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International Antitrust

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I. Developments in the European Union

A. Merger Control Regulation — Collective Dominance

During 1999, the application of the European Community (EC) Merger Control Regulation[1] to situations of collective dominance was further confirmed and expanded. Building on the *Kali und Salz*[2] judgment of the EC Court of Justice in 1998, the EC Court of First Instance (the CFI) further clarified the law on collective dominance in its judgment in *Gencor*.[3] In its September 1999 decision in the *Airtours/First Choice* case,[4] the European Commission (the Commission) for the first time prohibited a transaction where three major competitors would remain in the market following the proposed transaction.

1. *Gencor*

Gencor, a South African mining group that controlled Impala Platinum (Implats), and Lonrho, a British company with interests in two South African platinum mines held under the Lonrho Platinum Division (LPD), notified the Commission of a proposed joint venture between both companies whereby Implats and LPD were to be merged and would be jointly controlled by Gencor and Lonrho.

The Commission found that the world platinum and rhodium markets are characterized by product homogeneity, high market transparency, price-inelastic demand in the current

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1. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L395) 1; most recently amended by Council Regulation 1310/97 of 30 June 1997 Amending Regulation (EEC) No 4064/89 on the Control of Concentrations Between Undertakings, 1997 O.J. (L180) 1.
2. French Republic v. Commission (Kali und Salz), 4 C.M.L.R. 829 (1998).
3. Gencor Ltd. v. Commission, 4 C.M.L.R. 971 (1999).
4. Airtours/First Choice, Commission Decision (Sept. 22, 1999).

price range, moderate growth in demand, mature production technology, high entry barriers, a high level of concentration, financial links and contacts between suppliers in a number of markets, a lack of negotiating power for purchasers, and a generally low level of competition historically. The Commission also found that following the proposed transaction, Implats/LPD and the Anglo American Platinum Corporation, its main competitor, would each hold approximately a thirty-five percent share of the world platinum market (a combined market share of approximately seventy percent). It also found that, following the anticipated exhaustion of Russian stocks in two years, the two competitors' shares would rise to forty percent each (a combined market share of approximately eighty percent).

The Commission concluded that the effect of the proposed joint venture would be to create duopolistic dominance in the platinum and rhodium markets. On this basis, it prohibited the proposed transaction. Gencor appealed against the Commission's decision to the CFI.

In its judgment, the CFI accepted the Commission's position that the market characteristics that it had found could be used to identify markets prone to oligopolistic dominance. The CFI also concluded that structural links are not necessary for a finding of collective dominance. The likelihood of tacit coordination may be sufficient. The Court upheld the Commission in concluding that anti-competitive market structures could result not only from economic links between market participants but also as a result of oligopolistic market structures where each market participant may become aware of common interests and, in particular, cause prices to rise without having to enter into a cartel arrangement.

2. *Airtours/First Choice*

The *Airtours/First Choice* case involved a proposal by one U.K. tour operator, Airtours, to acquire a competing tour operator, First Choice. Both companies were fully vertically integrated with substantial investments in charter airlines operations and travel agencies.

The Commission found that the proposed transaction would affect the supply of foreign package tour holidays to U.K. residents and, in particular, package holidays made to popular destinations in Southern Europe and North Africa. The market structure was already highly concentrated with four vertically integrated companies accounting for eighty percent of the market. The rest of the market was fragmented amongst a large number of much smaller players, none of them fully integrated and most with shares of one percent or less.

Package tours were found to be a high volume, low margin product. The Commission found that a particular characteristic of the market was that capacity (the number of holidays) was basically fixed before the sales season began; only relatively minor adaptations were possible afterwards. As a result, the overall supply/demand balance had a strong effect on profitability. In particular, competition for market share risked leading to oversupply with serious negative financial consequences for market operators, whereas constraining capacity would result in markedly improved profitability for all operators. Therefore, tour operators had an incentive to keep capacity in the market tight.

The Commission also found that the major operators were linked insofar as they supplied one another with airline seats and distributed one another's products, that they had similar cost structures, and that there were high barriers to entry and growth and no countervailing buyer power.

The Commission found that, since First Choice would disappear both as a competitor in its own right and as a supplier of charter airline seats and travel agency distribution to the nonintegrated operators, the proposed takeover would create a market structure in

which the remaining three vertically integrated companies would collectively have a dominant position. Accordingly, the Commission prohibited the proposed transaction.

B. European Commission Block Exemption — Regulation for Vertical Agreements

1. *Introduction*

As the final stage in a process that began early in 1997 with the publication of a Green Paper,[5] the Commission, in December 1999, adopted a regulation providing for a block exemption of vertical agreements.[6] Following a transition period, the new Vertical Agreements Block Exemption will replace the three block exemptions that have been the bedrock of the Commission's vertical restraints policy: the Exclusive Distribution Block Exemption,[7] the Exclusive Purchasing Block Exemption,[8] and the Franchising Block Exemption.[9]

With the new Block Exemption, the Commission has indicated that it seeks to create a *"safe harbour"* for vertical agreements under the EU competition rules. Where the regulation's market share thresholds are not exceeded and where the parties to a vertical agreement avoid the inclusion of hard-core restrictions, they can be assured that article 81(1)[10] of the EC Treaty will not apply. Their arrangements will benefit automatically and without prior notification from an exemption under article 81(3)[11] of the EC Treaty.

2. *Agreements Covered by the New Block Exemption*

The Vertical Agreements Block Exemption applies to all agreements that:

- involve two or more parties (the three existing vertical block exemptions are limited to agreements to which only two undertakings are party);
- involve each of the parties operating at a different level of the production or distribution chain; and relate to the conditions under which the parties may purchase, sell, or resell goods or services.

3. *Agreements Not Covered by the New Block Exemption*

The new Block Exemption will not apply to agreements relating primarily to the assignment or use of intellectual property rights. However, the Vertical Agreements Block Exemption will apply to vertical agreements that include provisions relating to the assignment to or the use by the buyer of intellectual property, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale, or resale of goods or services by the buyer or its customers. Also, the new Block Exemption will not apply to vertical agreements that fall within the scope of another block exemption (for example, motor vehicle distribution and servicing arrangements). Furthermore, the Vertical Agreement Block Exemption will not apply to vertical agreements entered into

5. Green Paper on Vertical Restraints in EU Competition Policy, COM(96) 721.

6. Commission Regulation 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L336) 1.

7. Commission Regulation 1983/83 of 22 June 1983 on the Application of Article 85(3) to Categories of Exclusive Distribution Agreements, 1983 O.J. (L173) 1.

8. Commission Regulation 1984/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Purchasing Agreements, 1983 O.J. (L173) 5.

9. Commission Regulation 4087/88 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Categories of Franchise Agreements, 1988 O.J. (L359) 46.

10. Formerly art. 85(1).

11. Formerly art. 85(3).

between competitors. It may, however, apply to certain nonreciprocal vertical agreements between competitors.

4. *The Market Share Thresholds*

In a major innovation, the Commission has accepted in the Vertical Agreements Block Exemption that the likelihood of the efficiency-enhancing effects of vertical agreements outweighing any anti-competitive effects depends on the degree of market power of the undertakings concerned. The Block Exemption, therefore, includes a market share threshold. The new Block Exemption will apply on the condition that the supplier's market share does not exceed thirty percent. In addition, in the case of exclusive supply agreements, the new Block Exemption will apply only where the buyer's market share also does not exceed thirty percent. Even where parties cannot benefit from the new Block Exemption due to their market share, however, the Commission has made it clear that there will be no presumption of illegality with respect to the agreements.

5. *"Hard-Core" Restrictions*

The Commission has set out a list of *"hard-core"* restrictions, the inclusion of which will deprive an agreement of the protection offered by the new Block Exemption. Parties to vertical agreements may not:

- restrict the buyer's ability to determine its sale price (although, subject to some conditions, the supplier may impose a maximum sale price or recommend a resale price);
- restrict the territory into which, or the customers to whom, a buyer may sell (although there are exceptions that permit the restriction of active sales in exclusive relationships, sales to end-users by wholesalers, and sales to unauthorized distributors by members of a selective distribution system);
- in the context of selective distribution systems, restrict active or passive sales to end-users by members of a system or restrict cross-supplies between distributors within a system; or
- restrict, in certain circumstances, the supply of spare parts to independent repairers.

6. *Other Restrictions*

The new Block Exemption also includes a list of restrictive obligations that the Commission regards as unacceptable:

- any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. Where goods or services are sold by the buyer from the supplier's premises, however, the non-compete restriction may be coterminous with the period of occupancy by the buyer;
- any post-term non-compete obligation (although a one year post-termination non-compete obligation may be acceptable in some cases where it is justified by reference to the protection of know-how and where it is limited to the premises from which the buyer operated during the contract period);
- any obligation on dealers in a selective distribution system not to sell the brands of particular competing suppliers.

These obligations can be distinguished from the *"hard-core"* restrictions in that their inclusion will not deprive the whole of a vertical agreement of the benefit of the Block Exemption. The exemption is only lost in relation to the individual restrictive obligation.

7. *Transitional Arrangements*

The new Block Exemption will apply to vertical agreements concluded from June 1, 2000 onwards. In the interim, the regulation extends the validity of the current Block Exemptions (which were to expire on December 31, 1999) until May 31, 2000. Agreements already in force on June 1, 2000, which satisfy the current Block Exemptions but which would not qualify under the new regime, will be valid until December 31, 2001.

C. European Commission Modernization White Paper

In April 1999, the Commission issued a White Paper on the modernization of EC competition law.[12] The purpose of the White Paper was to consider options for bringing the procedural rules of EC competition law (which have remained substantially untouched since the adoption of Regulation 17 in 1962) up to date to reflect the changed realities of the Community and of the enforcement priorities of the Commission. Regulation 17 established a centralized authorization system for all restrictive practices requiring exemption.

While discussing several options in the White Paper, the Commission ultimately proposes a reform that would involve the abolition of the existing notification and exemption system, and its replacement by a Council regulation that would render the article 81(3) exemption directly applicable where its conditions were satisfied without prior decision by the Commission. In the new system, the Commission would seek to keep a leading role in determining EC competition policy through the adoption of regulations and of notices setting out the principal rules of interpretation of articles 81 and 82. The Commission would also continue to adopt prohibition decisions and positive decisions to provide guidance on its interpretation of articles 81(1) and 81(3).

Most commentators have welcomed the proposed abolition of the prior notification system and the reallocation of resources within the Commission away from the processing of exemption requests. They have expressed some concern, however, over the consistency of interpretation of the article 81(3) exemption criteria if it becomes directly applicable before the national courts and competition authorities. It has been suggested that the Commission's proposal could result in inconsistencies in the findings made under article 81(3) by the various national courts and authorities empowered under the proposed reform to grant exemptions.

The Commission's consultation on the White Paper closed at the end of 1999 and decisions on how to proceed with reform are expected during 2000.

D. State Aid

1. *Procedural Rules*

The Council of the European Communities has adopted a regulation[13] laying down detailed procedural rules in relation to state aid. The regulation codifies procedures that were previously laid down in a number of Commission Communications and EC Court judgments.

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12. White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/027, COM (99) 101.

13. Council Regulation 659/1999 of 22 March 1999 Laying Down Detailed Rules for the Application of Article 93 of the EC Treaty, 1999 O.J. (L083) 1.

2. *Notification of Aid*

The regulation provides that the member state concerned must notify the Commission of any plans to grant new aid. Until a decision is taken or deemed to have been taken by the Commission, the aid must not be put into effect. Aid that has not been notified or that is put into effect before the Commission's decision is regarded as unlawful aid.

The Commission is given a two-month period from the date of notification within which it is expected to make a decision. The initial period may be extended if further information is requested. If the Commission does not reach a decision within two months, aid will be deemed to have been authorized and the member state may proceed to grant the aid. If the Commission has doubts as to the compatibility of the notified aid, it may decide to initiate a formal investigation procedure. Once the Commission opens an investigation procedure, it is required to make a decision within eighteen months. If there has been no decision within that time, the member state involved may call on the Commission to make a decision within two months.

3. *Submission of Comments by Interested Parties*

Any interested party may submit comments where the Commission initiates an investigation procedure. Interested parties may also inform the Commission of alleged unlawful aid or alleged misuse of aid.

4. *Procedure Regarding Unlawful Aid*

The new regulation gives the Commission powers to require a member state to suspend any aid that has not been notified until it has made a decision on the compatibility of the aid. Furthermore, the Commission may adopt a decision requiring the member state to provisionally recover such aid pending a final decision. This provisional recovery of aid will only occur in the extreme cases provided for in the regulation where there is no doubt about the aid character of the measure concerned, or where there is a serious risk of substantial and irreparable damage to a competitor.

Recovery of aid is now subject to a limitation period. If ten years elapse from the grant of the unlawful aid, the Commission may no longer recover the aid. However, any action taken by the Commission with regard to unlawful aid shall interrupt the limitation period and start time running afresh.

5. *Existing Aid Schemes*

In relation to an existing aid scheme, the regulation provides that the Commission may conclude that such a scheme is no longer compatible and may issue a recommendation proposing substantial amendment of the aid scheme, the introduction of procedural requirements, or the abolition of the aid scheme.

6. *Monitoring of State Aid Schemes*

If advance warning is given to the member state concerned, the Commission may make inspections at company premises when it has serious doubts about compliance with its decisions on state aid. The inspectors' powers are roughly equivalent to those provided for in cases of investigations of breaches of the competition rules.

E. International Cooperation—EU-Canada Competition Cooperation Agreement

The EU-Canada summit, held in Cologne in June 1999, was marked by the signing of a competition cooperation agreement. This agreement supplements three earlier cooper-

ation agreements made between the European Union and Canada[14] and is similar in substance to the 1998 Positive Comity Agreement already in place between the European Union and the United States.

The agreement provides a framework for cooperation between the Canadian and the EU competition authorities. In particular, it seeks to increase the effectiveness of coordinated enforcement activities and to prevent conflicting decisions between those authorities. The agreement provides for:

- notification of cases under investigation by one party to the other, where the important interests of the latter are affected;
- "positive comity" whereby one party may request the other party to act where important interests of the former are affected by anti-competitive behavior on the latter's territory;
- "negative comity" whereby a party to the agreement will consider all relevant factors where its enforcement activities affect the important interests of the other party;
- exchange of nonconfidential information that will facilitate the effective application of EU and Canadian competition law;
- coordination of enforcement activities where significant issues for both sides are involved; and
- semi-annual meetings.

II. Developments in the United States

In 1999, antitrust enforcement in the United States focused on several areas having significant international components, including: (i) judicial decisions affecting the scope and reach of the U.S. antitrust laws; (ii) prosecution and punishment of alleged international cartels; (iii) global cooperation in merger review/enforcement; and (iv) continued (and increased) international cooperation efforts among competition agencies.

A. Legal Developments

1. *Personal Jurisdiction*

In *In re Vitamins Antitrust Litigation*,[15] the U.S. District Court for the District of Columbia addressed the issue of "whether, pursuant to section 12 of the Clayton Act, the relevant forum in which to analyze Defendant's contacts for purposes of personal jurisdiction is [the forum in which the action was filed] or the United States as a whole."[16] Relying on *Chrysler Corp. v. General Motors Corp.*,[17] which had held that "[s]ection 12 essentially is a long-arm statute which permits service of process in a nonforum district, *so long as the venue provision is met*,"[18] the foreign defendants in this action contended that the court lacked jurisdiction over them unless they had sufficient contacts with the District of Columbia.[19] The defendants did not contest the general rule, which is that "when a federal court is attempting to

14. Agreement for Economic and Commercial Cooperation, July 6, 1976; Declaration on European Community-Canada Relations, Nov. 20, 1990; Joint Political Declaration on Canada-EU Relations, Dec. 17, 1996.

15. *In re* Vitamins Antitrust Litigation, 1999-2 Trade Cas. (CCH) ¶ 72,627 (D.D.C. July 29, 1999).

16. *Id.* at 85,637.

17. Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984).

18. *Id.* at 1195 (emphasis added).

19. *See In re* Vitamins Antitrust Litigation, 1999-2 Trade Cas. (CCH) at 85,638.

exercise personal jurisdiction over a defendant in a suit based on a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States."[20] Nonetheless, they argued that the "first provision of section 12 governing venue has limited the application of the general rule."[21]

The court found that the venue provision, if anything, was intended "to expand the reach of [the] antitrust laws."[22] Therefore, it concluded, the relevant forum for purposes of minimum contacts analysis is the United States as a whole.[23] However, in light of the D.C. Circuit's later ruling in *GTE New Media Services, Inc. v. BellSouth Corp.*,[24] the court in *In re Vitamins Antitrust Litigation* subsequently ruled that the local contacts test will apply.[25]

2. *The Substantive Reach of the U.S. Antitrust Laws*

In *Access Telecom, Inc. v. MCI Telecommunications Corp.*,[26] the U.S. Court of Appeals for the Fifth Circuit reviewed a grant of summary judgment that had been awarded in favor of U.S. corporate defendants accused of conspiring to eliminate the U.S. market for the export of certain telecommunications services to Mexico.[27] Because the relevant market was limited to exports, the court reasoned there can be no antitrust injury unless Mexican law permits the U.S. exporters to compete with the state-created telecommunications monopoly in Mexico.[28] As the court emphasized, "[e]ven in the U.S., the existence of a legitimate government granted monopoly precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market."[29] Ultimately, however, the court found that Mexico did not, at the time in question, prohibit importation of the telecommunications services at issue and reversed the grant of summary judgment on that basis.

B. Criminal Prosecutions for International Cartel Behavior

Enforcement efforts in the United States, particularly against international cartel behavior, reached "precedent-setting and record-shattering" levels in fiscal year 1999, according to the Antitrust Division of the United States Department of Justice (Antitrust Division).[30] As of December 1999, there were "over thirty-five sitting grand juries looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over twenty different countries."[31]

A large bulk of the criminal fines secured in 1999 were related to the Antitrust Division's investigation into an alleged worldwide conspiracy to fix prices and allocate market shares

20. *Id.* (*quoting* Busch v. Buchman, 11 F.3d 1255, 1258 (5th Cir. 1996)).
21. *Id.*
22. *Id.* at 85,639.
23. *Id.*
24. GTE New Media Services, Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000).
25. *In re* Vitamins Antitrust Litigation, 94 F. Supp. 2d 26, 30 (D.D.C. 2000).
26. Access Telecom, Inc. v. MCI Telecomm. Corp., 1999-2 Trade Cas. (CCH) ¶ 72,735 (5th Cir. 1999).
27. *In re Vitamins Antitrust Litigation*, 1999-2 Trade Cas. (CCH) at 86,413.
28. *Id*
29. *Id.*
30. Joel I. Klein, *The War Against International Cartels: Lessons from the Battlefront* (Oct. 14, 1999), *in* U.S. Dep't of Justice (visited July 12, 2000) <http://www.usdoj.gov/atr/public/speeches/3747.htm> [hereinafter *Lessons*].
31. Gary R. Spratling, *International Cartels: The Intersection Between FCPA Violations and Antitrust Violations* (Dec. 9, 1999), *in* U.S. Dep't of Justice (visited July 12, 2000) <http://www.usdoj.gov/atr/public/speeches/3981.htm>.

for certain vitamins sold in the United States and elsewhere.[32] In that investigation, U.S. antitrust authorities collected a record $875 million in criminal fines in 1999.[33] Additionally, as "an important part of the deterrent value of [its] criminal enforcement program,"[34] the Antitrust Division obtained jail sentences and individual fines for those corporate officials who were at the center of illegal cartel activities.[35] For example, in connection with the department's investigation of an international cartel in the graphite electrodes industry, a former executive of UCAR International agreed to pay a $1.75 million fine and serve seventeen months in jail.[36] Joel Klein, the Assistant Attorney General for the Antitrust Division, stated that "[t]his case should send a strong message to other executives that participation in cartels that victimize U.S. businesses and consumers will result in severe penalties."[37]

In contrast, in *United States v. Nippon Paper Indus. Co., Ltd.*,[38] the U.S. District Court for the District of Massachusetts granted a directed verdict of acquittal in favor of the defendant.[39] At an earlier stage in the case, the U.S. Court of Appeals for the First Circuit had reversed a dismissal of the case, holding that the U.S. antitrust laws have extraterritorial application in both civil *and* criminal cases.[40] The government's case centered around a meeting between the defendant and several of its competitors that was called to address a common legal threat of "dumping" charges against Japanese firms in the industry.[41] After a trial that "proved complex and troubling,"[42] the jury was unable to reach a verdict.[43] Subsequently, the trial court granted a directed verdict of acquittal pursuant to Federal Rule of Criminal Procedure 29.[44] Reasoning that competitors can "lawfully meet to discuss common concerns[,] . . . market conditions, and even prices[,]"[45] the court concluded that the government had introduced no other evidence from which a rational fact-finder could conclude, beyond a reasonable doubt, that a conspiracy to fix prices had been formed.[46] Even if such evidence had been introduced, the court continued, there was no evidence at all that either the "conspiracy" or its alleged effects on U.S. commerce continued beyond the date that would have saved the prosecution from a statute of limitations defense.[47]

C. International Merger Enforcement

In fiscal year 1999, pursuant to the pre-merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[48] the federal agencies charged with

32. Department of Justice, Antitrust Division, *F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel*, Press Release (May 20, 1999).
33. *See Lessons*, *supra* note 30.
34. *Id.*
35. *See id.*
36. *See id.*
37. *Id.*
38. United States v. Nippon Paper Indus. Co., Ltd., 62 F. Supp. 2d 173 (D. Mass. 1999).
39. *Id.* at 177.
40. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir.), *cert. denied*, 502 U.S. 1044 (1998).
41. *See Nippon Paper Indus.*, 62 F. Supp. 2d at 180.
42. *Id.* at 177.
43. *Id.*
44. *Id.*
45. *Id.* at 180.
46. *See id.* at 196.
47. *Id.*
48. 15 U.S.C. § 18a (1994).

merger enforcement—the Antitrust Division and the Federal Trade Commission—reviewed approximately 4,600 transactions, many of which involved significant international components.[49] As a result, U.S. antitrust authorities report that they have engaged in regular contacts with their foreign counterparts on individual mergers, which proved especially important in several cases.[50] Indeed, as of July 1999, twenty-one of the thirty-eight second requests issued by the Federal Trade Commission involved transactions also subject to notifications to foreign competition agencies; of these, twelve involved "substantial discussions" with those agencies.[51]

A good example of inter-jurisdictional cooperation is the merger of the U.K.-based pharmaceutical company Zeneca with the Swedish pharmaceutical firm Astra. Regulatory authorities in the United States and the European Union were concerned that this merger could cause anti-competitive effects in the market for long-acting local anesthetics.[52] Astra was a supplier in this market. Although not a supplier itself, Zeneca's license arrangement with a third party to develop a new and potentially better anesthetic represented, in the eyes of the authorities, "the only potential new competition in the . . . market for the foreseeable future."[53] Through cooperation, the agencies and the parties in both jurisdictions were able to agree quickly on a potential remedy—severance of Zeneca's relationship with the third party supplier in a way that did not adversely affect that third party's ability to market its new product.[54]

D. International Cooperation

Antitrust officials in the United States report that international enforcement cooperation is both "broadening and deepening."[55] The broadening of cooperation can be seen in the increasing number of bilateral cooperation agreements entered into between the United States and other nations.[56] It is deepening "through the almost-daily contacts the U.S. antitrust agencies . . . have with their [foreign] counterparts."[57]

Of particular interest, on April 26, 1999, the United States and Australia[58] signed the first agreement entered into under the International Antitrust Enforcement Assistance Act of 1994.[59] The 1994 legislation was enacted so that both the Department of Justice and the Federal Trade Commission would have the authority to enter into agreements with other countries, allowing for (i) the sharing of otherwise confidential antitrust evidence,[60] (ii) the

49. *See* Richard G. Parker, *Global Merger Enforcement* (Sept. 28, 1999), *in* U.S. Dep't of Justice (visited July 15, 2000) <http://www.ftc.gov/speeches/other/barcelona.htm>.

50. *See id.* (discussing four specific cases wherein the remedying of potential anticompetitive harms was achieved through the close coordination of competition agencies in several countries).

51. *See id.*

52. *See id.*

53. *See id.*

54. *See In re* Zeneca Group PLC, FTC Dkt. No. C-3880 (June 7, 1999), *available at* <http://www.ftc.gov/os/1999/9906/zenecad&o.htm>.

55. *See* John J. Parisi, *Enforcement Cooperation Among Antitrust Authorities* (May 19, 1999), *in* U.S. Dep't of Justice (last modified Nov. 1999) <http://www.ftc.gov/speeches/other/ibc99051911update.htm>.

56. *See id.*

57. *Id.*

58. *See* Federal Trade Commission, *First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ*, Press Release (last modified Apr. 27, 1999) <http://www.ftc.gov>.

59. *See* International Antitrust Enforcement Assistance Act of 1994 (IAEAA), 15 U.S.C. §§ 6201-12 (1998).

60. *See id.* § 6202.

use of their investigative powers to gather antitrust evidence for use by foreign governments,[61] and (iii) the withholding from public disclosure of any antitrust evidence obtained from foreign governments.[62]

Also in 1999, the United States entered into bilateral cooperation agreements with Israel,[63] Japan,[64] and Brazil.[65] While these agreements differ in their details, all provide for both notification about anticipated enforcement activities that may affect the other's important interests, and a general statement of intent to cooperate in matters of antitrust enforcement.[66] All three agreements expressly allow each party to consider its own national interests when deciding the scope of cooperation it shall provide, if any.[67] Unlike the agreement with Australia, none of these agreements allows for the sharing of confidential information.

Less formal cooperation is also taking place in the area of prosecuting international cartels. Assistant Attorney General Klein has stated that the U.S. prosecution of international cartel cases "would have been much less successful . . . [without] . . . the assistance of foreign law enforcement agencies. . . . With rare exceptions, foreign governments no longer even try to defend the indefensible, so long as antitrust enforcers treat the foreign subjects of an investigation fairly. That means that [the] focus in criminal cartel cases can be on the evidence and the harm to consumers, and not on politics."[68]

Finally, the International Competition Policy Advisory Committee (ICPAC) continued its work on international antitrust issues during 1999. ICPAC was formed in November 1997 to provide advice and information to the U.S. Attorney General and Assistant Attorney General in charge of the Antitrust Division on international antitrust issues, such as transnational cartels, multi-jurisdictional merger reviews, international anticompetitive business practices, and cooperation with foreign nations and regional economic integration organizations on competition law issues.[69] In 1999, ICPAC met on four occasions for panel discussions on several topics including multi-jurisdictional merger review, confidential information sharing, the interface of international trade and competition policy, and the role of international institutions in competition policy. It issued its final report in February 2000.

III. Developments in Canada

A. Amendments to the Competition Act

In March 1999, various amendments to the Competition Act (the Act) were proclaimed into force. In part, those amendments amended the Criminal Code to allow wiretapping

61. *See id.* § 6203.

62. *See id.* § 6208.

63. *See* Agreement Between the Government of the United States of America and the Government of the State of Israel regarding the application of their competition laws, March 15, 1999, *reprinted in* 4 Trade Reg. Ret. (CCH) ¶ 13,506 (Trade Mar. 15, 1999).

64. *See* Agreement Between the Government of the United States of America and the Government of Japan concerning cooperation on anticompetitive activities, Oct. 7, 1999, *reprinted in* 4 Trade Reg. Ret. (CCH) ¶ 13,507 (Trade Oct. 7, 1999); *see also* section V(C) *infra.*

65. *See* Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding cooperation between their authorities in the enforcement of their competition laws, October 26, 1999, *reprinted in* 4 Trade Reg. Ret. (CCH) ¶ 13,508 (Trade Oct. 26, 1999).

66. *See* Enforcement Act.

67. *See id.*

68. *See Lessons, supra* note 30.

69. *See* U.S. Dep't of Justice, *Charter of the International Competition Policy Advisory Committee*, para. B., (last modified Oct. 12, 1999) <http://www.usdoj.gov/atr/icpac/charter.pdf>.

with respect to the basic conspiracy offense, bid rigging, and telemarketing; created statutory protections for whistleblowers; changed the name of the Director of Investigation and Research to the Commissioner of Competition; and amended the provisions in the Act dealing with prohibition orders. Perhaps most significantly for international merger transactions, those amendments also changed the provisions in the Act dealing with interim injunctions, to give the commissioner the ability to delay a merger for up to thirty days (with the possibility of a further thirty-day extension) upon certification that a formal inquiry has been commenced and more time is required to complete the inquiry.

In December 1999, various related amendments to the pre-merger notification provisions in the Act were proclaimed into force. The principal changes to the pre-merger notification regime involve: (i) doubling the existing seven and twenty-one day waiting periods applicable to short-form and long-form filings, respectively, and (ii) substantially increasing the amount of information required to be provided as part of a long-form filing. (The changes to the list of information required for short-form filings were relatively minor.) It may also be noted that the target of a share acquisition will now be required to provide the applicable information, even if it is not one of the parties "proposing" the transaction, i.e., even if it is a hostile transaction.

The substantial expansion of the list of information required for long-form filings likely will result in significantly greater costs being incurred by merging parties where a long-form filing is required. The following passages are perhaps the most controversial proposed additions to the list of information required for a long-form filing:

- all reports, studies, surveys and analyses that were prepared or received by a senior officer, together with an indication of the date of preparation, and the name and title of the author of each document, that were prepared for the purpose of evaluating or analyzing the proposed transaction with respect to [the principal categories of products produced by the notifying party that, to the extent known by the notifying party, are produced, supplied or distributed both by that party or its affiliates and the other party to the proposed transaction or its affiliates (Overlapping Products)], and the potential impact of the merger on prices for the Overlapping Products, market shares for the Overlapping Products, competition or competitors for the Overlapping Products, innovation and the potential for sales growth or expansion into new products or geographic regions;
- all marketing, business and strategic plans, and similar documents that were prepared or received by a senior officer, and that have been implemented in Canada over the last three years or are to be implemented in Canada, for each of the Overlapping Products.

These changes to the pre-merger notification regime, taken together with the softening of the test required for the commissioner to obtain a pre-closing injunction, are unlikely to have a significant effect on straightforward transactions. In transactions raising potentially significant *prima facie* issues, however, these changes may increase the likelihood of the commissioner requiring a long-form filing (which historically has seldom been required) and may make it more difficult for merging parties to close such transactions prior to the completion of the Competition Bureau's (the Bureau) review. Representatives of the Bureau have stated that a long-form filing will likely be required with respect to all transactions designated as "very complex," as well as transactions towards the more difficult end of the

"complex" category. Long-form filings will not be required for transactions falling within the "noncomplex" category.[70]

B. Criminal Fines Continue to Increase

In the fall of 1999, the Bureau announced that fines totaling $88.4 million had been imposed in relation to multiple conspiracies to fix prices and allocate market shares for ten vitamin and food additive products sold in Canada. These are the largest fines ever imposed under the Act and the largest criminal fines in Canadian legal history. They all followed guilty pleas by the relevant participants.

F. Hoffman-La Roche Ltd. was sentenced to pay a total fine of $50.9 million, of which $48 million was for offenses relating to bulk vitamins and $2.9 million for its role in an unrelated conspiracy involving citric acid. The latter conviction follows that of ADM, Haarman & Reimer and Jungbunzlauer, who were fined a total of $8.6 million in 1998 for their participation in the citric acid conspiracy.

Subsequently, Mr. Andreas Hauri, a Swiss national and former Head of Global Marketing for the Vitamins and Fine Chemicals Division of F. Hoffman-La Roche Ltd., was convicted and fined a total of $250,000 for his part in the vitamin and citric acid conspiracies. Mr. Hauri's former supervisor, Dr. Roland Bronnimann, was also fined $250,000 for his role in the bulk vitamins matter. BASF AG was fined $18 million in connection with the vitamin conspiracies.

In addition, the court imposed a $1 million fine for its participation in another conspiracy relating to choline chloride. Also, Rhône Poulenc S.A. was fined $14 million with respect to conspiracies relating to vitamins A and E; Daiichi Pharmaceutical Co., Ltd. was sentenced to a fine of $2.5 million for its participation in vitamin conspiracies involving B5 and B6; and Eisai Co. Ltd. was required to pay a fine of $2 million for having participated in a conspiracy relating to vitamin E. Chinook Group Limited was fined $2.5 million for its participation in the choline chloride matter. This followed the conviction of Mr. Russell Cossburn, former Vice President—Sales, for his part in the matter while employed by Chinook. He was sentenced to nine months imprisonment, to be served in the community, because of his age and on the finding that he posed no risk of re-offending and no danger to the community.

Moreover, Roussel Canada Inc., a subsidiary of Hoescht Marion Roussel S.A., pleaded guilty and was convicted under a seldom used provision of the Act (s.46) for implementing a foreign directed conspiracy in regard to pharma-grade vitamin B12. It was fined a total of $370,000. This followed a fine of $11 million imposed against UCAR Inc. earlier in the year under the same provision of the Act, for implementing pricing directives from its U.S.-based parent company, UCAR International Inc., as part of a scheme designed to coordinate worldwide prices of graphite electrodes used primarily in the steel industry.

C. EU-Canada Cooperation Agreement

In June 1999, Prime Minister Jean Chretien announced the signing of an Agreement Between the Government of Canada and the European Communities Regarding the Ap-

70. Pursuant to the Bureau's User Fee Policy, the maximum review periods required by the Bureau to complete its review of noncomplex, complex, and very complex transactions are fourteen days, ten weeks and twenty-one weeks, respectively. These time periods are separate from the statutory waiting periods described above.

plication of Their Antitrust Laws (the Agreement). The Agreement, very similar in format, style, and content to the 1995 Canada/U.S. Cooperation Agreement and the 1991 U.S./EU Cooperation Agreement, does, however, have some noteworthy differences, including stronger provisions relating to confidentiality, positive comity, and negative comity than those contained in the U.S./EU Cooperation Agreement.

D. Commissioner Continues to Accept Merger Undertakings

Notwithstanding various suggestions by senior representatives of the Competition Bureau over the last few years, the Commissioner continued to accept undertakings to the effect that greater use would be made of the consent order process when remedies are offered to resolve concerns in merger cases. For example, in December 1999, the Bureau announced that the Commissioner would not challenge the acquisition by Sobeys Inc. of The Oshawa Group Limited, after Sobeys offered a package of divestiture undertakings. That acquisition had been permitted to proceed in December 1998, after Sobeys provided other undertakings to hold separate and apart from its own business certain parts of Oshawa's business, pending the completion of the Bureau's review. The resolution of the Sobeys/Oshawa matter followed another settlement reached earlier in the year, again without the need for consent order proceedings, with respect to Loblaw Companies Limited's acquisition of Provigo Inc., and the Atlantic Canada wholesale and retail assets of Oshawa.

Similarly, in December 1999, after determining that Canadian Airlines Corporation (Canadian) "is facing imminent insolvency," the Competition Bureau announced that the Commissioner would not oppose the acquisition of Canadian by Air Canada and its partner, 853350 Alberta Ltd. Canadian and Air Canada are the only two national carriers operating in Canada. Apparently, unlike any other previous failing firm merger, however, the Bureau required Air Canada to provide various undertakings "designed to enhance the competitive climate in the airline industry in Canada." According to the Bureau's Press Release, "The Commissioner of Competition decided that the merger, with the undertakings, is more pro-competitive than a liquidation through bankruptcy proceedings."

The principal undertakings provided by Air Canada include commitments to:

- sell its interest in Canadian's subsidiary Canadian Regional Airlines Limited (CRAL), at the highest price received during a sixty-day period, provided that price is at or above the price established by an expert valuator chosen to oversee the sale;
- surrender up to twenty-eight departure/arrival slots during peak hours at Pearson International Airport in Toronto, for assignment to other carriers (if CRAL is not sold, the number of slots to be divested will increase to forty-two);
- refrain from establishing a discount airline service in Eastern Canada until September 30, 2001, in the event that a Canadian discount carrier begins to serve that region of the country (WestJet currently operates as a discount carrier in Western Canada); and
- surrender key facilities (loading bridges, gates, counters, etc.) at airports across the country.

In contrast to the above-noted three cases, in May 1999, the Bureau required British American Tobacco plc (BAT) to agree to a consent order, requiring the sale of all of the

interest that it proposed to acquire in Rothmans International B.V.'s Canadian operations, "to ensure that the sale by BAT would take place within one year from the merger's closing." Prior to the merger, BAT, through its forty-two percent interest in Imasco, had a significant indirect interest in Imperial Tobacco. Together, Imperial Tobacco and Rothmans accounted for approximately eighty-eight percent of manufactured cigarette sales and eighty-one percent of the sales of fine cut or "roll your own" products in Canada.

IV. Developments in Mexico

A. Latest Report From the Mexican Federal Competition Commission

In late 1999, the Federal Competition Commission (FCC) issued its "Report on Economic Competition," along with its "Gaceta de Competencia Económica" for September-December 1998. The former contains statements of a general nature and statistics. The latter partially discloses copies of FCC resolutions upon cases reviewed during 1998.

The following are perhaps the most salient features of the FCC activity:

1. *TELMEX is declared to have "substantial market power."* The FCC has taken perhaps its most daring action by issuing a resolution that declares TELMEX as a dominant firm in the following telecom markets: (a) local basic telephone; (b) access; (c) national long distance; (d) inter-urban transport; and (e) international long distance. On appeal, the FCC upheld its ruling, which also recommends that the telecommunications' regulator impose controls to prevent cross subsidies; adjust the interconnection rates with a factor reflecting productivity increases to bring them to the level of real costs of providing the service; and require the offering of other services like ports and billing in a nondiscriminatory basis, among others. TELMEX has contested the ruling before the judiciary. According to the telecommunications law, the regulator must impose asymmetric regulations upon firms enjoying market power, in accordance with the competition statute. The regulator has not done so. In the meantime, the whole industry is operating in a rather chaotic atmosphere.
2. *TELMEX is prevented from buying a cable operator.* In a separate case, the FCC also prevented a TELMEX subsidiary from buying fifty percent of the shares of stock in another cable operator (TELECABLE) that operates in the State of Mexico (neighboring with the Federal District, where a TELMEX subsidiary operates the largest CATV network), under the allegation of a potential conversion of the acquired network to telephone service. This ruling begins to conceptually reverse the widely criticized 1995 FCC ruling that cleared the acquisition of forty-nine percent of the shares of stock of CABLEVISION.
3. *ADM and Kyowa Hakko are fined.* In the internationally prosecuted lysine case, the FCC also did its part by imposing fines on the corresponding cartel activity.
4. *Nielsen fined.* After the corresponding investigation, the FCC found AC Nielsen illegally impeded other firms from access to data from commercial companies. Apart from fines imposed upon Nielsen and a chain of drugstores, Nielsen was ordered to include a contractual provision in its agreements, stating that providers of information were free to disclose such information to Nielsen's competitors.

5. *FCC's basic statistics for 1998.*

	1997	1998	98/97 (%)
Mergers			
Initiated cases and investigations	209	193	−7.7
Notifications	186	182	−2.2
Investigations	22	10	−54.5
Complaints	1	1	0.0
Concluded	218	189	−13.3
Not objected	207	178	−14.0
Conditioned	4	4	0.0
Objected	1	1	0.0
Sunset approval	0	1	–
Others	6	5	16.7
In process	24	28	16.7
Privatizations and licenses			
Initiated Cases	142	166	16.9
Concluded	175	160	−8.6
Not objected	136	146	7.4
Conditioned	1	8	700.0
Objected	23	0	−100.0
Others	15	6	−60.0
In process	5	8	60
Monopolistic practices and other anti-competitive restrictions			
Initiated cases and investigations	60	62	3.3
Investigations	35	5	−85.7
Complaints	25	57	128.0
Concluded	46	50	8.7
Sanctions or recommendations	9	12	33.3
Negotiated settlements	0	1	–
Against complainant	1	9	800.0
Dismissed	14	11	−21.4
Others	22	17	−22.7
In process	51	63	23.5

Source: *Annual Report*, 1998, Comisión Federal de Competencia, p. 91

B. The Proposed Competition Aspects of the Mexico-EU Free Trade Agreement

1. *Undertaking to apply their corresponding competition laws:* While Mexico has already undertaken related obligations under the OECD "Recommendation," as well as through

Chapter XV of NAFTA, Mexican competition law and policy now obtains full international dimension in the main trading blocs of the world. Bottom line: Mexico will have to accelerate implementation of its seven-year-old competition law and policy to reach the minimum standards of its major league trading partners (the United States, Canada, and the European Union) since its policy will come under stronger spotlights.

2. *Main objectives:* (a) to promote cooperation and coordination; (b) to eliminate anticompetitive activities that impede trade and economic development (note the concern for domestic issues), as well as to prevent their negative impact on the other party's interests; and (c) to promote cooperation in "order to clarify any differences in the application of their respective competition laws." The ambivalent meaning of such a provision should be noted. On the one hand, it may mean solution of disputable issues while, on the other, it also may mean possible harmonization since a previous draft used the language: ". . . promote the approximation of the respective legislation in order to reduce any differences in the application of competition laws."
3. *Scope*: For the European Union, concerted practices, abuses of dominant positions, and mergers. For Mexico, absolute (*per se*) monopolistic practices, relative (rule of reason) practices and mergers. (The absence of state aid and state monopolies should be noted. While both were included in an early draft, reflecting the relative asymmetries between systems, Mexico does not include state aid in its competition statement).
4. *Notification*: Competition authorities shall give notice of the following enforcement activities: (a) those relevant to enforcement activities of the other parties; (b) those that may affect the other party's important interests (note the diplomatic term and its corresponding obscurity); (c) those that relate to restrictions on competition that may affect the territory of the other party; and (d) decisions that may be conditioning or prohibiting action in the territory of the other party.
5. *Substance of the notification*: Two basic principles are notable: (a) notifications shall contain sufficient detail as to permit an assessment (description, relevant market, deadlines, probable outcome, and measures that may be taken); and (b) notifications shall be given in a timely manner as to permit the other party to offer an opinion that in turn may be taken into consideration in the corresponding ruling.
6. *Exchange of information*: The following information may be exchanged: (a) legal doctrine and market studies in the public domain, as well as nonconfidential data or summaries; (b) "information related to the application of competition legislation provided that it does not affect the person providing such information, and for the sole purpose of helping to resolve the procedure" (note the obscurity of the phrase: is its interagencies' "whistle-blowing" incentives?); and (c) "information concerning any known anticompetitive activities and any innovations introduced into the respective legal systems in order to improve the application of their respective competition laws." The reference to a wide array of activities, as well as the many possible interpretations of objectives, should be noted.
7. *Collection of information:* Parties shall help each other in obtaining "other types" of information in their respective territories. "Other types" is not defined. Can a party request such assistance in cases not reported through the notification procedure? Or can the Mexican agency request DGIV to help obtain information in France during a merger investigation that does not have a Community dimension? On what grounds could DGIV request information from companies not subject to its jurisdiction?

8. *Coordination of enforcement activities:* A party may request (through notification) coordinated enforcement activities with respect to a specific case. Such request may be denied.
9. *Consultations:* Parties may request consultations when: (a) a party considers that an investigation or proceeding conducted by the other party's agency may affect its important interest, so the consulted agency shall give full and sympathetic consideration to the views expressed by the requesting party; or (b) a party considers that the interests of the requesting party are substantially and adversely affected by anticompetitive practices of whatever origin, so the consulted agency shall give full and sympathetic consideration to the views and factual materials provided by the requesting agency. Suggested or requested actions are not binding.
10. *Avoidance of conflicts:* Parties shall seek a mutually acceptable solution, taking into consideration the impact and benefits, incompatibility of solutions, location of the assets and importance of penalties to be imposed.
11. *Confidentiality:* The exchange of information shall be subject to the standards of confidentiality applicable to each party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the parties, shall not be provided without the previous consent of the source of the information. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority under this mechanism, and oppose any application for disclosure of such information by a third party that is not authorized by the competition authority that supplied the information.

Interestingly, under Mexican law, all documents and information given to the agency are confidential. Can a foreign agency tip the other party to the confidential information it received from a company? Can the agency oppose a court order to disclose confidential information? Is it lawful to indict based upon information not known by the indicted party? These questions remain unanswered.

12. *Concluding items:*

    (a) The new agreement imposes healthy pressure on Mexican competition enforcement to impose stricter standards;
    (b) The new agreement does not include state aid nor state enterprises' disciplines; and
    (c) Provisions on information exchanges are vague; however, there is a clear provision on confidentiality that guarantees coverage of sensitive data and documents.

V. Developments in Japan

A number of important developments in the Japanese Anti-Monopoly Act and government regulation occurred in 1999. First, a new notification system for Merger & Acquisition (M&A) transactions was implemented as of January 1, 1999. Later in the year, on July 30, 1999, the Japanese Fair Trade Commission (JFTC) formally announced new Guidelines for Patent and Know-How Licensing Agreements (New Guidelines). Subsequently, on October 7, 1999, the Japan-U.S. Antitrust Cooperation Agreement (Cooperation Agreement) was concluded. The Cooperation Agreement is the first antitrust cooperation agreement that Japan has entered into with any foreign country and is an important step for further

cooperation between Japanese and U.S. competition authorities. Finally, the JFTC brought a few important criminal cases concerning cartel activities.

A. New Notification Requirements for M&A

Effective as of January 1, 1999, the Anti-Monopoly Act was amended to significantly change the notification system for M&A transactions. These changes include: (i) a reduction in the applicable scope of notification requirements for stockholding, mergers and acquisitions of businesses, etc., and (ii) new notification requirements by foreign companies involving mergers outside of Japan.

As a result of this latter change, the Anti-Monopoly Act now requires that prior notification of the plan of proposed merger between foreign companies be filed with the JFTC when (i) one of the merger parties has combined sales of its direct subsidiaries and business offices in Japan of more than ten billion yen and (ii) any other merger party has combined sales of its direct subsidiaries and business offices in Japan of more than one billion yen. Mergers between a parent and its subsidiaries or between sister companies having a common parent, however, are exempt from this notification requirement. Finally, the proposed merger may not be consummated within thirty days of the JFTC's acceptance of the notification, but the thirty-day period can be shortened when the JFTC considers it necessary or reasonable to do so.

B. New Guidelines for Patent and Know-How Licensing

While the JFTC's prior guidelines addressed unfair trade practices involved in patent and know-how license agreements, the New Guidelines additionally address for the first time the JFTC's positions on private monopolization and unreasonable restraint of trade involved in such license agreements.

The New Guidelines stipulate that even if certain acts may be considered "the exercise of rights under the Copyright Law, the Patent Law, the Utility Model Law, the Design Law, or the Trademark Act" (and thus generally would be exempt from the application of the Anti-Monoply Act), if such acts also are considered to deviate from, or run counter to, the purposes of the intellectual property rights system to, among other things, encourage innovation, then such acts are no longer deemed "acts recognizable as the exercise of rights," and thus no longer exempt from the application of the Anti-Monopoly Act. Accordingly, if these acts serve to exclude or control business activities of other firms, or to substantially restrict market competition for particular products or technologies, then such acts will be illegal as private monopolization under the Anti-Monopoly Act.

In addition, the New Guidelines provide that when a determination regarding the exercise of rights under the Patent Law, etc. is to be made, the issue of whether the rights have been exhausted must be taken into account. Thus, restrictions on the sale of patented products that were once lawfully distributed according to the wishes of the patent rights holder are handled in the same manner as restrictions on the sale of products in general under the Anti-Monopoly Act.

The New Guidelines also discuss the JFTC's views on patent and know-how licensing agreements from the perspective of unreasonable restraint of trade. A patent licensing agreement can give rise to an unreasonable restraint of trade if it is employed to mutually restrict business activities. For example, if a patent licensing agreement imposes mutual restrictions on sales price, manufacturing volume, sales volume, sales outlets, and sales

territories of the patented products and, as a result, substantially restricts competition in a market for particular products, it will be illegal under the Anti-Monopoly Act as an unreasonable restraint of trade. Thus, care must be given in cross-licensing, multiple licensing, and patent pool arrangements that tend to run afoul of the Anti-Monopoly Act.

C. The Japan-U.S. Antitrust Cooperation Agreement

The new Cooperation Agreement, which is similar to existing U.S. cooperation agreements with the European Union and Canada, includes provisions for (i) notification of enforcement activities; (ii) enforcement cooperation and coordination; (iii) positive comity; (iv) conflict avoidance (comity); and (v) use limitation and confidentiality.

The Japanese government may now expect that aggressive U.S. extraterritorial application and enforcement of its antitrust laws will be lessened, or at least become subject to consultation and coordination between the two countries. It is, however, questionable whether the United States will refrain from, or lessen, vigorous enforcement of U.S. antitrust laws against conduct or entities in Japan. From the U.S. perspective, the Department of Justice may expect to utilize the Cooperation Agreement to obtain evidence from Japan and/or request that Japan enforce its Anti-Monopoly Act against conduct or entities in Japan believed to affect important American interests. Because of confidentiality requirements under existing Japanese law and the limited resources of the JFTC, however, it is also questionable whether the U.S. government's expectation realistically can be met.

Notably, the Cooperation Agreement incorporates positive comity. If the competition authority of a party believes that anticompetitive activities carried out in the other country adversely affect its important interests, such competition authority may request that the competition authority of the other party initiate appropriate enforcement action. The request must be as specific as possible about the nature of the anticompetitive activities and their effect on the requesting party's important interests and also must include an offer of such further information and other cooperation as the requesting competition authority can provide. The requested competition authority is to carefully consider whether to initiate or expand ongoing enforcement action concerning the identified anticompetitive activities, and such authority is to inform the requesting authority of its decision as soon as practically possible. If enforcement action is initiated, the requesting authority is to be informed of the outcome and, to the extent possible, of significant interim developments.

The Cooperation Agreement will be implemented only in accordance with each country's existing laws. It does not change the existing laws of either country, nor is it a comprehensive antitrust mutual legal assistance agreement of the type authorized by the U.S. International Antitrust Enforcement Assistance Act of 1994.

D. Criminal Prosecutions for Cartel Activities

The JFTC continued its active policy to make criminal accusations (*Kokuhatsu*) and apply criminal penalties to serious violations of the Anti-Monopoly Act such as price cartels, supply restraint cartels, market allocation agreements, bid-rigging, and boycotts.

For example, on February 4, 1999, the JFTC filed a criminal accusation with the Public Prosecutor General against three manufacturers of ductile iron pipes, i.e., Kubota Corp., Kurimoto, Ltd., and Nippon Chutetsukan K.K., accusing them of forming a cartel to allocate and maintain market share in fiscal years 1996 and 1997. Four days later, ten officers of the three manufacturers were arrested, the first time that individuals have been arrested

for alleged violations of the Anti-Monopoly Act. The three manufacturers also were levied surcharges in the amount of 11,060 million yen (approximately $100 million at the exchange rate of $1 being 110 yen), the second largest surcharge for one case. In the above case, the amount of the surcharges to Kubota Corp. is about 7,072 million yen (approximately $64 million at the above exchange rate), by far the largest single surcharge amount ever imposed.

On October 13, 1999, the JFTC filed a criminal accusation with the Public Prosecutor General against eleven petroleum companies for bid-rigging for petroleum products procured by the Central Procurement Office of Japan Defense Agency. On October 19, nine employees of the seven petroleum companies were arrested, the second time that individuals have been arrested for criminal violations of the Anti-Monopoly Act.