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International Antitrust

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I. Developments in the United States

The year 1998 saw a number of significant developments in the area of international antitrust and competition law. The following provides a brief overview of some of these developments, including: (i) several judicial decisions in the fields of jurisdiction and *forum non conveniens*; (ii) prosecutions of alleged international cartels; (iii) merger enforcement activities; and (iv) international cooperation efforts among competition agencies.

A. Procedural Developments

Several significant court cases in 1998 addressed the international jurisdictional scope of the U.S. antitrust laws, along with related concepts such as comity and *forum non conveniens*.

1. *Subject Matter Jurisdiction and Comity*

In *Caribbean Broadcast System, Ltd. v. Cable & Wireless PLC*,[1] the D.C. Circuit reversed the district court and held that the plaintiff, the owner of an FM radio station in the Eastern Caribbean, had made sufficient allegations to establish jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).[2] The plaintiff alleged that the defendants, the owner of a competing FM radio station and a worldwide telecommunications company, had monopolized and conspired to monopolize the market for English language radio advertising in the Eastern Caribbean and that this had harmed U.S.-based advertisers. The court held that the plaintiff had alleged a "direct, substantial, and reasonably foreseeable effect" on export trade or commerce sufficient to establish jurisdiction under clause 1(B) of FTAIA.[3]

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1. *See* Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998).
2. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1994) [hereinafter FTAIA].
3. *See id.*

The U.S. District Court for the Southern District of New York, in *Betterware PLC v. Tupperware Corp.*,[4] held that it had jurisdiction to consider a claim by a British housewares supplier that an American firm had instituted "sham legal proceedings" overseas in order to exclude the firm from the U.S. market.[5]

The U.S. District Court for the District of Columbia, in *Millicom International Cellular, S.A. v. Republic of Costa Rica*,[6] addressed the scope of U.S. federal court jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA).[7] The court dismissed a complaint against the government of Costa Rica, a Costa Rican instrumentality, and a subsidiary of the instrumentality, which alleged that these entities had acted unlawfully to exclude the plaintiffs from the Costa Rican cellular telephone market.[8] The court held that a foreign state was presumptively immune under FSIA except in situations where the foreign state engaged in certain "commercial activity" or "expropriation."[9] The "commercial activity" exception was not available because the Costa Rican government's activities did not take place in the United States, nor did they have a "direct effect" on the United States.[10] The "expropriation" exception was unavailable because the plaintiffs had not exhausted the remedies available in Costa Rica for their alleged injuries.[11]

In *Filetech S.A.R.L. v. France Télécom S.A.*, the U.S. District Court for the Southern District of New York held that it had subject matter jurisdiction to consider antitrust claims against France Télécom, a foreign telecommunications and marketing corporation in which the French government is a majority shareholder, under FSIA and FTAIA.[12] The district court dismissed the claims against France Télécom on international comity grounds, however, explaining that the defendant had presented a "substantial claim" that there was a conflict between the Sherman Act[13] and French law.[14] The Second Circuit reversed the finding of jurisdiction, holding that there were significant factual disputes concerning whether France Télécom's level of "commercial activity" in the United States was sufficient to establish jurisdiction under FSIA.[15] The court also noted that there was as yet no basis for the conclusion that there was a "true conflict" between U.S. and French law—i.e., "an allegation that compliance with the regulatory law of both countries would be impossible."[16]

2. *Personal Jurisdiction*

In *Frank Sexton Enterprises, Inc. v. Société de Diffusions Internationale Agro-Alimentaire*,[17] one defendant, a French cooperative with a wholly-owned U.S. subsidiary, moved to dismiss for lack of personal jurisdiction a complaint alleging violations of the Robinson-Patman Act[18] and

4. Betterware PLC v. Tupperware Corp., 1998-1 Trade Cas. (CCH) ¶ 72,158 (S.D.N.Y. 1998).
5. *See id.* at 82025.
6. Millicom Int'l Cellular, S.A. v. Republic of Costa Rica, 995 F. Supp. 14 (D.D.C. 1998).
7. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*, (1994).
8. *See Millicom*, 995 F. Supp. at 16.
9. *See id.* at 18.
10. *See id.* at 19-22.
11. *See id.* at 22-23.
12. Filetech S.A.R.L. v. France Telecom S.A., 978 F. Supp. 464 (S.D.N.Y. 1997).
13. Sherman Act, 15 U.S.C. §§ 1, 2 (1994).
14. *See Filetech S.A.R.L.*, 978 F. Supp. at 478.
15. Filetech S.A.R.L. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998).
16. *See id.*
17. Frank Sexton Enterprises, Inc. v. Societe de Diffusions Internationale Agro-Alimentaire, 1998-2 Trade Cas. (CCH) ¶ 72,264 (E.D. Pa. 1998).
18. Robinson-Patman Act: Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (1994).

other causes of action. The U.S. District Court for the Eastern District of Pennsylvania held that it would have personal jurisdiction over the French firm only if the firm was the "alter ego" of its U.S. subsidiary.[19] A close and cooperative relationship between the two firms would be insufficient to meet this standard, while a "disregard of corporate independence" could be sufficient to show alter ego status.[20] The evidence submitted at the time of the decision was insufficient to show alter ego status, but did indicate a "significant interrelationship" between the firms.[21] The court accordingly denied the motion to dismiss without prejudice and ordered further discovery on the personal jurisdiction issue.[22]

In *Paper Systems Inc. v. Mitsubishi Corp.*,[23] the U.S. District Court for the Eastern District of Wisconsin denied a motion to dismiss for lack of personal jurisdiction made by two defendants that were allegedly part of a conspiracy to fix the price of thermal fax paper. The plaintiff admitted that it could not satisfy the requirements of the Wisconsin Long Arm Statute and that the defendants did not have substantial contacts with the State of Wisconsin.[24] Nevertheless, the court held that service of process on the defendants was sufficient under 15 U.S.C. § 22 to establish personal jurisdiction.[25] And while the plaintiff could not satisfy the venue provision of 15 U.S.C. § 22, the plaintiff could rely on the general venue provision of 28 U.S.C. § 1391(d), which provides that "an alien may be sued in any district."[26] The defendants had sufficient contacts with the forum (the United States) to satisfy due process.[27]

3. *Forum Non Conveniens*

In *Capital Currency Exchange, N.V. v. National Westminster Bank PLC*,[28] the Second Circuit upheld a district court decision dismissing an antitrust conspiracy complaint brought by a Dutch financial corporation (with New York and British affiliates) against two British banks. The court first rejected the plaintiff's contention that the forum non conveniens doctrine did not apply in antitrust cases based upon the holding of *United States v. National City Lines, Inc.* (*National City I*).[29] The Second Circuit explained that *National City I* had been overruled by the passage of 28 U.S.C. § 1404(a), which permits the transfer of cases from one federal district court to another for the convenience of the parties.[30] However, the application of § 1404(a) was limited to situations where the more convenient forum is another U.S. district court.[31] Where the more convenient forum is a foreign country, as in *Capital Currency*,[32] the common law doctrine of forum non conveniens continues to apply.

Applying the common law doctrine, the Second Circuit concluded that England was a more appropriate forum for litigating the Dutch company's conspiracy claims.[33] While English courts

19. *See Frank Sexton*, 1998-2 Trade Cas. (CCH) ¶ 72,264, at 82,696.
20. *See id.*
21. *See id.*
22. *See id.*
23. 1998-2 Trade Cas. (CCH) ¶ 72,340 (E.D. Wis. 1998).
24. *See id.*
25. *Id.* ¶ 83,316.
26. *Id.*
27. *Id.* ¶ 83,319.
28. Capital Currency Exch., N.V. v. National Westminster Bank PLC, 155 F.3d 603 (2d Cir. 1998).
29. United States v. National City Lines, Inc., 334 U.S. 573 (1948).
30. *See Capital Currency*, 155 F.3d at 607.
31. *See id.*
32. *See id.* at 607.
33. *See id.* at 612.

do not enforce the Sherman Act, they are bound by Articles 85 and 86 of the Treaty of Rome, which are substantively similar to the Sherman Act and which permit private actions for monetary damages.[34] Most of the witnesses and documentary evidence in the case were located in England; indeed, some crucial witnesses were not subject to compulsory process in the United States.[35] Finally, the fact that the real parties in interest were foreign corporations weakened any presumption in favor of the plaintiff's choice of forum.[36] Accordingly, the Second Circuit affirmed the dismissal of the case.[37]

B. Criminal Prosecutions for Cartel Activity

In 1998, the Antitrust Division of the Department of Justice (DOJ) continued to pursue its enforcement efforts against alleged international cartels.[38] The DOJ reported that in fiscal year 1998, it set a record with nearly $270 million in fines imposed or recommended in plea agreements.[39]

For example, in 1998 the DOJ pursued an investigation of an alleged international conspiracy to fix the price and allocate the volume of graphite electrodes sold in the United States and elsewhere. As a consequence of this investigation, a U.S. firm, UCAR International, Inc., entered a guilty plea and agreed to pay a $110 million fine—the largest fine in antitrust history.[40] In the same investigation, a Japanese firm, Showa Denko Carbon, Inc., entered a guilty plea and agreed to pay a $29 million fine.[41]

In another cartel investigation, a Japanese corporation, Fujisawa Pharmaceutical Co., Ltd., agreed to plead guilty and pay a fine of $20 million for allegedly participating in an international conspiracy to fix prices and allocate markets worldwide for an industrial cleaner called sodium gluconate.[42] This was the fifth case brought in connection with the alleged sodium gluconate cartel.[43]

The result was different in *United States v. Nippon Paper Industries Co.*, where the government alleged that the defendant and certain unnamed co-conspirators held a number of meetings in Japan that culminated in an agreement to fix the price of thermal fax paper throughout North America.[44] The district court initially dismissed the indictment on the ground that U.S. criminal law did not extend to conduct that took place entirely outside of the United States.[45] The First Circuit reversed this holding and remanded for trial.[46] In 1998, a four-week trial ensued—

34. *See id.* at 609-10.
35. *See id.* at 611.
36. *See id.*
37. *See id.* at 612.
38. *See generally* Statement of Joel I. Klein Before the Subcommittee on Antitrust, Business Rights, and Competition of the Senate Judiciary Committee, Oct. 2, 1998, at 5-10.
39. *See* A. Douglas Melamed, *Antitrust Enforcement in a Global Economy*, Fordham Corporate Law Institute (Oct. 22, 1998).
40. *See U.S. Company Agrees to Pay $110 Million Fine for International Conspiracy*, Dept. of Justice, Apr. 7, 1998, *available in* 1998 WL 164982.
41. *See Japanese Subsidiary Charged with International Conspiracy to Fix Prices for Graphite Electrodes in U.S.*, Dept. of Justice, Feb. 23, 1998, *available in* 1998 WL 74568.
42. *See Japanese Chemical Giant to Pay $20 Million Fine*, Dept. of Justice, Feb. 25, 1998, *available in* 1998 WL 86752.
43. *See id.*
44. United States v. Nippon Paper Industries Co., Ltd., 944 F. Supp. 55 (D. Mass 1996).
45. *See id.*
46. *See* United States v. Nippon Paper, 109 F.3d 1 (1st Cir. 1997). *See also* Gabriel Castañeda et al., *International Antitrust*, 32 Int'l Law. 291, 292-93 (1998).

the first in history involving criminal antitrust charges based on conduct that occurred entirely outside the United States. After seven days of deliberation, the jury was unable to reach a verdict.[47] Prosecutors indicated that they planned to retry the case.

C. International Merger Enforcement

As the U.S. merger wave continued and accelerated in 1998, the DOJ and the Federal Trade Commission (FTC), acting pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[48] reviewed numerous proposed transactions involving international components. Several of these transactions resulted in investigations and consent decrees designed to address potential anticompetitive consequences of the transactions.

An example of cooperative international merger enforcement is the merger of WorldCom and MCI, two U.S. firms with substantial overseas operations, discussed in Section IV(E). FTC Chairman Robert Pitofsky also noted in congressional testimony that the FTC worked closely with the European Commission to ensure expeditious clearance of two international mergers (Daimler/Chrysler and Lucas/Varity) where the agency did not see any significant antitrust issues.[49]

D. International Cooperation Agreements

In June 1998, the United States and the European Communities signed a new antitrust cooperation agreement supplementing an earlier 1991 agreement[50] and formally adopting the principle of "positive comity."[51] In other developments, in October 1998, eleven countries in the Western Hemisphere (including the United States) adopted a policy statement of hostility to cartel behavior and a commitment to cooperate in international enforcement against such behavior.[52]

The International Competition Policy Advisory Committee (ICPAC), formed by the DOJ in 1997 to discuss various international competition law issues, met on three occasions in 1998,[53] and held three days of hearings in November 1998.[54] Participants in the November hearings included antitrust enforcement officials from around the world and topics of discussion included enforcement cooperation, multijurisdictional mergers, and the interrelation of trade and competition policy. ICPAC has also requested the submission of papers on these and other subjects.[55]

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47. *See* United States v. Nippon Paper, 17 F. Supp. 2d 38, 39 (D. Mass. 1998).

48. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1994).

49. *See* FTC Testifies before Senate Subcommittee on International Antitrust Issues, Federal Trade Comm'n, News Release, *available in* 1998 WL 683460 (Oct. 2, 1998).

50. *See* Agreement Between the Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-EC, 30 I.L.M. 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504.

51. *See* Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-EC, § IV(E), 37 I.L.M. 1070 [hereinafter EC/US Positive Comity Agreement]. *See also U.S. and European Communities Sign Antitrust Cooperation Agreement*, Dept. of Justice, June 4, 1998, *available in* 1998 WL 290918.

52. Communiqué from Antitrust Summit of the Americas (Oct. 2, 1998).

53. Dept. of Justice, ICPAC, Notice of Hearing, 63 Fed. Reg. 8472 (1998); Dept. of Justice, ICPAC, Notice of Hearing, 63 Fed. Reg. 43,195 (1998); Dept. of Justice, ICPAC, Notice of Hearing, 63 Fed. Reg. 65,244 (1998).

54. Dept. of Justice, ICPAC, Notice of Hearing, 63 Fed. Reg. 53,927-28 (1998).

55. *See* Dept. of Justice, Notice, International Competition Policy Advisory Committee: Request for Papers, 63 Fed. Reg. 57314 (Oct. 27, 1998).

II. Developments in Canada

A. Proposed Amendments to the Competition Act

On November 20, 1997, proposed amendments to the Competition Act, which have been under active discussion since June 1995, were introduced as Bill C-20 in the House of Commons. This bill received third reading in the House of Commons in September of 1998, after it was amended by the Industry Committee to include new statutory protections for whistleblowers. It was expected to be passed by the Senate and proclaimed into force prior to year end; however, the Senate refused to pass the whistleblowing provisions on third reading in December. The House of Commons must now decide whether to pass the bill without the whistleblowing provisions, upon its return in early February 1999.

If Bill C-20 is passed, amendments would be made to the Competition Act's provisions concerning pre-merger notification, misleading advertising and prohibition orders, and new provisions would be introduced dealing with telemarketing. In addition, the Bill proposes 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 of the Act (§ 45), bid-rigging (§ 47) and deceptive telemarketing (§ 52.1). As might be expected, this "wiretapping" proposal has given rise to significant controversy within Canada, and led to a narrowing of what had been initially proposed.

For international business transactions, the proposals relating to pre-merger notification are the most potentially relevant. The principal amendments would 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 of Investigation and Research under the act, who heads the Competition Bureau (and 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 enquiry has been commenced and "more time is required to complete the enquiry." These proposals are unlikely to have a significant effect on straightforward transactions, but may increase the likelihood of the bureau requiring a long-form filing in 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 where their transaction raises potentially serious *prima facie* competition issues.

B. Draft EU-Canada Cooperation Agreement

On June 4, 1998, the Competition Bureau released an initialed version of the Draft Agreement Between the Government of Canada and the European Communities Regarding the Application of Their Antitrust Laws (Draft Agreement), together with initialed versions of draft interpretive letters. The Draft Agreement is virtually identical to the version obtained in the Fall of 1997 by the International Chamber of Commerce (ICC). The Draft Agreement is very similar in format, style, and content to the 1995 Canada-US Cooperation Agreement and the 1991 US-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 US-EU Cooperation Agreement.

C. Record Fines Obtained in Lysine and Citric Acid Investigations

On May 27, 1998, the Competition Bureau announced that a record fine of $16 million (Cdn) had been imposed on Archer Daniels Midland Company (ADM) after it pleaded guilty to having participated in price fixing and market sharing conspiracies, contrary to paragraph 45(1)(c) of the Competition Act. According to the bureau's news release, the "offences relate to the participation of the firm in an international conspiracy to fix prices and allocate market shares in the lysine and citric acid markets worldwide." The Agreed Statement of Facts states that the relevant "conversations and meetings [giving rise to the unlawful agreement] occurred in locations outside Canada." There were three counts in all. ADM was fined $9 million for price fixing and $5 million for market sharing in the lysine industry, and $2 million in connection with the citric acid conspiracy. In addition, the bureau's news release notes that ADM "has also agreed to cooperate with the Bureau in ongoing investigations into these and other food and feed additives." The previous record fine for a single count under the act was $2.5 million.

The charges related to the period from 1992 to 1995. According to the news release, total Canadian sales of lysine and citric acid during that period were approximately $89 million and $104 million, respectively, of which $48 million and $17 million, respectively, were made by ADM. Therefore, its fines represented approximately twenty-nine percent and 12.5 percent of its affected sales of lysine and citric acid, respectively, during the period of the offence.

Subsequently, several other firms pleaded guilty to having participated in the lysine and citric acid conspiracies. On July 23, 1998, Ajinomoto Co. Inc. of Japan was fined $3.5 million for one count of conspiracy in respect of the lysine matter, and Sewon America Inc., a subsidiary of Sewon Company, Ltd. of Korea, was fined $70,000 for its involvement in that conspiracy. Ajinomoto's fine apparently equals approximately twenty-three percent of the volume of its affected sales during the relevant period. According to a news release issued by the Competition Bureau, Kyowa Hakko Kogyo Company, Ltd. of Japan "was granted immunity . . . for having been the first of the companies to provide evidence to the Competition Bureau in cooperation with its investigation." Similarly, Sewon's fine "also reflects, in part, the fact that the company cooperated with the Bureau at an early stage in this investigation."

On October 21, 1998, Jungbunzlauer International A.G. (JBL), a Swiss corporation, and Haarmann & Reimer Corporation (HR), a U.S. subsidiary of Bayer Corporation, pleaded guilty to having participated in the conspiracy to fix prices and share markets for citric acid. HR was fined $4.7 million and JBL was fined $2 million, of which $1.9 million related to the citric acid conspiracy and $100,000 related to a further conspiracy to fix prices and allocate market shares for sodium gluconate. According to court transcripts, these fines represented approximately nineteen percent of the volume of the affected citric acid sales of HR and JBL during the period of the offence, and 12.5 percent of JBL's affected sodium gluconate sales.

D. Bureau Toughening Its Stance on Mergers

The year 1998 was noteworthy in merger enforcement policy, as the Competition Bureau publicly opposed four mergers. This represents a significant development, in comparison with recent years, in which only one or no mergers were challenged (although there have been some transactions that were permitted to proceed after the merging parties undertook to address concerns that had been raised in respect of a part of the transaction). The first rejected merger was between Petro-Canada Inc. (Petro-Canada) and Ultramar Diamond Shamrock (UDS). On June 22, 1998, after the parties announced the abandonment of their merger, the Competition Bureau announced that Konrad von Finckenstein, the Director of the Bureau, "had informed the companies of his serious concerns that the transaction would likely cause a substantial lessening or prevention of competition in wholesale and retail petroleum markets in Quebec and Atlantic Canada." The Bureau's News Release further stated: "In joint ventures of this size, there is often room to restructure a deal to alleviate competition concerns. . . . However, in this instance no workable alternatives could be identified."[7]

Subsequently, on December 1, 1998, the director filed an application under the preliminary injunction provisions in section 100 of the Competition Act to prohibit the acquisition by Superior Propane Inc. (Superior) of all of the issued and outstanding shares of ICG Propane Inc. (ICG) from a wholly-owned subsidiary of Petro-Canada. This was the first contested application filed under these provisions since they were inserted into the Competition Act in 1986. However, it was dismissed by the Competition Tribunal on December 6, 1998.

The key issue in the case was the definition of the product market. Among other things, the director alleged that Superior and ICG would have a market share of over ninety percent in seventeen local markets, over sixty-five percent in forty-seven markets, and over thirty-five percent (the "safe harbour" in the director's 1991 *Merger Enforcement Guidelines*) in fifty-eight of the eighty markets analyzed by the director. He further alleged that the merged entity would be "virtually" the only supplier of propane to national accounts in Canada, which are claimed to represent approximately twenty-two percent of total sales of the parties. In response, Superior argued that propane competes in a broader energy market, in which it accounts for a market share of approximately two percent. Superior further argued that "this share is dropping as a result of competition from other sources of energy, including natural gas, fuel oil, electricity and wood in the traditional industry segments, and with gasoline, diesel and other alternative fuels in the automotive segment."

Among other things, Superior produced what some might consider to be a "hot document" in the form of a letter issued by the bureau in respect of Superior's 1993 acquisition of Premier Propane Inc. (Premier), to support its case. In that letter, the bureau concluded that the acquisition of Premier would not likely result in a substantial lessening of competition, in part because "there was competition as between propane and gasoline and natural gas," and in part because "the industry had relatively low entry barriers." In response to questioning from the tribunal, the director's counsel was unable to explain what had changed since 1993. With this in mind, and given that the director did not introduce sufficient evidence to satisfy the tribunal that propane competes in a distinct product market characterized by high barriers to entry, the tribunal declined to issue the preliminary injunction. Immediately following this decision, on December 7, 1998, the parties completed their transaction. On the same day, the director filed an application under section 92 of the Competition Act to challenge the merger post-closing. On December 11, 1998, the tribunal granted an interim hold separate order on consent, under section 104 of the act (which the tribunal observed contemplates a lower standard than what is contemplated in section 100).

Finally, on December 14, 1998, the Honourable Paul Martin, Minister of Finance (Minister), announced that the proposed mergers between Royal Bank of Canada (RBC) and Bank of Montreal (BMO), and between Canadian Imperial Bank of Commerce (CIBC) and Toronto-Dominion Bank (TD) "will not be allowed to proceed because they are not in the best interests of Canadians." He gave the following three principal reasons for his decision: "The mergers would lead to an unacceptable concentration of economic power in the hands of fewer, very large banks. They would result in a significant reduction of competition. And they would reduce the government's policy flexibility to address potential future prudential concerns." The mergers would have involved four of the six major banks in Canada. (Under the Bank Act, the Minister has the ultimate authority to approve a bank merger.)

Regarding competition, the Minister noted that the Competition Bureau's "analysis is one of the cornerstones of our decision today." In separate (publicly released) letters sent to the merging parties by the Director of the Bureau, it was stated that the director concluded that the mergers "would cause higher prices and lower levels of service and choice for several key banking services in Canada." However, what is striking from a review of those letters is that they do not reflect the full flavor of the bureau's traditional qualitative analytical framework. In short, they reflect a much greater emphasis on market shares and concentration, and a reduced emphasis on qualitative factors such as barriers to entry, the ability of remaining competitors to discipline the exercise of market power, and the nature of change and innovation in the relevant markets.

For example, with respect to branch banking, the letters state: "Where the combined share of the Banks in either personal or business transaction accounts is forty-five percent or greater, it is the Bureau's conclusion that the proposed transaction will result in a substantial lessening of competition and would require a remedy." For the RBC/BMO transaction, there were 104 local markets in this category, while for the CIBC/TD merger there were thirty-six local markets in this category. In addition, the bureau included various provincial markets for mid-market loans between $1 million and $5 million in this category, for each merger. It is noteworthy that this is the first time that the bureau has used a market share threshold as a basis for inferring a likely anti-competitive effect.

III. Developments in Mexico

A. New Implementing Regulations

New implementing regulations to the Federal Law on Economic Competition were issued in March 1998. These regulations present more problems than solutions for the five-year-old Mexican competition enforcement system. On the bright side, the new regulations try to set out a procedural framework and certain clarifications to the merger review rules. Unfortunately, the flaws discredit the new set of rules: (a) there is a general tendency to obstruct private actions, granting the Federal Competition Commission (FCC) a "big brother" role to interfere in private actions (blurring the natural boundary that should separate private actions from *ex-officio* investigations, or simply blocking the possibility of private parties opposing mergers); (b) opening the door to predatory pricing and discrimination cases without offering proper analytical tools; and (c) placing an extremely heavy burden of proof for the FCC (over-expansive efficiency defenses and market definition assessment). In practice, the new regulations have made matters more complicated, raised the costs of litigation and increased the levels of uncertainty.

B. Telecomm Cases

The FCC issued a strong statement declaring TELMEX, the long distance and basic telephony former state monopoly, a dominant firm in five related markets: national long distance, international long distance, basic local service and inter-urban access and traffic. This FCC action, according to the Federal Telecommunications Law, calls upon the Telecomm regulator to issue new regulations to set controls upon the phone company. TELMEX, of course, has appealed the FCC ruling.

C. Merger Cases

After twenty months of analysis in the Grand Met/Guinness worldwide transaction, the FCC decided to allow the Mexican portion of this transaction, subject to divestiture or licensing of the J&B Scotch whiskey brand. The parties appealed the FCC decision, but the ruling was affirmed.

IV. Developments in the European Union

A. Amendments to the EC Merger Regime

Significant amendments to the EC Merger Regulation came into force in March 1998 following an intensive review process.[56] Some of the changes are of considerable benefit to business and are welcome. Although the reduction in the notification thresholds is not as great as was hoped by the business sector due to reluctance on the part of member states, a compromise solution was reached that resulted in reduced thresholds for mergers whose effects concern at least three member states.[57] This is a recognition that mergers that affect a number of member states are more appropriately dealt with at the EU level and the "one-stop-shop" principle may provide the basis for further amendments in the future.

Most importantly the amended regulation will apply to all structural joint ventures, the so-called "full-function" joint ventures (provided the turnover tests are met).[58] The European Commission may also take Article 85 considerations into account when considering a joint venture that raises issues of "cooperative overlap."[59] This amendment will go a long way towards removing the largely artificial distinction between concentrative and cooperative joint ventures which owed little to commercial reality.

The provision dealing with commitments entered into by the parties (e.g., divestiture) has been amended to allow commitments to be enforced in first phase proceedings.[60] The one-month deadline for issuing a first phase clearance decision will be extended to six weeks where commitments are offered during first phase proceedings in order to give the European Commission sufficient time to consider the proposals without the need to open second phase proceedings.[61] This will enable the parties to avoid a long and burdensome second phase investigation. This amendment is already proving its worth, with the European Commission having accepted Phase I undertakings in ten cases in the first nine months of the rules.

Amendments to Article 9 of the Regulation will make it easier for member states to request a referral back to them of all or part of a particular case if a "distinct" national market is affected.[62] It will no longer be necessary for a member state to provide evidence of a threat of the creation or strengthening of a dominant position in that distinct national market (provided it does not itself constitute a substantial part of the common market, such as a major member state).[63] The worry here was the likely increase in references back and the increased uncertainty for parties as to the regulator they would have to deal with. The risk of having to deal with more than one regulator is also increased. To date this fear has not become a reality with only three cases being referred back since March 1998.

The test will be whether the Merger Task Force (MTF)[64] will cope with the increased workload that these changes have brought. Götz Drauz, the Director of the MTF, has estimated

56. Council Regulation 1310/97 of 30 June 1997 amending Council Regulation 4064/89 on the control of Concentrations Between Undertakings, 1997 O.J. (L 180) 1.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.* at L180/5.

63. *See id.*

64. The Merger Task Force (MTF) is the directorate within DG IV responsible for the application of the EC Merger Regulation. DG IV is the Directorate General within the European Commission responsible for the application of EC competition rules.

that the changes will result in an increased workload of twenty to twenty-five percent for the MTF. There is already a concern being voiced that, due to recent staff changes and increased workloads, members of the MTF are becoming more cautious and less willing to reach pragmatic solutions to the notification requirements. In addition, there is a risk that the Article 85 analysis in joint venture cases may take too long and increase the number of Phase Two enquiries. The increased workload of the European Commission is evidenced by the 224 notifications made to the MTF in 1998 as compared to 171 in 1997 and a mere sixty in 1991. At least fourteen of those notifications were as a result of the amended turnover thresholds. An additional fourteen joint ventures were notified under the revised EC Merger Regulation since March 1998.

B. European Commission Communication on Vertical Restraints

On September 30, 1998, the European Commission adopted a communication on the application of EC competition rules to vertical restraints[65] and proposed legislative amendments to reflect the European Commission's evolving policy in this area. These legislative changes must be in force before the expiry of the current system in the year 2000. The European Commission has recognized that vertical agreements can be used pro-competitively to promote the entry into new and risky markets, or anti-competitively to partition markets or to exclude new entrants who could intensify competition. The European Commission has also recognized that vertical arrangements entered into by companies with market power give rise to more competitive concerns than those entered into by companies with lesser market shares.

The European Commission's policy as reflected in the Communication contains the following elements:

- One umbrella block exemption applicable to all vertical agreements in the distribution chain and concerning both goods and services.
- The listing of hard-core restrictions that will take an agreement outside the application of the block exemption.
- The introduction of market share caps. It has not yet been decided whether one or two market share thresholds will be introduced or the exact level of these thresholds.
- If one market share is introduced it is likely to lie in the range of twenty-five to thirty-five percent. Agreements where the parties have market shares below this threshold are presumed either to fall outside the scope of Article 85(1) or to warrant exemption.
- In the case of a two threshold system, the first and main market share cap would be around twenty percent. All non-hard-core restrictions between companies with market shares below this lower threshold would be exempted. Vertical agreements between companies with market shares below the second threshold of around forty percent would only be exempt with regard to less serious (non-exclusive) restrictions of competition.
- All vertical agreements, with the exception of those containing hard-core restrictions, between companies having turnover of less than 150 million ECU are exempted regardless of market share.
- The possibility of removal of the block exemption if cumulative effects give rise to a serious restriction of competition. Any withdrawal will only have effects for the future.

65. Commission Communication on the application of EC Competition rules to vertical restraints, September 1998.

- An increased role for national courts and competition authorities, giving them the power to apply the block exemption. National competition authorities will, on the basis of clear and well-specified criteria, be able to withdraw the benefit of the block exemption in respect of their territory.

In order to alleviate concerns on legal certainty the European Commission has indicated that it will take the following measures:

- Publish guidelines on the scope of application of Article 85(1) in cases above the market share cap, its policy under Article 85(3), and its policy on the withdrawal of the benefit of the block exemption, particularly in cumulative effects cases.
- Publish leading decisions that will assist companies in determining if a notification under Article 85 (1) is in fact necessary.
- Adapt Article 4(2) of implementing Regulation 17 to remove the obligation to notify vertical distribution agreements to the European Commission in order to ensure their legal validity. The European Commission will no longer be restricted to granting an Article 85(3) exemption from the date of notification but will be able to grant exemption retroactively.

If adopted, these proposals will be far-reaching and involve a major departure from the current piecemeal approach to vertical restraints. There are many elements to be welcomed, including the introduction of one umbrella block exemption that will cover all vertical distribution agreements regardless of their particular form. The removal of the list of clauses that must be present in order to benefit from the block exemption is also a welcome development and should remove the straitjacket effect of the current block exemptions.

Although the European Commission's suggestion of a market share cap has not been warmly welcomed by industry, who fear that it will be difficult to estimate market shares reliably, commentators have been unable to come up with an alternative proposal. Too much should not be made of this difficulty. Although there will always be cases where market definition is difficult, it should be noted that many jurisdictions impose a market share test for merger control, and companies and their advisers cope adequately.

C. Cartels

The European Commission has confirmed its commitment to fight the creation of cartels and to punish companies that enter into agreements with competitors to increase prices, partition markets, or restrict production. The European Commission announced in December 1998 the creation of a new unit within DG IV with at least twenty officials dedicated exclusively to unveiling, pursuing, and eliminating cartels.[66] The seriousness with which the European Commission regards cartel activity is also evidenced by the high fines that were imposed in 1998 on the companies involved in price fixing and bid rigging in the market for district heating pipes.[67] However, it should be noted that DG IV's powers in this area are considerably weaker than those held by some competition authorities in other parts of the world, as they are unable to impose criminal penalties or personal liability on any individual company employee.

D. State Aid

The issue of state aid has come further into focus recently as the European Union introduces competition through liberalization measures in areas previously excluded from competition.

66. Commission of Eur. Communities, Press Release IP/98/1060, December 3, 1998.
67. Commission of Eur. Communities, Press Release IP/98/917, October 21, 1998.

Member states must obtain prior approval from the European Commission in order to grant financial aid to enterprises. The decisions that the European Commission must make in this area are always difficult, involving complex economic analysis, and bring the European Commission into direct conflict with the member states. It is very difficult, as the case involving state aid to the ailing French bank Credit Lyonnais case has shown, to remove politics and wider concerns from a state aid decision. The recent efforts of the European Commission in proposing a procedural regulation for state aid cases should tighten up the control of subsidies and weaken the political pressures which are brought to bear.[68] However, the current proposal is lacking in a number of aspects. It does not set out clear procedural rights for third parties. Clearer rights would allow the European Commission to benefit more from this crucial source of information; most importantly it would place the European Commission in a better position to verify information supplied by member states. Nor does the European Commission provide any clear rights to the beneficiary of the aid although they have the greatest interest in ensuring that the aid is cleared.

Although the current practice of concluding preliminary proceedings within a two-month time limit is laid down in the proposal, no time limit is set for completion of an in-depth investigation. The lack of a time limit is a serious weakness as it will allow political pressures to build up as in current cases.

E. International Cooperation

Leaving aside developments within the OECD and increased dialogue on global cooperation in competition matters (see Section II(B)), 1998 has seen continued cooperation between the U.S. competition authorities and the European Commission. The 1991 EC/US Cooperation Agreement on antitrust matters was supplemented with the coming into force on June 4, 1998 of the EC/US Positive Comity Agreement.[69]

The EC/US Positive Comity Agreement seeks to reduce the number of cases being investigated by both a U.S. competition authority and the European Commission. The agreement expands on the possibility provided for in the 1991 agreement of one authority requesting the other authority to investigate a particular case. Mergers do not fall within the scope of the Positive Comity Agreement and will continue to be monitored closely by authorities on both sides of the Atlantic; nor does the agreement provide for exchange of confidential business information, unless the consent of the source of the information has been obtained. To date there has only been one request for positive comity—in January 1997 the U.S. Department of Justice requested the European Commission to investigate allegations of abusive practices by Amadeus, a European computer reservation system. This investigation is ongoing.

In contrast to the tensions that arose in 1997 in relation to the Boeing/McDonnell Douglas merger,[70] the cooperation during the summer of 1998 between the U.S. Department of Justice and the European Commission in the MCI-Worldcom merger[71] provides a model for future cooperation. The authorities were in close contact, exchanging views, coordinating information gathering (with the parties' consent), and holding joint meetings and settlement negotiations

68. COM (1998) 73 FINAL.

69. EC/US Positive Comity Agreement, *supra* note 51.

70. Commission Decision IV/M.877 of 30 July 1997 declaring a concentration compatible with the Common Market and the Functioning of the EEA Agreement, 1997 O.J. (L 336) 16.

71. Commission Decision IV/M.1069 of 8 July 1998.

with the parties. The merger was ultimately cleared with the divestiture of MCI's interest in certain Internet assets to Cable & Wireless PLC.[72]

A key issue for future cooperation is whether or not agreements allowing the exchange of confidential information received from companies will soon be entered into. At present the European Commission may only exchange confidential information with the consent of the source concerned. However, the European Commission is clearly seeking the ability to exchange information on a broader basis. It appears that the European Commission is hopeful that it will get agreement from the member states for such exchanges if it limits the scope in the first instance to hard-core cartels and the most serious cases of abuse of market power.

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72. *See Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell Its Internet Business*, Dept. of Justice, July 15, 1998, *available in* 1998 WL 389299 ("there was a high degree of cooperation" between the DOJ and the European Union).