merged enterprises must notify the FCO if: (1) a domestic market share of 20 percent is obtained or increased by the merger, or if one of the enterprises possesses a 20 percent market share in another market, or (2) the enterprises during the business year prior to the merger had at least 10,000 combined employees or a combined turnover of at least 500 million DM.

The FCO may prohibit completed mergers only within one year after notification. A completed merger that the FCO has prohibited is dissolved unless the federal minister of economics otherwise permits.

Enterprises proposing to merge must notify the FCO if at least two of the participating enterprises each had sales of 1 billion DM or more during the
preceding fiscal year. Notification of mergers in the newspaper business is required if two of the participating enterprises each have sales of 50 million DM. Mergers not subject to control involve comparatively small enterprises and markets, or restraints of competition which do not produce an effect in a substantial part of the Federal Republic of Germany.

An independent Monopoly Commission reviews the information supplied by merging enterprises, and evaluates the development of enterprise concentration in the Federal Republic of Germany. The Commission issues a report every two years.

ARC Section 38 specifies that an offense is committed by any person who willfully or negligently disregards an order of the FCO, violates a prohibition, or fraudulently furnishes or uses incorrect information to influence a prohibition proceeding of the FCO. The offender may be fined up to 10,000 DM plus three times the additional revenues realized as a result of the violation.

The ARC's provisions are designed primarily to protect the public interest. Claims by private parties for damages resulting from a violation of the ARC are allowed under the ARC; however, these claims can only be lodged against market-dominating enterprises and only if an order issued pursuant to ARC Section 22 (abusive conduct) is deemed to be directly protective of individual interests. A damage claim requires a showing that the defendant acted willfully or negligently in violating the protective order. Injunctive relief is also available, and it does not require a showing of willful or negligent conduct. These private actions are subject to a three-year statute of limitations. There is no provision for private actions with regard to mergers.

**C A S E S**

WuW/E BGH 1299—“Strombezugspreis.” ARC Sections 22-24a do not protect the individual interests absent an expressly protective order.

WuW/E BGH 1377—“Zementmahlenlage.” Established point at which the acquisition of assets is sufficiently significant to constitute a merger subject to the reporting requirements.

WuW/E OLG 1467—“BP.” Concerns proof of an absence of significant competition between or among oligopolists.

WuW/E BKA 1482; KVR 4/75—“Vitamin B-12.” Federal Supreme Court confirmed the FCO’s authority to order lower prices in response to an abusive market-dominating practice although the specific order here was overruled.

WuW/E BKA 1517—“Bituman Verkaufsgesellschaft.” Merger improved competition by the entrance of a strong competitor which weakened an existing oligopoly.

WuW/E BKA 1526; WuW/E BGH 1445; WuW/E OLG 1645; KVR 2/76—“Valium-Librium.” FCO order to lower prices overruled.

WuW/E BKA 1571—“Kaiser-VAW.” Merger improved competition by resulting in an increased number of strong competitors.
WuW/E OLG 1599; WuW/E BGH 1435—"Vitamin B-12." Federal Supreme Court recognized the "comparative market" concept for determining abusive pricing by comparing alleged abusive behavior with behavior of enterprises exposed to substantial competition.

WuW/E BKA 1625; WuW/E OLG 1745—"Sachs." Strengthening of market-dominating position occurs if a dominant enterprise would become part of a concern which has significant financial resources.

WuW/E OLG 1637—"Weichschaum." Enterprise's assurances can avert prohibition order or partial dissolution.

KartV 34/67 of 18 February 1969. Sale conditioned on exclusive five-year buying agreement, i.e., tying arrangement, is an abuse of a market-dominating position.

BGHST 24 of 12 July 1973—"Olfeldrohre." Federal Supreme Court held that the existence or absence of "effects" for application of the ARC must be judged in connection with the rule of substantive law invoked in the specific case.

KVR 2/78 of 29 May 1979. Federal Supreme Court held that an acquisition completed abroad is subject to notification requirements according to the effects theory and the independent notification procedure of ARC Section 23.

SECONDARY SOURCES

Barnikel, Abuse of Power by Dominant Firms: Application of the German Law, 14 ANTITRUST BULL. 221 (1969).

German Federal Cartel Office Decision in the Metro Case, 13 ANTITRUST BULL. 1017 (1968).


Heil and Vorbrugg, Antitrust Law in West Germany: Recent Developments in German and Common Market Regulation, 8 INT'L LAW. 349 (1974).


—, Recent Developments in German Antitrust Law, 30 Bus. Law. 1273 (1975).

FRANCE

LAW


Synopsis
French economic policy underlies competition policy. The dominant theme of that policy since World War II has been price control. The Price Ordinance of 1945 was used primarily to fight price increases; it was only partially considered to be the legal basis for a general policy of maintaining competition and facilitating the development of free enterprise in a market economy.

Article 50 of the Price Ordinance No. 45–1483 prohibits activities of dominant enterprises which may have the effect of interfering with the normal operation of the market. The minister of the economy may require enterprises that have abused a dominant position to amend or annul the acts and transactions from which the abuse arises. The minister may also require such enterprises to take necessary steps to reestablish either the status quo ante or adequate competition. If injunctions issued by the minister are violated, fines may be assessed against the enterprises. Exemption provisions are extensively utilized where there has been legislative approval or where the activities further economic progress as proven by the parties to an agreement. In practice, the law has not been rigorously applied.

There is no system for the notification or registration of restrictive agreements in France. However, restrictive agreements can be investigated at the administrative level if inquiries are made to the appropriate ministry. The minister of the economy may refer the matter to the Commission on Competition (Commission). The Commission may bypass this referral process and examine the case on its own initiative at the behest of other interested parties. The Commission may issue an opinion as to the lawfulness of the practices and make remedial proposals to the minister. The minister of the economy then decides what measures are to be taken, i.e., closing the case,
fining the violators, or remitting the case to the Public Prosecutor's Office for criminal proceedings against the parties.

The French Government encouraged mergers through the 1960s and into the 1970s as a simple answer to problems created by the small size of the average French firm in contrast with the large size and innovative practices of U.S. competitors. European "merger fever" during the 1960s ran highest in France.

Recently, however, the French government articulated its concern for the effects of mergers on inflation in the Act No. 77–806 of 19 July 1977. This Act purports to serve the government's inflation control objectives by authorizing action against unlawful cartels and abuse of dominant positions and by introducing some form of control over concentrated operations. The government's adoption of a policy that gradually frees prices is also significant because it changes the direction of competition policy away from price control, toward the regulation of the structural causes of inflation. The 1977 Act establishes control of mergers above a certain size for the first time in France. This Act also provides for selective control of concentrated industries which impede competition without adequately contributing to economic and social progress. The Act applies to the activities of concentrated enterprises if such enterprises impede competition and their annual sales exceed 40 percent of domestic consumption on a national market in the case of similar or substitute goods, products or services, or 25 percent of domestic consumption if such goods are of a different nature and not substitute goods. Mergers or other agreements between firms that exceed these thresholds may be prohibited or modified. The Act No. 77–806 established punitive measures to be taken against unlawful cartels and abuse of dominant positions. With respect to cartels and market-dominating enterprises, the Act establishes a system of administrative fines, a procedure for injunctions, and arrangements to encourage interested parties to inform the Commission on Competition of allegedly illegal arrangements.

Article 53 sets forth sanctions for unlawful cartels and abuse of dominant positions. An enterprise may incur a maximum fine of 5 percent of turnover for an Article 50 offense or Frs. 5 million in the case of associations, trade organizations, or commercial interest groups. The minister of the economy imposes the fine pursuant to the Commission on Competition's opinion. In cases where settlements are reached, the minister and the parties may agree to a system of lighter penalties which have a maximum fine of Frs. 100,000.

The minister may enjoin an enterprise engaged in practices in restraint of trade. The enterprise may also be ordered to restore competition. For abuse of dominant position, the minister may order the enterprise to amend or cancel agreements or to take measure to reestablish adequate competition. If the enterprise does not comply with the injunction, the minister may impose a fine. The Commission on Competition may also propose that an Article 50 case be remitted to the Public Prosecutor's Office. If the minister does so it
enables both a public prosecution and a civil action for damages resulting from the offense.

To date the government has not aggressively enforced these new concentration provisions. However, following enactment of the 1977 Act, the government published four texts to clarify and bring its provisions into operation. These texts demonstrate the government's new determination to develop and enforce competition policy.

The Act establishes an optional notification system regarding activities of concentrated industries. Enterprises can voluntarily notify the minister of the economy who may either make no objection to the proposed action or who may refer the matter to the Commission on Competition for further scrutiny. The Commission may issue an Opinion within the limits of which the appropriate minister may require that the enterprises involved take necessary measures to insure or reestablish adequate competition. Such a decision must be made within eight months of notification.

Absent voluntary notification, the minister of the economy or the chairman of the Commission may order an inquiry to determine whether enterprises have concluded any illegal acts or agreements. There is no time limit for decisions initiated by the government's own inquiry into the nature of a business concentration.

An appeal lies for abuse of powers from all decisions taken by the government under this Act.

**Administrative Proceedings**

*Opinions delivered by the Technical Commission on Combines and Dominant Positions and by the Competition Commission.*

*Position Regarding Competition in the Carbon Dioxide Industry and on the Market for that Product,* Official Bulletin No. 15 of the Price Services, 23 August 1969. The Commission found the existence of a dominant position but no evidence of anticompetitive practices. It recommended continued careful review of the industry with a conclusion in two years as to the existence of a cartel or any discriminatory practices.

*Boycotting of the Limouzy Haulage Company by the GLAM,* Opinion of 18 December 1970, Official Bulletin No. 6 of the Price Services, 17 March 1971. The Commission found the boycott to eliminate Limouzy from the sheephide processing market had the characteristics of a restraint of competition. Since no economic benefits resulted from the boycott and because of mitigating circumstances (Limouzy's objective was to acquire a quasi-monopoly), the Commission did not subject GLAM to criminal proceedings.

*Practices Restricting Competition among Plastic Bottle Crate Manufacturers,* Opinion of 17 March 1971, Official Bulletin No. 19 of the Price Services, 30 October 1971. The Commission recommended that the case be referred to the public prosecutor for violating Article 59 bis of
the Price Ordinance concerning the abuse of a dominant position through restrictive contracts.

**Exclusive Dealing Agreements Involving Exclusive Territorial Rights and Geographical Allocation of Markets; Concerted Action in Connection with Public Tenders**, Opinion of 8 November 1974, Official Bulletin No. 5 of the Price Services, 1 February 1975. The Commission considered the submission of uniform bids upon invitation to tender as enabling the enterprises grouped within an economic cooperation group to compete with larger enterprises in regard to national contracts. Thus, the effect was not to restrict or distort competition but to strengthen it, and the agreements were permitted.

**Situation with Regard to Competition in the Distribution of Spectacle Frames**, Opinion of 4 June 1975, Official Bulletin No. 9 of the Price Services, 13 March 1976. The Commission found the generalized use by all opticians of a trade price scale, without reference to their true costs, to be an abusive cartel situation. However, the Commission recommended that, if a competitive situation did not emerge after direct retail price control, an information campaign would be launched to draw consumer's attention to the absence of binding price scales and the unlawfulness of such price scales. This marks a new direction for the Commission in allying consumers by keeping them informed of anticompetitive practices.

**Competitive Situation in the Production and Distribution of Sound Recordings**, Opinion of 17 May 1977, Official Bulletin No. 5 of the Price Services, 10 February 1978. Uniform price system violated Art. 59 but was not a restriction on competition because of the industry's need to expand.

**Practices in Restraint of Competition in the Marketing of Non-Refillable Lighters**, Opinion of 11 May 1978, Official Bulletin No. 13 of the Price Services, 1 June 1978. The Commission imposed heavy fines on three companies responsible for nearly 80 percent of the distribution of lighters to tobacconists. The companies had placed restrictions on freedom to purchase a small firm's disposable lighter and provisions restricting freedom of marketing. In addition to the fines, the Commission ordered the companies to cease these practices and revoke all measures restricting free competition in the trade.

**Practices in Restraint of Competition Found to Exist in the Sector of Non-Skid Tire Studs for Motor Vehicles**, Opinion of 8 June 1978, Ministerial decision of 26 July 1978. Practices in restraint of competition were found to exist in the sector of nonskid tire studs for motor vehicles. The Commission held that agreements or practices designed to harmonize prices violated the prohibition on cartels, and that the companies in question should renounce all agreements in restraint of competition, including the exclusive supply provisions. Although the minister did not refer the case to the public prosecutor, he did require a follow-up report on the restoration of competition.
SECONDARY SOURCES


OECD, *Annual Reports on Competition Policy in OECD Member Countries*.


GREAT BRITAIN

LAW


Synopsis

The Fair Trading Act of 1973 is the major law governing mergers and the exercise of monopoly power in Great Britain. It defines monopoly as an enterprise that occupies 25 percent of the market. The Act also created an Office of Fair Trading that is headed by an independent director general responsible only to Parliament. The director general is empowered to make monopoly and oligopoly references to the newly named Monopolies and Mergers Commission (Commission), though only the Board of Trade can refer mergers to the Commission. The Act also implemented provisions concerning consumer protection, restrictive labor practices, and pyramid selling. Further, it extended the registration requirements of the 1956 and 1968 Restrictive Practices Acts to services; thus, all restrictive agreements and information agreements affecting the product and service markets come under the scrutiny of the Monopolies Commission. The secretary of state and the director general of fair trading each have power to refer scale and complex monopoly situations to the Commission for investigation and report. A scale monopoly may exist when one person, company, or group of interconnected companies sup-
plies or acquires at least one-quarter of the market share in a particular market for goods or services. A complex monopoly may exist when at least one-quarter of the market share in a particular market for goods or services are supplied by or sold to two or more persons, unconnected companies or group of companies who prevent or restrict competition in the supply of goods or services.

If the director general determines that a monopoly situation exists, or may exist, he can refer it to the Commission for investigation. Any such reference must relate to the supply of all goods or services of a particular description; it cannot relate to the activities of a named person, company, or companies. The Commission cannot investigate a monopoly situation unless the matter has been formally referred to it.

A monopoly reference requires the Commission to consider whether, in fact, a monopoly situation exists. If the Commission determines one does exist, it must decide, first, who is favored by the situation; second, whether the favored persons are taking steps to exploit or maintain the situation; and third, whether any of the favored persons' acts or omissions are attributable to the existence of the monopoly situation. Also, the Commission examines whether the monopoly situation operates against the public interest and how that aspect can be remedied.

When the Commission reports that a monopoly situation exists and operates against the public interest, the minister of the appropriate state and industry may, by order, give effect to the report. In so doing, the minister takes into account any recommendations of the Commission and the advice of the director general. Noncompliance with an order is not a criminal offense. Individuals or the Crown may enforce orders by bringing a civil action "for an injunction or interdict or for any other appropriate relief." The director general is responsible for monitoring merger activities in order to identify situations that qualify for investigation. Mergers qualify for investigation if, first, two or more enterprises merge and cease to be distinct; second, at least one of the enterprises does business in the United Kingdom or is under the control of a corporation incorporated in the United Kingdom; third, the merger has occurred within six months; and fourth, the enterprises are both engaged in supply of goods or services of the same description, and either have between them at least one-quarter of the market for those goods or services, or the gross value of the assets taken over exceeds £5 million.

A merger may only be referred to the Commission by the secretary of state on the advice of the director general. The Commission is directed to consider any relevant matter, but the following matters are mentioned in the legislation for guidance: competition, the interests of the consumer, costs and innovation, a balanced distribution of industry and employment in the United Kingdom, and the export market. All merger reports must be published and presented to Parliament. If a report is made with adverse findings, the secretary of state may ask the director general to negotiate assurances
from the parties as to their future conduct. Also, the secretary may prohibit a proposed merger or dissolve an existing merger.

The new U.K. Competition Bill (now in the committee stage in the House of Commons) contemplates selective investigation and control of practices which have, or are intended or likely to have "the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it."

It empowers the director general to carry out preliminary investigations of conduct that may have this effect. Following an investigation, the director general will publish his findings. If he identifies an anticompetitive practice, he may request the Commission to investigate further and report whether the practice is against the public interest; as an alternative, the director general may accept a voluntary remedy (undertaking) from the enterprise relating to the practice. Following adverse findings by the Commission, the secretary of state may ask the director general to seek an undertaking from the enterprise or he may make an order prohibiting the particular practice or remedying its adverse effects.

The Competition Bill also provides, in part, for a new investigative method of scrutinizing activities of nationalized industries and certain other bodies. Additionally, it enables the secretary of state to require the director general to investigate prices or charges of major public concern.

The Competition Bill is expected to be out of the committee stage by March, 1980.

**Administrative Proceedings: Monopolies**

*Supply of Chlordiazepoxide and Diazepam (Librium and Valium);* 899 H.C. DEB. (1975-76) 12 November 1975, col. 1543-47. In 1973, Parliament ordered a 40 percent decrease in the price of Librium and a 25 percent decrease in the price of Valium. In settlement negotiations, Roche agreed to pay the government approximately £3¾ million in excess profits from 1970-73, to participate in a voluntary price regulation scheme, and to reduce the price of Valium and Librium to one-half their 1970 level.

*Supply of Building Bricks;* 913 H.C. DEB. (1975-76) 17 June 1976, col. 221-23. One manufacturer supplying more than one-third of the building market, was found not to operate against the public interest.

*Barrister's Services—the supply by her Majesty's Counsel alone of their services, and Advocate's services—the supply by Senior Counsel alone of their services;* 914 H.C. DEB. (1975-76) 7 July 1976, col. 543-45. Restrictions requiring senior and junior counsel for certain actions were deemed to create a monopoly operating against the public interest.

for solicitors created a monopoly situation operating against the public interest. The prohibitions restricted entry to the field and decreased competition and efficiency. The minister asked the director general to discuss with the relevant professional bodies the implementation of new rules.

Restrictions on Advertising by Veterinary Surgeons, Stockbrokers and Accountants; 916 H.C. DEB. (1975–76) 6 Aug. 1976, col. 1209–15. Restrictions on advertising created a monopoly situation that operated against the public interest. The minister asked the director general to consult with the appropriate professional bodies to implement the Commission’s recommended rules and safeguards.

Revised Undertakings Given by Oil Companies Regarding Retail Supply of Petrol; 916 H.C. DEB. (1975–76) 3 August 1976. Pursuant to the minister’s request, the director general obtained comprehensive agreements from the oil companies regulating supply agreements for various petrol products and leases and licenses of company filling stations.

Supply of Diazonium Sensitized Copying Materials; 927 H.C. DEB. (1976–77) 2 March 1977, col. 191–93. One company supplied over 50 percent of the U.K. market but the Commission determined the monopoly was not operating against the public interest. However, the Commission discovered twenty-two industry-wide restrictive agreements that had not been registered and were subsequently terminated.

Supply of Cat and Dog Foods; 935 H.C. DEB. (1976–77) 20 July 1977, col. 543–44. Two companies each controlled more than 25 percent of the market, but their profits, prices, and efficiency indicated the monopolies did not operate against the public interest.

Supply of Frozen Foodstuffs for Human Consumption; 919 H.C. DEB. (1975–76) 10 November 1976, col. 165–66. One company supplied over one-quarter of frozen foodstuffs in the U.K. The Commission found the company was efficient and its prices were not excessive. However, it recommended discontinuance of the company’s practice of giving discounts to retailers for reserving space in freezers.

Supply of Indirect Electrostatic Reprographic Equipment; 922 H.C. DEB. (1976–77) 16 December 1976, col. 744–78. Rank Xerox Ltd. supplied at least one-third of the market. Though the Commission found the company generally not be operating against the public interest, it criticized certain of Xerox’s practices, including group discounts. Xerox remedied some of the criticized practices, and the minister asked the director general to consult with Xerox to end the others.

Supply of Wheat Flour and Bread Made from Wheat Flour; 935 H.C. DEB. (1976–77) 14 July 1977, col. 261–62. Three companies required their flour-using subsidiaries to buy flour from the group’s own mills. This foreclosed 51 percent of the market and the Commission determined it was done to restrict competition. However, the Commission concluded that effective competition existed to the extent allowed by the substan-
tial statutory control of the industry and that the situation did not operate against the public interest. The Commission discovered twenty-two restrictive trade agreements that had not been registered and these were subsequently abandoned.

**Wholesaling of Newspapers and Periodicals;** Press Notice, Department of Press and Consumer Protection, June 1, 1978. Wholesale suppliers of national newspapers and periodicals refused to supply certain retailers. Though this constituted a complex monopoly situation, the Commission determined it was cost-efficient for wholesalers to limit the number of retailers they supplied and to select them on the basis of location and service standards.

**Supply and Export of Ceramic Sanitaryware;** Press Notice, Department of Prices and Consumer Protection, August 31, 1978. One company and its wholly owned subsidiary controlled over 25 percent of the domestic market. However, its profits were not excessive and price similarity in the industry reflected effective competition. Thus, the Commission determined the monopoly did not operate against the public interest. Control of 31 percent of the export market was found not to operate against the public interest because of competition from the international market.

**MERGERS**

**Amalgamated Industrials Limited,** 912 H.C. Deb. (1975–76) 26 May 1976, col. 274–75. The Commission found a consummated merger to be contrary to the public interest. It restricted the acquired company's progress, lessened the company's contribution to the balance of payments, and caused serious labor problems. The minister asked the director general to consult with the acquiring company to limit its holdings to no more than 10 percent of the stock of the acquired company.

**Pilkington Brothers Ltd./U.K. Optical and Industrial Holdings Ltd.**, 928 H.C. Deb. (1976–77) 24 March 1977, col. 590. The Commission expected the merger to operate against the public interest because of decreased incentive to meet the needs of the domestic market for glass and plastic lenses, and decreased ability to compete on the international market. The secretary of state asked the director general to obtain an undertaking from Pilkington Brothers to refrain from any merger activity with U.K. Optical.

**Babcox & Wilcox Ltd./Herbert Morris Ltd.,** 926 H.C. Deb. (1976–77) 23 February 1977, col. 571–73. Three members of the Commission determined the acquisition would be against the public interest, and recommended limiting Babcox's holdings in Herbert Morris to 10 percent. However, the secretary of state took no action on the report.

**The British Petroleum Company Ltd./Century Oil Group Ltd.**; Press Notice, Department of Prices and Consumer Protection, May 31, 1977. The
Commission determined the merger would be against the public interest because it might restrict development of Century's refining activity, tend to decrease price competition and customer-oriented research, and end the largest independent producer of lubricants in the U.K. The director general received an undertaking from British Petroleum to refrain from any merger activity with Century Oils.

Rockware Group Ltd./Redfern National Glass Ltd.; United Glass Ltd./Redfern National Glass Ltd.; Annual Report of the Director General of Fair Trading, 1978, at 93–94. The Commission expected both mergers to operate against the public interest by diminishing competition and domestic supply and increasing imports. The director general was asked to seek, and did receive, undertakings from the companies to forego the proposed mergers.

SECONDARY SOURCES


Monopolies Commission Reports
OECD. GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, Vol. II.
Pass and Hawkins, Exclusive Dealing, Supplier Ownership of Outlets and the Public Interest: The Petrol Case, 18 ANTITRUST BULL. 567–95 (1972).

IRELAND

LAW


Synopsis

The Restrictive Practices Act of 1972, and the orders promulgated pursuant to it, provide a comprehensive system of investigation and control of market-dominating enterprises and monopolies. Section 4 of the Act empowers the Restrictive Practices Commission to establish rules to insure the fair supply and distribution of goods. These rules are not enforceable, and depend on voluntary compliance. However, § 8 of the Act empowers the minister of industry and commerce (minister) to issue fair trade orders that are legally enforceable. Section 19 provides courts jurisdiction to enforce orders. Section 20 declares that anyone who contravenes an order is guilty of an offense. Offenses are defined in § 23; they range from fines of £100 to £5000 and imprisonment for up to six months.

The third schedule to the Act sets forth categories of individual or group practices that violate the Act, including: unjust elimination of competitors, restrictions of the supply of goods, creation of barriers to entry, territorial division of markets, private monopolization, and all other acts or agreements that "operate against the common good or are not in accordance with the principles of social justice."

Sections 13 through 16 of the Act establish and define the functions of the Examiner of Restrictive Practices. The examiner is appointed by the minister. The examiner investigates any aspect of: (a) the supply and distribution of goods or the provision of a service, (b) the operation of an order under the Act; or (c) the operation of Fair Practice Rules. Where a potential trade abuse is found it must be submitted in a report to the Restrictive Practices Commission or the minister.

Section 5 empowers the Restrictive Practices Commission to conduct inquiries into unfair trade practices at the request of the minister or examiner. It may also conduct an inquiry on application by a private party who lodged a prior request with the examiner that was denied. In conducting an inquiry, the Commission may summon witnesses and order discovery. Section 8 requires the Commission to report its findings and recommendations to the minister. To remedy an abuse, the Commission may establish fair practice rules, or the minister may declare legally enforceable restrictive practice orders.

Comprehensive Orders governing supply and distribution in eleven industries were issued through 1976.
Appendix 1

CASES

Report of the Board of Examiner: Motor Spirit, 1971; Restrictive Practices (Motor Spirit) Order, No. 18 of 1972, No. 15 of 1975. In April 1970, the Commission, at the request of the minister, announced an inquiry into retail outlets for motor spirits. The Commission learned that company stations accounted for 31 percent of total motor spirit sales, and that three major companies accounted for a high proportion of sales through company outlets. The Commission recommended, in part, that there should be a halt to the growth of new company outlets for three years to permit freer entry into the market. The minister issued an order that incorporated the recommendation, and the order was renewed, with slight modification, in 1975.

Report of Examiner: Iron and Steel Scrap, 1972. A government-owned steel company held a monopoly position for certain types of steel. It used a graduated rate scale that resulted in its supplies being channeled through a single supplier. This forces all scrap dealers to deal through only that supplier. The Commission concluded that “it is impossible to justify, in a protected market for scrap, the range and composition of the graduated price scale” adopted by the steel company for its purchases. This procedure created “a formidable and unnecessary barrier to entry into trade in scrap with the company, foster[ed] a monopoly in merchant scrap sales to the company,” and served to create a situation in the trade which “seriously impedes free and fair competition.” The Commission recommended revision in the purchase scale for scrap, and removal of the sole supplier of scrap from the steel company’s board. The minister accepted these recommendations. Enforcement by order was not necessary because the government controlled the steel company.

SECONDARY SOURCES


ISRAEL

LAW


Synopsis
The Israeli antitrust statute prohibits anticompetitive agreements between enterprises and provides for control of concentrated industries through ministerial discretion.
Arrangements that restrict competition, whether undertaken by a formal cartel or pursuant to an implicit agreement within an industry, are illegal unless exempted by statute or sanctioned by the Restrictive Trade Practices Board. Violations are criminal offenses and parties to the agreement are subject to private tort liability. Tacit consent to an agreement, combined with an interest in its operation, is sufficient to establish an individual as a party.

Agreements negotiated by trade unions, by agricultural marketing organizations, by conglomerates with their subsidiaries, as well as those involving intellectual property, international air, or sea carriage (where the minister of transport has been consulted), or exclusive dealing between suppliers and resellers are afforded statutory exemption. Parties involved in other agreements must register as cartels with the Board and determine their effect on the public interest. While the statute provides that the Board should refer to considerations set forth in the British Restrictive Practices Act of 1956 as indicative, nonexhaustive, criteria for this determination, applicants bear the burden of demonstrating that the benefits of cartelization to the public as a whole outweigh any damage that will result to identifiable sections of the society. An autonomous government official, the controller of restricted trade practices, is charged with representing the public interest before the Board. Cartels may be granted provisional, temporary, conditional, or partial authorization. All dispositions may be modified or cancelled by subsequent decisions of the Board and are subject to review by the Supreme Court.

The minister of commerce has discretionary power to declare that a particular industry has reached a level of concentration sufficient to justify government control of the entire industry. The level of concentration is not defined with reference to control of the relevant market by several firms. Rather, it is defined with reference to the size of the largest "commercial unit" in that market. Commercial unit is defined as "a single corporation; a corporation and its subsidiaries; the several subsidiaries of a single corporation; several corporations with predominantly interlocking directorates; a corporation and its controlling interests; or several corporations controlled by a single interest."

Once the minister of commerce and industry determines an industry's concentration level is monopolistic, that industry becomes subject to ministerial control with regard to the price, quality, and amount or method of production. Such control is imposed in response to proposals by the controller of restrictive trade practices, based upon findings that the existence of monopoly has led to unsatisfactory economic results.

Dispositions by the Restrictive Trade Practices Control Board create no stare decisis effect upon subsequent applications. However, some fairly consistent principles of decision are discernible.

The attainment of lower prices is considered to be inherently in the public interest so long as agreements which facilitate this do not interfere with other policy goals. Price stabilization, however, is not a public interest goal in itself. Furthermore, provision for public supervision of price increases is insufficient justification for agreements which tend to eliminate competition. Assertions
that a cartel will improve efficiency, quality, or service must be supported by substantial evidence, including a showing of the degree of cartelization necessary to attain the projected benefits. That a cartel agreement would insure the continued existence of an advantageous branch of the Israeli economy will not justify registration where the agreement could do so only by protecting firms that are inefficient or that are threatened with the technological obsolescence of their capital plants, even where there exists a government policy encouraging investment in the affected industry. Government initiated or approved export cartel plans through which industry members levy charges upon domestic sales to fund export subsidies have been approved. Other assertions of export benefit, however, may be dismissed as de minimis or as requiring the imposition of disproportionate cost upon consumers.

CASES

Dagan Flour Mills, Ltd. v. Minister of Commerce and Industry 26 P.D. 292 (1972–1).
Shimoni v. Ulamei Lehayim, Ltd. 25 P.D. 824 (1971–1).

ADMINISTRATIVE DECISIONS

SECONDARY SOURCES


JAPAN

LAW


Synopsis

Japan's Antimonopoly Act of 1947 is modeled after U.S. antitrust legislation. Enacted under the auspices of the Occupation Forces, the Antimonopoly Act was designed to be the basic law governing industry, and, as such, to provide the legal foundation for a strong free enterprise system. The Antimonopoly Act controls private monopolization, unreasonable restraints of trade, stockholding, interlocking directorates, mergers which may substantially restrain competition, and unfair business practices. However, the numerous exemptions subsequently enacted restrict the application of the statute in several industries. The Antimonopoly Act is administered by the Fair Trade Commission (FTC) which exercises its powers independently, although it is administratively attached to the prime minister's office.

The Act's history demonstrates that its enforcement in Japan has differed markedly from antitrust enforcement in the United States. For example, private antitrust actions for money damages have as yet played little role in the Act's enforcement. Furthermore, there have been only four criminal actions since 1947 against violators under Section 73, which permits the FTC to file an accusation with the public prosecutor when it determines the Act has been violated.

The Antimonopoly Act proscribes "... private monopolization, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, [and] technology, ... through combinations, [and] agreements, ..." Section 3 prohibits an entrepreneur from effecting a
private monopoly or engaging in unreasonable restraints of trade, although private monopolization is not a per se violation of the Act. Section 6 extends the statutory provisions to international trade; Section 8 lists activities which trade associations may not undertake; and Section 13 places restriction on interlocking directorates. Up to 1977, the FTC took action in six cases of private monopolization.

Section 2(5) defines a prohibited private monopolization as "business activities by which any entrepreneur, either individually, or in combination with, or in conspiracy with other entrepreneurs or in any other manner, excludes or controls the business activities of other entrepreneurs thereby causing a substantial restraint of trade contrary to the public interest." The Tokyo High Court has stated that any substantial restraint of trade is inherently contrary to the public interest.

Sections 10 (restriction on acquisition of stock), 15 (restriction on mergers or consolidations), and 16 (restriction on acquisition of assets) prohibit mergers or acquisitions of businesses where the effect may be substantially to restrain competition in any field of trade or where unfair business practices have been employed. Proposed mergers or acquisitions must be reported to the FTC thirty days in advance of the transaction. The FTC must act within the thirty-day period if it determines that the proposed transaction violates the above prohibition and should be enjoined. These sections, unlike the provisions concerning private monopolization under Section 2(5), require only the probability of a substantial restraint of trade to prohibit a merger or acquisition. However, the FTC has not been particularly active in the merger area. In the few cases that have arisen, none of the proposed mergers have been prohibited.

The Yawata-Fuji Merger Case in 1968 has been the most controversial merger case to date. The Yawata Steel Company and the Fuji Steel Company, which had constituted the Japan Steel Company prior to World War II, sought to reconstitute the Japan Steel Company and restore the prewar status quo. The FTC initiated proceedings to block the merger alleging substantial restraints of competition in four product areas. The two companies proposed a compromise whereby they would make a partial transfer of their facilities to their competitors and give technical assistance to their competitors. A consent decision was accepted by the FTC permitting the merger on that basis.

The Antimonopoly Act has been amended on three occasions, the most recent in May 1977, when, for the first time in the history of Japanese competition policy, the Diet passed an amendment which strengthened the Antimonopoly Act. Included in the 1977 amendments are new provisions relating to surcharges on profits by illegal cartels; structural controls providing for regulation of industries where an enterprise holds a 50 percent market share or two enterprises hold a 75 percent market share, and where the economic performance of the industry has been unsatisfactory; establishment of a reporting system for enterprises participating in parallel price in-
creases; FTC hearing procedures; reinstitution of restrictions on stockholding by large corporations or financial companies; and an increase in maximum criminal fines for a violation of the Act.

The Antimonopoly Act empowers the FTC, a quasi-judicial agency modeled after the U.S. Federal Trade Commission, to enforce the Act's provisions. There are three ways in which a violation may be brought to the attention of the FTC. First, any person having knowledge of a violation may request the FTC to take appropriate measures to remedy the illegality. However, the FTC retains discretion as to whether it should commence proceedings on the basis of such a report. Second, the public prosecutor may file a report with the FTC when a violation is discovered, although this procedure is seldom used in practice. Third, the FTC can commence an *ex officio* investigation.

If it becomes clear from an FTC investigation that a violation exists, the FTC may either recommend that the violator refrain from its illegal conduct or it may institute formal proceedings against the violator. If the concerned party accepts the FTC recommendation, a decision is issued on that basis without formal trial. If the FTC initiates formal proceedings, a trial takes place in which FTC investigators bring their findings before administrative law judges. During the trial the defendant may accept both the investigators' facts and the application of law to those facts as presented in the FTC's complaint, but contest the FTC's proposed remedies. If the Commission agrees to modify its proposed abatement measures, the trial is terminated and a consent decision is issued. If neither a recommendation nor a consent decision is issued, a decision is rendered upon completion of a formal trial. Therefore, three types of decisions may result from an FTC investigation: recommendation decisions, consent decisions, and formal decisions. All three types of decisions are legally binding, and violation of a decision is an offense punishable by imprisonment or fine.

A defendant whose conduct has been found to be illegal may appeal the FTC decision to the Tokyo High Court, which has exclusive jurisdiction over FTC decisions. The FTC's findings of fact are binding on the Tokyo High Court and the introduction of new evidence is generally not allowed. An FTC decision is subject to reversal if it is not based on substantial evidence or if it is found to be unconstitutional, in which case, the Court may remand the case to the FTC for further proceedings. Through 1977, thirty-one cases had been appealed to the court and in fifteen cases, the FTC's decision was affirmed.

Violations of the Antimonopoly Act are subject not only to the various orders rendered by the FTC including, for example, orders under a 1977 provision for disgorgement of profits gained by cartel participants through illegal activities, but also to criminal penalties. Private monopolization and unreasonable restraint of trade are the violations for which the heaviest penalty is imposed—imprisonment for not more than three years or a fine of not more than 5 million yen. However, criminal proceedings are initiated
only upon accusation by the FTC so that alleged violations can be judged by FTC personnel having special economic and expert knowledge.

Section 25 of the Act also provides money damages for private actions. Any person who has been injured because of a violation of the Act is entitled to indemnification for actual damages. The claim for damages under the Act can only be made after a final decision, in which case the FTC's decision is conclusive evidence of the illegality of the defendant's conduct. To date, only three private actions have been concluded. If no FTC decision has been issued with regard to the particular conduct, an injured party may still bring an action under § 709 of the Civil Code, which authorizes general tort claims.

Chapter 6 of the Antimonopoly Act sets forth exceptions to the Act for certain acts of public utility enterprises, rights exercised under the patent, copyright, and trademark acts, and acts of various cooperatives. In addition, land transportation, insurance, and certain other activities are exempted from the Antimonopoly Act by virtue of the “Act concerning Exemption from the Application of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade.” Shipping cartels also are exempted from the Antimonopoly Act by virtue of the Marine Transportation Act of 1949.

The 1953 amendments to the Antimonopoly Act exempted certain depression cartels and rationalization cartels. Separate exemption laws also were enacted about this time. These exemption laws include the “Export Trading Act of 1952” (now the “Export and Import Trading Act”) and the “Temporary Measures Act of 1952 concerning the Stabilization of Specific Small and Medium-Sized Enterprises” (replaced by the “Small and Medium-Sized Enterprises Organization Act of 1957”). Today, in such industries as coal, machinery, and textiles, other statutes permit specific rationalization cartels to be formed in conjunction with particular promotional programs of government agencies. But, the number of exemption cartels has been decreasing yearly, from 1,040 in 1965, to 788 in 1978, and 492 in 1979.

**CASES**


*Toho Co. Ltd. and Another v. Fair Trade Commission*, Tokyo High Court Decision of December 7, 1953. Exclusive dealing agreement between two companies for distribution of motion pictures.


Case of Idemitsu Kosan and 26 others, Tokyo High Court, formal proceedings initiated May 28, 1974. Criminal action for price fixing.

ADMINISTRATIVE PROCEEDINGS

Leading decisions of the Fair Trade Commission.
Case of the Yuasa Timber Co. Ltd. and 64 Others, Decision of August 30, 1949. Horizontal price fixing of plywood.
Case of the Noda Shoyu Co. Ltd. and 4 Others, Decision of April 4, 1952. Horizontal price fixing of soy sauce.
Case of the Snow Brand Dairy Co. Ltd. and 3 Others, Decision of July 28, 1956. Private monopolization concerning fresh milk.
Case of the Yawata/Fuji Merger, Consent Decision of October 30, 1969. Restraints of competition in a particular field of trade by merger.
Case of the Gunma Asano Concrete Co. Ltd. and 5 Others, Recommendation Decision of June 5, 1978. First surcharge case; price fixing.
Case of Mitsukoshi, Formal proceedings were initiated on May 14, 1979. Abuse of dominant position.
Case of Komatsu Co. Ltd., Bucyrus-Erie Co., Formal proceedings initiated on October 12, 1979. First extraterritorial antitrust case; abuse of dominant position.

SECONDARY SOURCES

OECD, COMPARATIVE SUMMARY OF LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1978).
OECD, GUIDE TO LEGISLATION ON RESTRICTIVE TRADE PRACTICES (1968).

MEXICO

LAW

Constitution Article 28 (Mex.); Organic Law Associated with Article 28, 85 D.O. 1161 (August 31, 1934); Regulations to the Organic Law, 88 D.O. 112 (February 1, 1936); Codigo Penal Article 253 (Mex.); Codigo Civil Article 1910 (Mex.).

Synopsis
Article 28 of the Constitution of 1917 states:

The law shall punish severely and the authorities shall effectively prosecute every concentration or association in one or a few hands of goods of primary necessity for the purpose of obtaining a rise in prices; every act or proceeding which prevents or tends to prevent free competition... every agreement or combination, in whatever manner it may be made, to prevent competition... and to compel consumers to pay exaggerated prices; and in general, whatever constitutes an exclusive and undue advantage in favor of one or more specified persons and to the prejudice of the public in general or of any social class.

Constitutionally-established exceptions include labor union activity, authorized associations of producers selling directly in foreign markets, and specified state-created monopolies (telegraph, postal service, federal banks, etc.).

The 1934 Organic Law adopted pursuant to Article 28 of the Constitu-
tion forbids the existence of monopolies, defined in Article 3 of the Organic Law as any situation deliberately created which allows one or more persons to fix prices or set quotas on services with resulting injury to the general public or a specified social class. Under Article 4 a rebuttable presumption of the existence of monopoly is raised by any concentration of goods of necessary consumption, any price-fixing agreement or combination made without authorization or regulation from the government, or any commercial or industrial situation willfully created to fix prices on goods or set quotas on services. The 1936 regulations to the Organic Law provide that government authorization will generally be granted to price-fixing agreements or combinations if the organization seeking authorization can demonstrate that the proposed agreement will result in any of the following: integration of an industry line permitting price reductions, suppression of intermediaries to obtain less costly distribution, elimination of one or more goods from product lines without unjustly raising prices, creation of a competitor, reduction of commercial activities because they have ceased to be economically useful to the public, adoption of quality control rules or ethical standards, exportation of goods without prejudice to national consumption, adoption of cost-minimizing production and distribution techniques, or any other activities which by their nature demonstrate it is not their aim to impose prices that harm the public.

The Organic Law defines other conditions that raise a presumption concerning activity which "tends" to be a monopoly. Since these conditions show only a tendency toward monopolization, the penalty is one-half that of an Article 4 violation. Under Article 5 these conditions include the importation of goods which may result in unfair competition, unauthorized voluntary destruction of goods to raise prices by lowering supply, unregulated benefits to consumers such as rebates, and sales of goods below cost. However, sales of goods below cost is allowed if the goods are new on the market, the market price is below cost, or the goods are sold at an auction or bankruptcy proceeding.

The Organic Law excepts from the definition of a monopoly any authorized industrial or public services operating under official price schedules and any industries in which the government participates as shareholder or partner.

The Organic Law establishes a fine of 100 to 10,000 pesos for persons who violate Article 1. In the case of continued unlawful conduct a new sanction will be imposed every day. In addition to this penalty, the federal executive, together with the National Council on Economics, is empowered to take steps to restore competitive market conditions by fixing maximum prices on goods, forcing the sale of goods held off the market, forcing the furnishing of withheld services, and promoting competition by granting subsidies or franchises.

The federal executive is also empowered to take action pursuant to the decreed Powers of the Federal Executive in Economic Matters, Feb. 1 D.O.
1936, which grants regulatory authority to the federal executive without specific reference to antitrust. This law applies to business activity related to certain types of merchandise such as goods of necessary consumption, raw materials, and products of fundamental industries. Luxury item industries are specifically excluded from the scope of this law. The decree empowers the federal executive to impose maximum prices on goods, force the sale of goods held from the market, regulate the distribution of goods to avoid unnecessary intermediary steps, regulate imports and exports, force raw material producers to satisfy domestic demand before exporting, and impose rationing and priority systems when a product's demand exceeds its supply. Persons who violate this law face fines of 100 to 20,000 pesos or confinement for ninety days.

Alternatively, a plaintiff may seek remedies through provisions in the Penal Code. Article 253 of the Penal Code of the Federal District of Mexico punishes the following acts with up to nine years imprisonment and a fine of up to 150,000 pesos: monopolizing goods of primary necessity with the intent to obtain price increases by restricting the flow of goods; impairing competition by creating barriers to entry; restricting output of goods with intent to obtain higher prices; exporting goods without authorization; selling goods of primary necessity for excessive profits or any other acts which violate the provisions of Article 28 of the Constitution. In addition, a court may order suspension of operation for one year or the dissolution of the enterprise. Under Article 30 of the Penal Code, a plaintiff can seek restitution and indemnification for any damage caused to him.

Either individuals or the National Council on Economics, representing the government, can initiate an antitrust action. The National Council on Economics, a federal agency, is in charge of regulating national economic matters including trade and more specifically any illegal monopoly activity. The provisions of the Civil and Penal Codes and the Organic Law of Article 28 of the Constitution do not preempt but supplement each other. Therefore all three statutory provisions are channels available to the plaintiff.

CASES

Amparo Administrativo en Revision Promovide por Estevez Adelfonso, 43 Seminario 781, 786 (1935).
Amparo Civil Directo promovide por miguel Kuri Awad, 108 Seminario 1655 (1951).
Amparo Administrativo in Revision promovido por Mexican Petroleum Company, 57 Seminario 818 (1938).

SECONDARY SOURCES

Browning, A Comparative Glance at the Anti-Monopoly Laws of the United States and Mexico, 42 Texas L. Rev. 577 (1964).
THE NETHERLANDS

LAW


Synopsis
The Economic Competition Act (Act) deals with two subjects: regulation of competition which is defined as "any agreement or decision governed by civil law, regulating economic competition between owners of enterprises"; and dominant position which is defined as "a factual or legal relationship in trade or industry involving a predominant influence by one or more owners of enterprises on a market for goods or services in the Netherlands." Actions are brought by the government only when such actions are deemed to be in the public interest. Any private action by interested third parties is limited to filing complaints with the government.

Section 2 of the Act requires notification to the minister of economic affairs of any "regulation of competition" within one month after such regulation comes into being. However, the minister may grant exemptions to the notification requirement, and have in fact done so for certain types of agreements (for example, joint purchase or sale agreements, agreements regarding exclusive selling or purchasing rights, and others).

The minister can make a competition regulation binding on an entire branch or sector of a trade or industry for a period not to exceed three years, where such an action is deemed to be within the public interest. However, the minister may invoke an Order in Council which declares that specific elements of regulations of competition are not valid for a period of five years, again only where the public interest requires such an action.

This authority has been invoked regarding, respectively, collective resale price maintenance and individual resale price maintenance for certain durable consumer products, and agreements restricting competition which require binding arbitration of disputes. This prohibition may be and in fact has been extended in these areas by periodic statutory enactments. Before the minister can take any of these actions, however, the matter is referred to the Economic Competition Commission, which is a Crown-appointed panel of independent experts who act in an advisory capacity, giving consideration to both the competition regulations and claims of dominant position. The Commission publishes a notice of public hearings, and all interested parties may present their positions at that time. Also, the Commission has the power to make otherwise secret information public for the purpose of informed public involvement in the hearing process.

Ministerial decrees under the Act must be complied with by all enterprises operating in the Netherlands (whether foreign or domestic), but the Act does not have extraterritorial effect. Noncompliance with a ministerial
Appendix 1

decree can give rise to criminal sanctions, although in practice damage remedies are more common. The government has instituted relatively few investigations under the Act, due mainly to the high burden of proof required to establish a violation contrary to the public interest. Draft legislation has been submitted to the Parliament to amend the statute's approach to control of horizontal and vertical price arrangements, making such arrangements prima facie contrary to the public interest, with the enterprise bearing the burden of showing that its actions fall within one of the specific exceptions allowed; this legislation is likely to be adopted in the near future. Recommendations have also been made for the development of premerger controls; action in this area, however, is unlikely in the near future.

SECONDARY SOURCES

Boot & de Jong, Chapter 20, Economic Law, in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS (Fokkema, Chorus, Hondius & Lisser eds. 1978).
[1972] COMM. MKT. REP. (CCH) ¶ 27,005 et seq.

REPUBLIC OF SOUTH AFRICA

LAW


Synopsis

The Regulation of Monopolistic Conditions Act of 1955, as amended (Act) empowers the minister of economic affairs to control, prevent, or eliminate monopolistic practices "detrimental to the public interest." The Act also empowers the Board of Trade and Industries to conduct investigations into alleged monopolistic conditions and to make recommendations to the minister of economic affairs.

The Act applies to:

(a) Every agreement, arrangement, or understanding, whether legally enforceable or not, between two or more companies;
(b) Every business practice or method of trading, including any method of fixing prices;
(c) Every act or omission on the part of any person, whether acting independently or in concert with any other person;
(d) Every situation arising out of the activities of any person or class or group of persons;
which by directly or indirectly restricting competition, has or is calculated to have, the effect of—

(i) restricting the output or disposal of any commodity;
(ii) limiting the facilities available for the production or distribution of any commodity;
(iii) enhancing or maintaining prices;
(iv) preventing the production or distribution of any commodity by the most efficient or economic means;
(v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets;
(vi) preventing or retarding the entry of new products or distribution into any branch of trade or industry; or
(vii) preventing or retarding the adjustment of any branch of trade or industry to changing circumstances.

Specific types of monopolistic practices may be prohibited by the Board of Trade and Industries, or a cease and desist order may be issued to a particular party within a specific trade. However, takeover bids are actually aided by a provision of the South African Companies Act which stipulates that when a bidding company acquires 90 percent of another company's outstanding shares, the remaining 10 percent must be relinquished to the bidding company.

South African law does not specifically prohibit monopolies or require prior government approval for mergers. It more closely resembles the British system than the U.S., in that mergers and voluntary agreements are permissible if deemed to be in the public interest. Since the Act provides no definition of public interest, the Board of Trade and Industries has to weigh the advantages and disadvantages of the monopolistic condition and conclude on the preponderance of the evidence, and in light of its own assessment of the facts, whether the monopolistic condition in question is justified. A merger that creates "monopolistic conditions" may be dissolved.

In the period 1955 to 1976 the minister of economic affairs ordered the Board of Trade and Industries to conduct eighteen investigations into suspected monopolistic conditions of which fifteen had been completed through 1979. Only four prosecutions resulted in convictions through 1976. Furthermore, the minister has only irregularly issued directives to undertake an investigation. During two five-year-periods, no directives were given to the Board of Trade and Industries. Investigations that were undertaken were quite lengthy—more than two years on the average—and even in those investigations for which the minister of economic affairs issued an order, very little was done to enforce such orders prior to 1974.

Nonetheless, Section 18 of the Act provides for fines or imprisonment or both for specified violations. Section 8(1) provides that any person who fails
to comply with an order issued by the minister of economic affairs, and based upon the Board of Trade and Industries' investigation into suspected monopolistic conditions is guilty of an offense and liable for a fine not exceeding R 20,000 (ten thousand pounds) or imprisonment not exceeding five years, or both. Any person who fails to comply with the Board of Trade and Industries' investigation by submitting requested information or who knowingly furnishes false information is likewise guilty of an offense and liable to a fine not exceeding five thousand pounds or imprisonment not exceeding two-and-one-half years, or both.

Merger and acquisitions policy will be substantially changed by the report of the Mouton Commission (Commission) (published in 1977), if the government accepts the Commission's recommendations. Although a draft bill embodying some of the recommendations of the Commission was published for general information in February 1978, it appears, as a result of criticism, that the draft is being reconsidered by the Department of Commerce. The Mouton Commission contends the Act's main weakness lies in its inability to deal effectively with the merger problem. While the Act may be used to dissolve harmful concentrations that result from horizontal and vertical mergers, conglomerates may fall outside the Act. The Commission also questions the wisdom and efficacy of compulsory dissolution of consummated vertical and horizontal mergers. The Commission concluded that the decision to entrust enforcement of the Act to the Board of Trade and Industries rather than an autonomous body has interfered with proper implementation of the legislation. The Commission considered it unrealistic to expect the Board of Trade and Industries to be an impartial judge and effective policeman of those firms with which the Board had been closely linked and whose growth and well-being had been its primary task for years.

The Commission's proposals concerning mergers are:

(a) Since the Commission is not in favor of the per se prohibition of economic concentration, or of behavior which causes such concentration, the proposal concerns the need to provide in the legislation for the investigation of mergers, takeovers and other methods of acquiring control on an individual basis in accordance with the requirements of the public interest;

(b) the Commission is not in favor of an elaborate system for the scrutiny of mergers, takeovers and other forms of acquiring control involving provision for pre-notification and criteria, such as total assets or market shares for the screening of amalgamations. Apart from the demands on time and manpower which such a system would involve and which the country can ill afford it would not cover "creeping" takeovers, i.e., the purchase of shares over a period until control of another company is obtained;

(c) there should be established a quasi-judicial body which may be called the Merger Tribunal presided over by a judge or by some
other independent person together with at least two further members experienced in, or with the knowledge of, the problems in this field;

(d) the Tribunal would have the power not only to forbid a takeover to proceed but also to break it up once it had been completed and to break up the results of a "creeping" takeover or indeed any form of conglomerate if it considers it in the public interest to do so;

(e) the Tribunal should complete its investigation and report its decision to the Minister within three months after the date of reference, and the Minister must convey his decision to the relevant parties within two weeks after receipt of the Tribunal's decision; and

(f) the Commission considers that the existing maximum fine of twenty thousand Rand can no longer be considered adequate and favors an increase in the maximum fine.

SECONDARY SOURCES


VENEZUELA

LAW


Synopsis

In order to encourage domestic financial and technological development, Venezuela has enacted legislation that regulates foreign investment and multinational corporate activity in Venezuela. The AFIC and Decree 2442 require that all new and existing foreign investments be registered with and approved by the government. Loans from foreign sources to Venezuelan enterprises must receive prior government approval; all contracts to import technology, or license patents or trademarks must also be approved and registered. Failure to comply with these registration requirements will result in the loss of the right to remit earnings or capital, to make payments on principal or interest, and to transfer royalties abroad.

The Foreign Investment Agency (SIEX), responsible to the Venezuelan Ministry of Finance, is a government agency charged with supervising all foreign investments. If a direct foreign investment is to be approved, such
approval must come from SIEX within 180 days after a completed application is filed. Aggrieved enterprises can appeal an adverse decision of SIEX.

All foreign enterprises investing in Venezuela after December 31, 1974 must agree to transform themselves into “mixed” or “national” companies within fifteen years. For the purpose of this provision the expansion of an existing investment is treated as a new investment. In a mixed enterprise foreign investors hold less than 50 percent of the stock; an enterprise is considered national when foreigners own less than 20 percent of its shares. When computing percentages, citizens of other Andean Common Market countries can be treated as Venezuelan nationals.

Certain sectors of the Venezuelan economy are reserved for national companies. One such sector is public services, which includes telecommunications, mail, drinking water, electricity, sanitation, and security. The following industries are also limited to national companies: domestic transportation services, advertising, television, Spanish language newspapers and magazines, and retail firms. Certain companies are exempt from national and mixed company requirements: companies selling goods made in Venezuela, companies providing services, such as computer software or rental cars, and firms importing capital equipment.

In the area of technology transfer, domestic development is the principal goal. Royalty payments between a majority foreign-owned subsidiary and its parent or affiliates are prohibited, and such payments may not be deducted from taxable income. Foreign enterprises that have agreed to convert into national or mixed enterprises are exempt from this proscription, however. If a foreign company transfers technology to a Venezuelan subsidiary, it is obligated to train Venezuelan personnel in the use of the transferred technology.

Recently there has been an effort to regulate the commercially restrictive practices of Venezuela’s domestic enterprises. The Venezuelan legislature is presently considering a bill that would prohibit most acts and agreements that create or threaten to create a monopoly situation. Under the proposed legislation certain types of cartel arrangements are permissible, including those for supply, payment, and quantity discount standards, standardization of goods, uniform trade practices, promotion of export sales, and production of agricultural goods. However, with all such exceptions the enterprise must notify the government of the agreement; government approval will be granted only if the parties prove that the same result cannot be reached by other means and establish that the agreement will not prejudice the means of production or supply.

The proposed law also prohibits price-fixing agreements, although it permits resale price maintenance arrangements. The statute does not automatically prohibit agreements that limit the use of goods or services acquired by price-fixing agreements, nor does it bar tying arrangements. Instead the government reserves the right to examine these arrangements and, if necessary, void them. The bill also prohibits agreements concerning licenses, patents, designs, or industrial secrets that impose substantial limitations on the
acquiring party, except when the limitation or improvements relate to a price agreement between the parties, or to sales in a foreign market.

The bill also authorizes the prohibition of all economic abuses by market-dominating enterprises. To this end it will control merger, acquisitions, and transfer of assets. It will accomplish this by requiring the parties involved to notify the government of such agreements when it is probable that an enterprise will acquire 20 percent of an industry market or that an enterprise already possessing such market power shall increase it. The proposal in general terms limits abusive pricing, purchase and sales restrictions, and price discrimination. The penalties for violations of the proposed statute are fines, calculated as a percentage of paid income tax, and prison terms.

SECONDARY SOURCES

