International Antitrust

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I. Developments in the United States

The three developments with international implications attracting the most attention in 1997 may have been the Boeing-McDonnell Douglas merger, the decision of the First Circuit Court of Appeals in *United States v. Nippon Paper Industries Co., Ltd.*,[1] and the Kodak-Fuji matter before the World Trade Organization (WTO).

The Boeing Company announced in late 1996 that it would acquire the McDonnell Douglas Corporation, its only domestic competitor in large civil aircraft. The transaction would leave only two manufacturers in the world of large civilian aircraft, Boeing and Airbus Industrie. Both the U.S. Federal Trade Commission (FTC) and the European Commission (EC) scrutinized the transaction very closely. The FTC concluded that the transaction should be permitted;[2] the EC expressed great concern about the potential competitive impact of the transaction and ultimately cleared it only after obtaining concessions from Boeing not to enforce certain long term exclusive supply agreements it recently obtained with several major airlines, to maintain the separate legal identity of the commercial aircraft business of McDonnell Douglas for ten years, and to continue to provide customer support to existing McDonnell Douglas aircraft.[3] Crucial factors in the analyses of both competition authorities included the facts that major aircraft purchasers indicated they were unlikely in the foreseeable future to place any orders for large aircraft with McDonnell Douglas, so that McDonnell Douglas could not be viewed as a viable independent competitor in the marketplace in the long term, and that there was

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1. 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

2. *See, e.g.*, FEDERAL TRADE COMM'N, WATCH No. 481, MERGER WATCH 1 (June 30, 1997); FEDERAL TRADE COMM'N, WATCH No. 482, Failing Firm Theory? U.S. clears BOEING/MCDONNELL DOUGLAS 11 (July 14, 1997) [hereinafter FTC: WATCH No. 482]; Trade Reg. Rep. (CCH) ¶ 24,295.

3. *See, e.g.*, FEDERAL TRADE COMM'N, WATCH No. 483, MERGER WATCH 1 (July 28, 1997); Trade Reg. Rep. (CCH) ¶ 484 (June 30, 1997); Trade Reg. Rep. (CCH) ¶ 485.

no alternative purchaser for the company. The EC placed greater emphasis than the FTC on the concerns of Airbus about the transaction, and less on the doubtful viability of an independent McDonnell Douglas and the efficiencies that may result from the merger.

The transaction highlighted the differences in the substantive antitrust analyses applied by the U.S. and the European Union (EU) competition authorities, and the frictions that arise in such situations, especially when trade considerations are introduced into the equation. The European Union sought to invoke the 1992 agreement settling the dispute regarding government subsidies to aircraft manufacturers as violations of the GATT Subsidies Code and the GATT Agreement on Trade in Civil Aircraft,[4] seeking an earlier consultation under that agreement than is customary regarding possible violations by the United States of the agreement.[5] That action led the U.S. Trade Representative to seek assurance that the European Union would conduct its inquiry into the Boeing-McDonnell Douglas transaction on "competition policy principles and not on extraneous political principles."[6] Conversely, after the FTC cleared the transaction, and before the EC voted on the merger, President Clinton publicly expressed concern regarding the EC's analysis of the transaction and stated that an adverse decision on the deal by the EC might lead the United States to take the matter to the WTO.[7] The concern on the part of the United States was such that Joel I. Klein, then Acting Assistant Attorney General in charge of Antitrust, went to Brussels to discuss the issues, although it was not his agency, the executive branch Antitrust Division, but rather the independent agency, the Federal Trade Commission, that was reviewing the transaction in the United States.[8] Ultimately, trade considerations appeared to have little impact on the outcome of the competition authorities' analysis. Nonetheless, the raising of the possibility of a trade dispute highlighted the differing analytic approaches and created friction between the authorities.

In *United States v. Nippon Paper Industries Co.*, the U.S. Government accused Nippon Paper of conspiring with competitors and distributors to fix the price of thermal fax paper sold in North America. The indictment charged that Nippon Paper and various co-conspirators met in Japan and reached an agreement to fix the price of fax paper in North America. The defendant allegedly achieved this goal by selling the paper in Japan to unaffiliated trading companies on the express condition that the trading companies resell that paper in North America only at the fixed prices. The trading companies then allegedly shipped the paper to their U.S. subsidiaries, which sold the paper to consumers at the fixed prices. Nippon Paper was charged with ensuring compliance with its instructions by auditing its customers.

Nippon Paper and the Japanese Government argued that the Sherman Act did not authorize criminal prosecution of activities that took place entirely outside the United States. The trial court agreed and dismissed the indictment.[9] The U.S. Government appealed, and the U.S.

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4. *See* Agreement Concerning Application of General Agreement on Tariffs and Trade to Trade in Civil Aircraft of July 17, 1992, 9 Int'l Trade Rep. (BNA) No. 1273 (July 22, 1992).

5. *See, e.g., Barshefsky Denies Brittan's Allegation That United States May Violate Aircraft Pact*, 14 Int'l Trade Rep. (BNA) No. 806 (May 7, 1997).

6. *See*, FTC: WATCH No. 482, *supra* note 2, at 12.

7. Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. TIMES, July 18, 1997, at D2.

8. *See* FTC: WATCH No. 482, *supra* note 2, at 11.

9. United States v. Nippon Paper Indus. Co., Ltd., 944 F. Supp. 55 (D. Mass. 1996), *rev'd*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). *See also* Michael H. Byowitz et al., *International Antitrust*, 31 Int'l Law. 413, 413-14 (1997).

Court of Appeals for the First Circuit reversed the lower court. The Court of Appeals reinstated the indictment and remanded the matter to the trial court for further proceedings.

The Court of Appeals concluded that the U.S. antitrust laws provide civil and criminal remedies against activities that may have been conducted entirely outside U.S. territory, but that had the express intent of affecting commerce within the United States. So long as the defendants are subject to the personal jurisdiction of U.S. courts, they may be prosecuted for antitrust violations committed entirely abroad that were specifically targeted toward the United States. Certiorari was denied by the U.S. Supreme Court.[10]

Therefore, activities intended to have an effect in the United States may be subject to criminal prosecution in the United States, regardless of where those activities took place. In addition, persons or entities engaging in those activities may be brought before a U.S. court as long as they are subject to the personal jurisdiction of U.S. courts. In that connection, it is noted that the second largest aggregate criminal fine under the antitrust laws, $65 million, was imposed in December 1997 against a Dutch company and a Belgian company and its American subsidiary for an international cartel in marine construction and transportation services.[11] Meanwhile, fines continue to be imposed against U.S. and foreign defendants in the citric acid price fixing cases.[12]

In December 1997 the WTO panel reviewing the United States complaint against Japan that Japanese regulations improperly denied Kodak access to the market in Japan for photographic film issued a preliminary decision that the complaint was without sufficient basis. The panel found that the Japanese Government and Fuji Film did not conspire to place trade barriers unfairly keeping the United States and Kodak from competing in Japan. The petition Kodak filed with Japan's Fair Trade Commission alleging violations by Fuji of Japan's competition laws remains pending.[13]

Other developments that attracted less general attention included the largest civil penalty imposed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), the conclusion of two agreements relating to competition law enforcement, and the formation of an International Competitiveness Advisory Committee by the U.S. Department of Justice.

One merger enforcement action by the U.S. competition authorities during 1997 may be noteworthy from the international perspective. A German piston manufacturer and a Brazilian competitor paid total civil penalties exceeding $5.6 million for failure to file premerger notification under the HSR Act,[14] a fine far larger than the next largest under that Act, the $3.1 million paid by the Sara Lee Company in 1996. In addition, Mahle GmbH agreed to divest the U.S. business in large-bore, two-piece pistons for high-output diesel and natural gas engines that it acquired as a result of the acquisition of Metal Leve, S.A.[15]

The United States and the European Union concluded an agreement on the application of positive comity principles in the enforcement of their respective competition laws. Also, the United States and Australia entered into the first agreement under the International Antitrust

10. 118 S. Ct. at 685.

11. United States v. Dockwise N.V., Trade Reg. Rep. (CCH) ¶ 45,097 (1998); FEDERAL TRADE COMM'N, WATCH No. 492, SECOND LARGEST FINE IN ANTITRUST HISTORY: THREE COMPANIES COUGH UP $65 MILLION FOR ALLEGED BID-RIGGING 11 (Jan. 1998).

12. United States v. Jungbunzlauer Int'l AG, Trade Reg. Rep. (CCH) ¶ 45,097 (1997).

13. *See also* Byowitz et al., *supra* note 9, at 415-16.

14. United States v. Mahle GmbH, 1997-2 Trade Cas. (CCH) ¶ 71,868 (D.D.C. 1997).

15. Mahle GmbH, 62 Fed. Reg. 10,566 (FTC 1997) (decision and order).

Enforcement Assistance Act of 1994 (IAEAA). Negotiations are under way for other agreements under the IAEAA, but none appear to be close to conclusion.

The Antitrust Division of the U.S. Department of Justice in November 1997 convened an International Competition Policy Advisory Committee, co-chaired by James F. Rill, former Assistant Attorney General in charge of Antitrust, and Paula Stern, former chair of the U.S. International Trade Commission, with Merit E. Janow of Columbia University as Executive Director. The Committee has a two year mandate to study issues including multi-jurisdiction merger review, international cartel enforcement, and market access. The Committee is expected to hold its first meeting in early 1998 to determine its direction.

II. Developments in Canada

A. New Director for the Competition Bureau

On February 4, 1997, Konrad von Finckenstein, Q.C., was appointed Director of Investigation and Research under the *Competition Act*. The Director is the head of the Canadian Competition Bureau (the Bureau). Before his appointment, Mr. von Finckenstein, a career civil servant, occupied the position of Assistant Deputy Minister, Business Law, at Industry Canada and Justice Canada. Prior to that, he served as Assistant Deputy Minister, Free Trade Policy and Operations, at the Department of Foreign Affairs and International Trade, and Assistant Deputy Attorney General, Tax Law and Coordinator for the Implementation of NAFTA, for the Department of Justice. His appointment reflects a recognition within government circles of the increasing importance of the interface between competition policy and other government priorities, particularly in the trade area. In this regard, Mr. von Finckenstein stated that "the best forum to deal with private barriers and for reaching an [international] agreement is the WTO," although he acknowledged that before this can occur it will be necessary to continue to promote enforcement cooperation through bilateral agreements and "to continue the Basic concept evolution at the OECD."[16] Since assuming office, Mr. von Finckenstein emphasized the compliance-oriented approach to enforcement and consulted widely in an attempt to gain a better understanding of the concerns of the bar, business, and various other stakeholders.

B. Proposed Amendments to the Competition Act (Canada)

On November 20, 1997, proposed amendments to the Competition Act, which were under active discussion for over two years, were introduced as Bill C-20 in the House of Commons.[17] With one notable exception, these proposals essentially mirror those contained in Bill C-67, which died on the order paper when Prime Minister Chretien called an election in the Spring of 1997. If passed, amendments would be made to the Act's provisions concerning pre-merger notification, misleading advertising, and prohibition orders, and new provisions would be introduced dealing with telemarketing. The one significant departure from Bill C-67 is a new proposal to amend the Criminal Code to allow judicially authorized interception, without consent, of private communications in the context of investigations involving the basic conspiracy provisions

16. Konrad von Finckenstein, Address to Canadian Bar Assoc. Competitive Law Section Annual Conference (Sept. 19, 1997).

17. Proposed Amendments Bill C-20, an Act to Amend the Competition Act and to Make Consequential Amendments to Other Acts, § 24[1], First Session 36th Parliament, 46 Elizabeth II 1997.

of the Act (s.45), bid-rigging (s.47), and deceptive telemarketing (s.52.1). As might be expected, this wiretapping proposal gave rise to significant controversy within Canada.

With respect to pre-merger notification, the principal amendments involve: (a) doubling the existing seven and twenty-one day waiting periods applicable to short-form and long-form filings, respectively; (b) significantly expanding the information requirements for long-form filings, and (c) providing the Director (who would be renamed the Commissioner if the amendments are passed) with the ability to delay a merger for up to thirty additional days (with the possibility of a further sixty-day extension) upon certification that a formal inquiry was commenced and "more time is required to complete the inquiry."[18] These proposals are unlikely to have a significant affect on straightforward transactions, but may increase the likelihood of the Bureau requiring a long-form filing in respect of transactions raising potential issues and will reduce the probability that merging parties will be permitted to close a transaction prior to the completion of the Bureau's review when their transaction raises potentially serious prima facie competition issues.

Other proposals were postponed for further study. These proposals include repeal of the criminal price discrimination provisions in the Act, as well as a new private right of access to the Competition Tribunal for non-criminal matters. In addition, a proposal to overhaul the provisions in the Act respecting confidentiality and international enforcement cooperation was deferred pending resolution of the issues raised in the *Schreiber* decision. As noted in last year's Year in Review,[19] in that case, Wetston J., a former Director of the Bureau, ruled that a Canadian enforcement authority is required, before requesting a foreign enforcement authority to execute a search and seizure, to obtain prior authorization from a Canadian court and to satisfy the court that there are reasonable and probable grounds, established upon oath, to believe that an offence was committed and that there is relevant evidence to be found at the place of the search. On March 12, 1997, a majority of the Federal Court of Appeal upheld that ruling. The matter is now before the Supreme Court of Canada. The postponement of the amendments in this area leaves the law in an unsettled state, with significant uncertainty respecting the ability of the Bureau to exchange information with foreign enforcement authorities.

C. New User Fees

On November 3, 1997, the Bureau began charging user fees for pre-merger notification filings, merger advance ruling certificates (ARCs), advisory opinions, and, in certain instances, photocopies. The fee for pre-merger notification filings and ARCs is CDN $25,000. Only one fee is payable when a pre-merger notification filing is made and an ARC is requested. In addition, only one fee is payable in respect of a merger, even if the parties notify separately. (In Canada, the acquiring party often, but not always, notifies on behalf of both parties). Written advisory opinions under the deceptive marketing practices provisions in the Act cost $500, while requests for advisory opinions under other provisions in the Act, including the merger provisions when no ARC is requested and no formal filing is required, cost $4,000.

In return, the Bureau committed to meeting certain service standards. These standards primarily relate to turn-around times and the nature of the comfort provided in the advisory opinion. With respect to turn-around times, the Bureau made the following commitments:

18. *Id.*
19. Byowitz et al., *supra* note 9, at 416-17.

Matter	Maximum Turn-around Times
Pre-merger Notification	
non-complex	14 days
complex	10 weeks
very complex	5 months
Advisory Opinions	
(Sections 52 to 60)	
non-complex	8 days
complex	30 days
Other Provisions	
non-complex	4 weeks
complex	8 weeks

However, these time periods will not begin to run until the Bureau has determined that it has received sufficient information from the parties on certain key analytical points described in information guidelines the Bureau published in connection with the user fee initiative.

With respect to advisory opinions, the Bureau intends to explain the basis for the opinion and to publish any opinions of potential precedential value if the party or parties in question consent. If such consent is not granted, the Bureau will request permission to publish a generic version of the opinion, i.e., one that does not disclose any confidential information or identities.

D. Draft EU-Canada Cooperation Agreement

In the latter part of 1997, the text of a revised *Draft Agreement Between the European Communities and The Government of Canada Regarding The Application of Their Antitrust Laws* (the Draft Agreement) became public. The Draft Agreement is very similar in format, style, and content to the 1995 Canada/U.S. Cooperation Agreement and the 1991 U.S./EU Cooperation Agreement. However, there are some noteworthy differences, including stronger provisions relating to confidentiality, positive comity, and negative comity than those contained in the 1991 U.S./EU Cooperation Agreement.

E. Competition Tribunal in Tele-Direct Bars Tying While Declining to Compel Trademark License or Bar Other Practices

In February 1997 the Competition Tribunal issued its long-awaited decision in *Director of Investigation and Research v. Tele-Direct (Publications), Inc.*[20] While rejecting most of the allegations made by the Director under the abuse of dominance provisions of the Act, the Tribunal agreed with the Director's position that: (1) telephone directory space and telephone directory advertising services constitute two separate products for national and regional advertisers; (2) Tele-Direct (Publications), Inc. and its affiliate, Tele-Direct (Services), Inc. (collectively Tele-Direct), tied the supply of advertising space to the acquisition of advertising services for these customers; and (3) this tying practice is likely to substantially lessen competition. The Tribunal also agreed with the Director's position that Tele-Direct engaged in a practice of

20. [1997] C.P.R. 3d 1(Comp.Trib.).

discriminatory anticompetitive acts against advertising consultants and that those anticompetitive acts are likely to substantially lessen competition. Accordingly, the Tribunal issued an order prohibiting these practices and the above-noted tying. This is the first case in which the Tribunal addressed tying as a principal allegation.

It is particularly noteworthy that the rejected allegations in the abuse of dominance part of the case included the Director's claim that Tele-Direct's refusal to license its trademarks to certain competitors is a practice of anticompetitive acts. This is the first time the Tribunal was required to address the issue of compulsory licensing. After observing that "something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark," the Tribunal added:

> The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a license; selectivity in licensing is fundamental to the rationale behind protecting trade-marks.[21]

III. Developments in Mexico

A. Merger Enforcement

1. *A Major Merger Is Blocked by the FCC*

In the first precedent of this kind, the Federal Competition Commission (FCC) decided to block Sigma (a Grupo Alfa subsidiary) from acquiring Zwanenberg,[22] a leading processed meat producer owned by Unilever. This transaction involved the possibility of concentrating up to seventy percent of an already highly concentrated market in which there is substantial consumer preference for established brands (those with fifteen to forty years standing). Kir, an Axa Group and Sara Lee joint venture, opposed the merger and ended up acquiring Zwanenberg.

2. *Controversial Interpretation of the Concept of Controlling Interest*

A premerger notification filing by G. Carso (the telephone company and other huge business interests owners) in the area of radio and television prompted a disturbing FCC ruling in which the authority seems to assume that when an acquisition is financial in nature, the possible antitrust concerns are neutralized and the parties may be cleared to close the transaction (irrespective of rather large concentration ratios and other cross-ownership concerns) if: (1) acquired assets are divested after "maturity of the financed projects"; and (2) voting rights are not exercised by the acquiror. Due to its lack of rationale and distorting effects on competition policy, this non-binding precedent is expected to be reversed in the near future.[23]

B. Private Enforcement (Complaints)

1. *Exclusive Dealing—American Express vs. Visa*[24]

This is a widely reported case in which the FCC granted American Express (Amex) a preliminary injunction to prevent VISA from imposing an exclusionary by-law prohibiting Mexican

21. *Id.* at 32.
22. *See* <http:/cfc.gob.mxlcfc97/....concentraciones/cnt-101-97.html>.
23. *See* Annual Report, 1994-95 FCC, pp 46-50.
24. *See* Annual Report, 1996 FCC, pp 42-44.

banks from issuing American Express cards. Such injunctive relief, the first of its kind granted in a private complaint action, shows a welcome blend of careful consideration and timely response.

Litigation on the merits included a chilling anticompetitive effect claim by plaintiffs. The case settled, since Amex accepted VISA's representation before the FCC that it will not impose any exclusivity arrangement in the future. The FCC approved the settlement, but warned VISA of aggravated penalties should it pursue exclusionary practices and served notice of its ruling to all VISA member banks.

2. *Notary Public Service*[25]

In another controversial case prompted by a complaint by corredores públicos (lawyers recently empowered, among other functions, to grant official creditworthiness to documents and acts licensed by the federal government) against the notary public trade association of Mexico City, whose members are notaries licensed by the Mexico City local government (about 220 for a population of over 18 million people), the FCC ruled the notaries were guilty of monopolistic practices while successfully exerting pressure against the local public registrar to refuse registration of documents issued or validated by competing corredores. The FCC imposed fines against the notaries' trade association and against several individuals, and directed the corresponding registrar to refrain from rejecting documents certified by corredores. This is a major antitrust ruling that sends a clear signal against regulators captured by members of a professional trade association and is also an example of how antitrust agencies may start leveling the field in this traditional area that remains protected from competition in other important jurisdictions with a roman law tradition (Spain, France, and Latin America).

3. *Warner Lambert México Found Guilty of Predatory Pricing*

In an FCC ruling stemming from an ex-officio investigation, Warner Lambert México was found guilty of marketing a brand of chewing gum (Clarks) at a price well below its total average cost, resulting in losses during the period in question. Other technical details were not disclosed, but this ruling arose after the FCC decided to warn Warner Lambert of certain concerns in a February 1996 not guilty resolution that concluded a three-year predatory pricing litigation with Canel's, Warner Lambert's closest competitor. The FCC ordered Warner Lambert to cease and desist from its predatory pricing policy and imposed a 1.5 m. pesos fine (about US$185,000).

C. INTERSTATE COMMERCE INVESTIGATIONS

In an interesting variation of its competition advocacy role, the FCC investigated a bill sent by the Chihuahua State Governor to the local legislature for approval. The bill, aimed at regulating purchases and procurement of public works and services, included provisions intended to grant anticompetitive advantages to persons and "goods and services" of local origin, authorizing a differential percentage of five percent over competitors from other states. The FCC issued a recommendation to the governor to eliminate these provisions.

25. *See* <http//cfc.gob.mx/cfc97/....denuncias/corredores.html>.

D. Judicial Review of Competition Cases (Amparos)

The FCC's rulings are subject to judicial review only on constitutional grounds through amparo proceedings before district judges and federal circuit tribunals. None of the amparos filed challenging the constitutional validity of the competition statute were successful, and the FCC's investigative powers (procedure, data, and document requests) were upheld by federal judges. The string of cases reported suggests the competition statute of 1993 and the FCC's actions are now gaining maturity and becoming areas of specialized legal work.

IV. Developments in the European Union

A. EU Merger Regulation Amendments

The review process of the EU Merger Regulation came to a close on June 30, 1997, with the adoption of amendments to the EU Merger Regulation. Many were disappointed that the Member States were unwilling to approve a simple reduction of the turnover thresholds laid down by the Regulation. Instead, the current test continues to apply, but an alternative test was introduced to deal with cases that do not meet the current turnover thresholds but will raise multi-jurisdictional issues and will therefore be more appropriately dealt with by the European Commission. The alternative test is satisfied if the following conditions are all met:

- the worldwide turnover of the companies is over 2.5 billion ECUS;
- the EU wide turnover of at least two of the undertakings is over 100 million ECUS each;
- combined turnover in each of at least three Member States is over 100 million ECUS; and
- turnover in each of those three Member States by each of at least two of the undertakings is over 25 million ECUS.

In addition, both tests require that if two-thirds of the EU turnover of each of the companies involved derives from sales within one Member State, then the EU Merger Regulation does not apply and the national authorities have jurisdiction. The calculation of turnover for banks was also amended to introduce a more sensible test based on banking income rather than assets.

Most important, the amended regulation applies to all structural joint ventures, the so-called full-function joint ventures (provided the turnover tests are met). The Commission may also take article 85 considerations into account when considering a joint venture raising issues of cooperative overlap. This amendment goes a long way toward removing the largely artificial distinction between concentrative and cooperative joint ventures that owed little to commercial reality.

The provision dealing with commitments entered into by the parties (e.g., divestiture) was amended to allow commitments to be enforced in first phase proceedings. As with commitments entered into in second phase proceedings, the Commission may now revoke clearance if the parties breach their commitments.

The one month deadline for issuing a first phase clearance decision is extended to six weeks when commitments are offered during first phase proceedings. The present automatic three week suspension period, within which the parties may not put the transaction into effect, was extended to the date the Commission issues a first or second phase clearance decision.

Amendments to article 9 of the Regulation make it easier for Member States to request a referral of all or part of a particular case if a distinct national market is affected. It is no longer necessary for a Member State to provide evidence of a threat to the creation or strengthening of a dominant position in that distinct national market (provided it is not a substantial part of the common market, such as a major Member State).

B. Transactions Blocked by the EU Commission

Despite the large number of mergers entered into in 1997 and the high number of second phase investigations opened by the European Commission, only one merger was blocked during 1997. The European Commission decided that the acquisition of the Dutch Toys "R" Us stores by Blokker led to the strengthening of Blokker's dominant position in the Dutch market of specialized toy outlets and was therefore incompatible with the common market. This merger did not in fact meet the turnover thresholds laid down in the Regulation, but was referred to the European Commission by the Dutch Government under article 22 of the EU Merger Regulation. Contrary to the situation following an investigation by the Commission under the normal rules, the implementation of a transaction referred to the Commission under article 22 is not suspended during the examination. As a consequence, the Commission's decision declaring the acquisition incompatible also required Blokker to divest the Toys "R" Us stores to an independent third party unconnected to the Blokker Group.

The in-depth investigations in 1997 included the much publicized Boeing/McDonnell Douglas, Coca Coal/Carlsberg, and Guinness/Grand Met mergers.

C. Notice on Market Definition

On October 3rd the European Commission adopted a notice on the definition of the relevant market for the purposes of Community competition law. The notice provides long-awaited guidance on the approach taken by the Commission in defining relevant product and geographic markets.

The notice outlines the basic legal and economic concepts underlying the Commission's approach and sets out the process to be followed in order to reach a conclusion as to market definition in individual cases. These concepts apply in both merger and restrictive practices cases. The notice also provides useful insight into the type of evidence the Commission relies on in drawing their conclusions on the definition of the relevant market.

The notice is intended to enable companies and their advisors to anticipate the issues that may give rise to competition concerns for the Commission, allowing them to take these considerations into account when making important commercial decisions. At the same time, the notice provides guidance to national authorities and national courts when called on to implement EC competition law or national competition law based closely on EC law. The approach taken by the Commission is clearly influenced by the U.S. Horizontal Merger Guidelines.

D. Notice on Agreements of Minor Importance

In October 1997 the Commission made some important amendments to the notice on agreements of minor importance. The notice defines agreements that, due to their insignificance or de minimis effect, should not be caught by the prohibition in article 85 of the EC Treaty. Turnover thresholds in determining significance were abolished and a higher market share threshold of ten percent (as opposed to five percent) was introduced for vertical agreements. Certain categories of agreements/practices such as price fixing are not within the scope of the notice and remain prohibited whatever the Member State. The abolition of turnover thresholds means that for the first time large firms with small market shares are able to benefit from the notice.

E. Notice on Cooperation between National Competition Authorities and the Commission

In October the European Commission published a notice governing cooperation between national competition authorities and the Commission in applying articles 85 and 86. The notice is a counterpart to the 1993 notice on cooperation between national courts and the Commission and provides a practical mechanism for national authorities to review complaints and to undertake investigations on behalf of the Commission. National authorities, however, are only able to perform these functions when they are granted jurisdiction to do so under national law.

It is envisaged that the Commission will continue to handle cases involving businesses whose relevant activities are carried on in more than one EU Member State or that raise a new point of law or involve a government-owned undertaking or one that is granted special or exclusive rights. National authorities will handle cases whose effects are felt mainly in their territory and that appear unlikely to qualify for exemption from the article 85 prohibition (given the Commission's exclusive jurisdiction to grant article 85(3) exemptions). The economic magnitude of a case does not necessarily give rise to particular EU significance unless access by firms from another Member State to the relevant national market is significantly impeded.

A national competition authority should systematically inform the Commission of any proceedings it commences based on EU competition law. This notice enables a determination of whether the case should more properly be dealt with by the Commission. The notice further provides that a national authority is generally expected to stay proceedings brought under national or EU competition law when the Commission is investigating the same case and it appears conflicting decisions may be reached.

F. Guidelines on the Method of Setting Fines

The European Commission published its guidelines on the method of setting fines under articles 85 and 86 of the EC Treaty and Article 65(5) of the ECSC Treaty in the Official Journal. The publication of the guidelines clarifies the method of calculating fines, which sometimes appeared somewhat opaque.

Article 15(2) of Regulation 17 provides that, in cases of infringement, the Commission may impose fines of up to ten percent of the turnover in the preceding business year of each of the undertakings participating in the infringement. It also provides that, in fixing the amount of the fine, "regard shall be had both to the gravity and to the duration of the infringement." Under the ECSC Treaty, the limit laid down is twice the turnover on the products in question, increased in certain cases to a maximum of ten percent of the undertaking's turnover on ECSC products. The guidelines go into much greater detail. The starting point is that a base sum is set relating to the length and seriousness of the infraction and is calculated without reference to turnover. This sum is then adjusted up or down to take into account aggravating or mitigating circumstances.

A distinction is made between minor, serious, and very serious infringements. Minor infringements, which might be trade restrictions of a vertical nature, are likely dealt with by a fine of between ECU 1000 to ECU 1 million. More rigorously applied horizontal or vertical restrictions with a wider market impact attract fines of between ECU 1 million and ECU 20 million. Finally, very serious infringements, such as price-fixing and market sharing cartels, compartmentalisation of national markets, and flagrant abuses of a dominant position by undertakings holding a virtual monopoly, are likely dealt with by fines in excess of ECU 20 million. This category includes cartels attracting record fines in the past, such as the Cement cartel fine imposed in 1994 where fines totalling ECU 248 million were imposed on thirty-three European cement producers, and also the Tetra-Pak, Soda Ash, and Carton board cases.

The guidelines also distinguish between infringements of short (less than one year), medium (one to five years), and long (more than five years) duration. Infringements of medium duration likely incur an increased fine of up to 50 percent and those of long duration attract an additional increase of 10 percent per year.

Aggravating or attenuating circumstances have a further impact on the amount of the fine. Persistent offenders, ringleaders, and companies obstructing the Commission in its investigations attract heavier fines and, when the amount of the gains improperly made can be objectively estimated, the penalty should exceed that amount.

G. EC/U.S. Positive Comity

The year 1997 saw the conclusion of negotiations between the U.S. and EC competition authorities on an agreement on the application of positive comity principles in the enforcement of their competition laws. This agreement supplements the 1991 U.S./EC Agreement and encourages the use of the provisions enabling an authority to request the other authority to take enforcement action when that authority is better placed to deal with the behavior in question. The Agreement does not confer any additional powers on the authorities. However, the Agreement creates a presumption that in certain circumstances a Party normally defers or suspends its own enforcement activities when the other authority agrees to investigate the matter.

The positive comity provision of the 1991 Agreement was invoked for the first time in January 1997. The U.S. Department of Justice (DOJ) requested that the European Commission investigate alleged anticompetitive behavior by Amadeus, a computer reservation system operating in Europe. The request was made after Sabre, a U.S. computer reservation system, complained to the DOJ that it was encountering difficulties entering the EC market.

In contrast to the 1991 Agreement, mergers are not within the scope of the new agreement; the competition authorities state that this is due to the tight timetables imposed by EC and U.S. merger legislation.