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BUSINESS REGULATION

International Antitrust

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I. Developments in Australia

A. Merger Regulation in a Global Context

The jurisdictional scope of the Australian merger provisions has been expanded since the enactment of the Trade Practices Act of 1974 (the Act). The merger prohibition applies not only to acquisitions of shares and assets within Australia, but also to acquisitions outside Australia that have an effect on a substantial market in Australia. If an acquisition that takes place outside Australia transfers a controlling interest in a corporate body, a corporation such as a domestic trading company, or the holding company of a domestic trading company, the Australian Competition and Consumer Commission (ACCC) now has the power to intervene in that merger insofar as it affects a substantial market in Australia. For example, when Volvo and Scania, both Swedish companies with Australian subsidiaries, proposed an international merger of certain of their operations early in the year 2000, Volvo took care to seek informal clearance from ACCC, insofar as the proposed merger in Sweden would impact the two Australian subsidiaries.

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When assessing a global merger the ACCC has said that its prime concern is the impact of a merger on competition in Australia. This means that it will not necessarily approve a merger between Australian subsidiaries of overseas companies merely because the merger has been approved in another country. For instance, in an application for an informal clearance of the proposed acquisition of Cadbury Schweppes by Coca-Cola, the ACCC refused the application because the acquisition would lead to a substantial lessening of competition in several markets.

There is no obligation under the Act to notify the ACCC of a proposed merger. However, a multinational corporation proposing an international merger that is likely to impact the Australian market can pursue one of three options: seek an informal clearance that may or may not be subject to court enforceable undertakings; seek formal authorization from the ACCC, a statutory procedure available if the parties can point to some public benefit associated with the merger; or simply proceed with the transaction without informing the ACCC. The last option is clearly the one that carries the most serious potential risk. International mergers inevitably come to the ACCC's attention, either by way of complaint from a competitor, media scrutiny, or through its close links with competition law regulatory authorities in other countries. The Australian Governments' Foreign Investment Review Board may also inform the Commission of proposed acquisitions of Australian corporations or assets that are notified to it under the Foreign Acquisitions and Takeovers Act of 1975 and the Australian Government's foreign investment policy. A merger that proceeds without ACCC clearance risks applications by the ACCC for injunctions and ACCC-initiated court action for breach of the Act's merger provisions. It is also possible that financial penalties could be imposed, not only on the corporation, but also on those individuals involved in the transaction such as the directors, lawyers, banks, and other advisers.

The following are leading examples of the Commission's attitude in the last year to mergers in a global context.

1. *Alcoa and Reynolds*

Alcoa and Reynolds, major international aluminium producers, entered into a worldwide merger agreement. Internationally, they operated across the mining production spectrum, from bauxite mining to processed aluminium products. In Australia, however, the only area in which they overlapped was in the production of alumina.

After conducting market inquiries, the Commission determined that the merged entity would control almost 50 percent of the worldwide trade in untied alumina sales. This raised concerns not only for the Commission, but also for the U.S. Department of Justice and the European Commission.

The merger was allowed to proceed, however, on the basis of undertakings given to U.S. and EU authorities obliging the merged firm to divest itself of Reynolds' interest in the Worsley joint venture (bauxite mine and alumina refinery) in Western Australia.

2. *Schweppes and Pepsi-Cola*

The recent acquisition of Pepsi-Cola Bottlers Australia by Cadbury Schweppes Pty Limited also provides an interesting insight into the process that the Commission adopts when assessing a proposed acquisition. Although it had rejected the proposed acquisition of Schweppes by Coca-Cola in 1999, the Commission concluded that the proposed merger would not reduce competition in the national market for the manufacture and wholesale supply of soft drinks enough to warrant Commission opposition.

The Commission was strongly influenced in this decision by the fact that Pepsi and Schweppes specialized in different segments of the market. Further, the merged entity would still face strong opposition from Coca-Cola Amatil, which would still be the strongest player in all channels of distribution. However, the Commission also concluded that the merger might create an entity that would develop into a stronger player and enhance competition in the non-grocery segments of the market.

3. *AB Volvo and Renault VI*

In July 2000, Renault and AB Volvo signed an agreement whereby Renault would sell its truck manufacturing operation, Renault VI, to AB Volvo in exchange for 15 percent of the share capital of AB Volvo. AB Volvo is one of the world's largest manufacturers of trucks under the Volvo brand name. In Australia, Renault VI trades under the brand name of Mack Trucks.

The main area of competitive overlap between Volvo and Mack Trucks in Australia was in the supply of commercial heavy-duty trucks, that is, trucks weighing over sixteen tons. The ACCC decided not to oppose the merger since the merged truck supplier would still face significant competition from other commercial truck manufacturers, such as International/Iveco, Kenworth, Isuzu, and the DaimlerChrysler Group. These competitors, according to the ACCC, indicated that the market for the supply of heavy-duty trucks was quite competitive.

4. *Rio Tinto and North Ltd.*

Although the proposed merger between Rio Tinto and North Ltd. occurred entirely in Australia, the merger is significant from the point of view of general merger control policy because the ACCC took into account the impact of the merger in global mineral markets. This was because virtually all of the two companies' Australian mineral production is exported.

The main areas of competitive overlap between the parties were in the mining and sale of iron ore, copper, gold, zinc, and uranium. Following the merger, the ACCC estimated that the merged entity's worldwide market share would amount to the following:

- Iron ore production: 7%
- Copper production: 7%
- Gold production: >4%
- Zinc production: >2%
- Uranium production: >10%

While the merged entity's share of Australian iron ore and uranium production would be substantially higher than its global shares, the ACCC formed the view that its impact on competition in Australian markets would be minimal. BHP is the only major domestic consumer of iron ore and given that it supplied its steel mills from its own iron ore mines, BHP would be unaffected by the merger proposal. In the case of uranium, there is no substantial domestic market as production is exported.

The ACCC also considered the potential competitive impact of the merger proposal on the markets for the provision of rail and port infrastructure in the Pilbara region of Western Australia, where the Rio Tinto and North mines were located. It found that while there are some issues relating to access to and use of third party infrastructure, the competitive

effects of the merger proposal in these markets would not influence decisions by rail owners to provide access.

The ACCC, therefore, decided not to intervene on the basis that the proposed merger was unlikely to result in a substantial lessening of competition in any Australian market.

B. Access to Essential Services

Issues of access and essential infrastructure have been at the forefront of competition law and policy in 2000. Since the introduction of a National Competition Policy in 1992, both national and state governments have been committed to removing protections that pose barriers to benefits such as reduced prices, innovative products, and the efficient use of resources. New provisions have been inserted into the Act to govern applications for access to essential infrastructures, the creation of the National Competition Council (NCC), and the expansion of the powers of the ACCC.

The new provisions introduce a procedure by which third parties may obtain access to particular facilities such as airports, ports, electricity cables, gas pipelines, railway lines, and telecommunications facilities. First, the application for access must be in relation to a "declared service." A declared service is a service that the NCC, after assessment by reference to the competition principles set out in the Act, has recommended should be subject to an access declaration to the responsible Minister. Once the NCC has made the recommendation and the relevant Minister has made the final decision to declare a service, the access provider is obliged to consider, in good faith, applications for access to a particular service by an access seeker. If the parties cannot agree to the terms and conditions of access, either party may apply to the ACCC to arbitrate the terms of access. Significant arbitrations in 2000 by the ACCC include the Telstra/Worldxchange telecommunications access dispute and the Moomba-to-Adelaide gas pipelines dispute.

Alternatively, state governments can submit their own state access regimes to the NCC for certification. The process of certification also involves the NCC assessing the state regime by reference to the Competition Principles Agreement. A significant advantage with certification, however, lies with the fact that the regime incorporates not only a description of the declared facility but also the terms and conditions for access by a third party. This means that once the regime has been certified, the terms and conditions by which access is granted to a third-party access seeker are governed by the access regime. In 2000, the NCC considered applications for the certification of the Queensland regime for gas services, the Northern Territory/South Australia regime for rail services, and the Northern Territory Electricity Network Access Code. With the exception of the NT/SA rail regime, which has been certified, the parties are still in negotiation over the submitted regimes.

The NCC, in undertaking regulatory reform of water, gas, electricity, and road transport utilities, is also aiming to remove artificial barriers that are created by virtue of inconsistent state regulation. These legislative and policy changes have facilitated entry by multinational corporations; for instance, Primus and Optus into existing telecommunications markets, as well as created new markets in Australia such as cable television markets. They also indicate that private businesses are now able to compete with government authorities on an equal footing.

The Commonwealth government has asked the Productivity Commission to undertake a review of the national access regime, with a view to recommending appropriate changes to the complex access regimes described above.

C. International Price Fixing

Over the past year, the ACCC has actively pursued a number of alleged international cartels.

1. *International Vitamins Cartel*

The ACCC commenced proceedings against three multinational corporations that were alleged to have had an international price fixing and market sharing cartel involving animal nutritional vitamins A and E. This cartel affected $5-6 billion dollars of U.S. commerce and the Commission estimated that the worldwide effect would be somewhere in the realm of U.S.$20 billion.

The collusive arrangements that are alleged to have been formed in Australia involved the affiliates of three major multinational vitamin corporations: F. Hoffman-La Roche Ltd., BASF AG, and Rhone Poulenc S.A. In its submissions to the Court, the ACCC alleged that the arrangements in Australia involved regular meetings and telephone conversations between corporations during which time the parties came to agreements on both the supply prices of vitamins A and E in Australia and the allocation of certain tenders for major customers.

The parties settled prior to the delivery of judgment. The settlement included penalties amounting to $A26 million. These are, to date, the highest recorded penalties, exceeding the penalties of over $A21 million imposed on Pioneer Concrete, Boral Resources, and CSR in 2000 for price fixing in the Australian concrete industry.

2. *Credit Card Interchange Fees Allegations*

The ACCC commenced proceedings against the National Australia Bank alleging price fixing in relation to credit card interchange fees. Of interest from a multinational perspective is the application by Visa International to be made a party to these proceedings.

The ACCC has proposed that the question of joinder (of Visa and other parties) be dealt with at a later time given that it is also investigating and participating in discussions with other leading banks over its concerns with the fixing of such fees.

D. Penalties in Australia

1. *The Commission's Policy*

As indicated by the *Vitamins* case, the ACCC's leniency policy is not the same as the prescriptive policy followed by antitrust authorities in Europe and the United States. According to the (then) Deputy Chairperson Allan Asher, the ACCC has adopted an overtly flexible leniency policy, which merely sets out the factors, which the ACCC will consider relevant when considering a request for leniency.[1] As a result, the policy has left the co-operating offender in Australia in a somewhat doubtful position.

The ACCC's policy sets out two different levels of amnesty: immunity from prosecution and leniency in the imposition of a civil penalty. Pursuant to this policy, leniency may be considered appropriate for a corporation where it provides valuable and important evidence

1. *See* Allen Asher, New Developments in Competition Policy: An Australian Perspective, Address at the Joint Conference of The Australian and New Zealand Society of International Law and The American Society of International Law, International Legal Challenges for the Twenty-first Century (June 26, 2000).

of a contravention, takes prompt and effective action to terminate its own part in the activity, provides the ACCC with full and frank disclosure of the activity and cooperates fully with the ACCC's investigation and any ensuing prosecution, is prepared to make restitution or rectify the situation, and has no prior record of contraventions. Similar factors were also taken into account by Justice Goldberg in the Federal Court in *ACCC v. SIP Australia Pty Limited* [1999] FCA 858 (25 June 1999).

There has been little evidence of the ACCC granting immunity for full cooperation. Rather, the ACCC is more inclined to agree to lesser penalties for cooperating parties. Consequently, Rhone Poulenc, for example, was penalized in Australia (though to a lesser degree) despite being granted immunity in the United States.

2. *Queensland Fire Protection Industry Cartel*

The ACCC has alleged that an anti-competitive arrangement has existed for many years in the markets for the installation of fire sprinkler systems and fire alarms systems in Queensland. These arrangements are said to include agreements on tender allocations and the submission of tender prices. In 2000, several companies (about forty-seven in total to date) and individuals (including management and employees) were penalized for their involvement in the alleged market sharing and price fixing arrangement.

To date, these penalties have amounted to about $A14.5 million. This is despite the fact that several parties, such as Trident Fire Protection and FFE Building Services, cooperated with the ACCC by admitting to the allegations made against them.

According to the court, the level of the penalty imposed on each party reflected a number of factors. These facts include the size of the company, the seriousness of the unlawful conduct, and the level of management involved.

The Federal Court also ordered injunctions against the respondents, prohibiting them from engaging in similar conduct for a period of three years. The individuals associated with FFE Building Services and Trident Fire Protection have agreed to participate in trade practices compliance training to ensure their awareness of their obligations under the Trade Practices Act of 1974.

E. International Cooperation

The ACCC has, in recent years, actively developed international links for regulatory cooperation with competition and consumer protection agencies around the world. The ACCC has taken the view that, in light of the increasing economic interaction between countries and the increased activity of multinational firms with global cartels and global market power, regulatory authorities clearly need to adopt an international approach to assessing competition policy and problems.

To achieve this end, the ACCC has put in place a network of formal cooperation agreements to facilitate information exchanges, cooperation, and coordination with other authorities and assistance in enforcement matters. These include agreements providing for cooperation in competition and consumer matters; concluded with the New Zealand Commerce Commission in 1994, the Economic and Cultural Office of Chinese Taipei in 1996 and the Papua New Guinea Consumer Affairs Council in 1999. An agreement was also concluded with the U.S. government in 1999, providing for mutual assistance in antitrust enforcement matters. Important recent additions to this network of cooperative agreements are set out below.

In 2000, two agreements, entered into by the ACCC and the U.S. Federal Trade Commission (FTC), were aimed at facilitating enhanced law enforcement cooperation in the area of consumer protection. The first agreement provides for increased information sharing and cooperation between the Commission and the FTC. The second agreement permits the Commission to participate in the FTC's Consumer Sentinel System (a consumer complaints database already used by over 250 law enforcement agencies). These agreements were announced at the workshop on Consumer Protection in Electronic Commerce at the Asia Pacific Economic Cooperation meeting in Bangkok on July 20, 2000.

Further, a tripartite cooperation agreement was entered into by the ACCC, the Commissioner of Competition (Canada), and the New Zealand Commerce Commission in October 2000. Similarly, it provides for notification of enforcement activities as well as cooperation and coordination in the field of enforcement.

The ACCC sees these international cooperation agreements as critical, especially in light of the increasing prevalence of global mergers, and the extent to which these agreements can assist the Commission in dealing with the complexities of global markets.[2] The Alcoa/Reynolds merger is an instance of ACCC attitude to global cooperation. In that merger, undertakings given to the EU and the U.S. Department of Justice were accepted in lieu of any undertaking to the ACCC, despite the fact that the undertaking concerned the divestiture of an Australian asset.

F. Misuse of Market Power

1. *Melway*

One of the more significant trade practices cases to come before the Australian courts last year was *Melway v. Robert Hicks*.[3] This case was argued before the High Court[4] in August 2000. It is the first case relating to misuse of market power under Section 46 of the Act to come before the High Court since 1986.

The case involved a very popular Melbourne street directory known as "Melway." The manufacturer of Melway had a very successful selective distribution system that involved a number of distributors within specific areas. Robert Hicks was involved in a partnership that used to distribute Melway street directories. When the partnership dissolved, Hicks, having set up a new business called Auto Fashions, demanded to become an additional distributor for Melway. Melway refused on the grounds that it did not need or wish to add to its distributors. The distributor claimed that Melway's refusal to supply constituted a misuse of Melway's substantial market power, which infringed Section 46 of the Trade Practices Act.

Section 46 states that a corporation with a substantial degree of power in a market is proscribed from taking advantage of that power for a prohibited purpose. Prohibited purposes include eliminating or substantially damaging a competitor, preventing the entry of a person into any market, and deterring or preventing a person from engaging in competitive conduct in any market.

2. *See* Press Release, Australian Competition and Consumer Commission (ACCC), Global Enforcement Co-operation, Apr. 28, 1999, *available at* http://www.accc.gov.au.

3. *See Melway Publishing Pty Limited v. Robert Hicks Pty Ltd* [2001] HCA 13 (Austl.).

4. The High Court of Australia is the final court of appeal.

The primary question for appeal before the High Court concerns the meaning of the phrase "taking advantage" in Section 46 of the Act. Melway did not dispute the fact that it had substantial market power in the Melbourne street directory market. Melway has asked the High Court to reconsider its earlier interpretation, in 1986, of "taking advantage" when the High Court said that the phrase did not carry with it a moral inquiry into the corporation's conduct. That is, a corporation takes advantage of its market power when it engages in conduct in which it could not have engaged in a competitive market.

In Melway's case, a simple application of the "taking advantage" test resulted in the lower courts' finding that Melway had abused its market position by refusing to supply Auto Fashions. The lower courts held that Melway would not have stood by and refused to supply if it had been operating in a competitive market. Melway submits, however, that its decision to replace an inefficient wholesaler with an efficient one in accordance with a successful, pre-existing exclusive distributor policy was a decision driven by objectives of efficiency only. Accordingly, it is asking the High Court to reassess the simple form in which the "taking advantage" test has been cast, so that efficiency considerations become the primary element of any future test.

The High Court granted special leave to appeal in August 2000 but has reserved its judgment to date.

2. *Record Company Case*

In July 1998, the Copyright Amendment Act (No. 2) 1998 (Cth) came into force. This, in effect, removed the prohibition under existing copyright law on the importation of legitimate copyright sound recordings without the authority of the copyright owner.

The ACCC initiated action in 2000 against three of the major record companies in Australia—Universal Music, Sony Music, and Warner Music—alleging that they had taken unlawful action to discourage or prevent Australian businesses from selling parallel imported sound recordings. One of the allegations made by the Commission is that the three major record companies have each breached Section 46 of the Act by taking advantage of their individual market power to deter retailers from stocking parallel imports. The companies have denied the charges and are actively defending the proceedings.

These actions are interesting because they allege misuse of market power despite the fact that none of the companies individually has a market share greater than approximately 25 to 27 percent. Under normal circumstances, this would be insufficient to constitute substantial market power as proscribed by Section 46 of the Act.

G. Intellectual Property and Competition

Competition law under the Act has traditionally regulated intellectual property dealings differently from other forms of property. It was thought that the protection of intellectual property dealings from some aspects of the Act would promote creative invention that, in the long term, would deliver competitive benefits. It is for that reason that provisions prohibiting the parallel importation of copyrighted material (with the exception of sound recordings) are retained in Section 37 of the Copyright Act and exemptions from certain provisions in respect of intellectual property are maintained in the Trade Practices Act.

In April 2000, the Intellectual Property and Competition Review Committee (the Committee) issued its report on competition issues surrounding the parallel importation restrictions under the Copyright Act. The Committee was asked to determine whether provisions that prohibit the importation of goods manufactured outside the jurisdiction under the

authority of a copyright owner, by someone other than an authorized importer or distributor, should be retained.

The Committee recommended the repeal of the provisions based on the finding that, in light of the direct economic impact of these restrictions, there was no overall beneficial effect to the community. It also proposed, in essence, the removal of the exemptions from Sections of the Trade Practices Act in respect to intellectual property. A repeal of the provisions will have significant implications for the authorized importers and distributors of copyright material in Australia.

The ACCC welcomed these recommendations, stating that intellectual property rights have captured producer interests at the expense of competition and consumers in Australia. While intellectual property rights that protect invention, discovery, and originality are justified, the ACCC maintains that special exemptions under the Trade Practices Act are difficult to justify, particularly when the Act allows for the possibility of seeking authorization of certain conduct.

II. Developments in Canada

A. Final IP Guidelines Released

In September 2000, the Canadian Competition Bureau (Bureau) released its final Intellectual Property Enforcement Guidelines (Guidelines).[5] This followed the publication of two drafts of the Guidelines, which were circulated for comment in June 1999 and in February 2000. Overall, the Guidelines reflect a restrictive approach to intervention in the area of interface between IP law and competition law. The Guidelines address two broad categories of conduct: (1) conduct involving the "mere exercise" of IP rights, and (2) conduct involving "something more than the mere exercise" of IP rights. The Bureau's reluctance to intervene is particularly evident in relation to the first of these categories.

In brief, conduct involving "the mere exercise of an IP right" will be challenged by the Bureau only in "very rare circumstances."[6] By "mere exercise," the Bureau means "the exercise of the owner's right to unilaterally exclude others from using the IP."[7] The Guidelines add that the "Bureau views an IP owner's use or non-use of the IP also as being the mere exercise of an IP right."[8] The Guidelines then make the bold statement that "[t]he unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected."[9]

The very rare circumstances mentioned above are described as being when the elements of Section 32 of the Competition Act (the Act) are met *and* the Bureau concludes that: (1) invoking a remedy against the IP right holder under Section 32, "would not adversely alter the incentives to invest in research and development in the economy;" (2) "the alleged competitive harm stems directly from the refusal and nothing else;" and (3) "no appropriate remedy is available under the relevant IP statute."[10] One example of where these three conditions could be met "is in a network industry, when the combination of IP protection

5. *Intellectual Property Enforcement Guidelines* (Competition Bureau, Can., Sept. 21, 2000), *available at* http://www.strategis.ic.gc.ca/SSG/ct01992e.html.
6. *Id.* at 7.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 9.

and substantial positive effects associated with the size of the network could create or entrench substantial market dominance."[11] The Guidelines state that in such circumstances, "IP rights and network externalities can interact to create *de facto* industry standards."[12] It may be noted that the Bureau would consider condition (1) to be met "if the refusal to license the IP is stifling further innovation."[13] Furthermore, the Guidelines make it very clear that the Bureau will not invoke the general restrictive trade practices provisions of the Act in respect of this first broad category of conduct, which involves only the mere exercise of an IP right.

By way of background, Section 32 is found in Part IV of the Act, which deals with "special remedies." The general restrictive trade practices provisions of the Act are found in Part VI (criminal matters) and Part VIII (civilly reviewable matters, such as abuse of dominance and non-price vertical restraints). Section 32 gives the Federal Court the power, on application by the Attorney General, to make remedial orders if it finds that a company has used the exclusive rights and privileges conferred by a patent, trademark, copyright, or registered integrated circuit topography to unduly restrain trade or lessen competition. Among other things, a remedial order may include an order declaring void, in whole or in part, any agreement, arrangement, or license relating to the challenged use of the IP right. Remedial orders can also restrain the exercise of rights under such agreements, require compulsory licensing, revoke a patent, direct that the registration of a trademark or an integrated circuit topography be expunged, or contain mandatory provisions. The Guidelines state that in practice, "the Attorney General likely would seek a remedial order under the *Competition Act* only on the recommendation of the Bureau."[14]

In determining whether the mere exercise of an IP right is being used to unduly restrain trade or lessen competition, the Bureau's focus is upon whether the refusal "has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services which result directly from the exercise of the IP."[15] The Bureau will only proceed to an assessment of the conditions described above if it concludes that, "(i) the holder of the IP is dominant in the relevant market; and, (ii) the IP is an essential input or resource for firms participating in the relevant market — that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market."[16] It may be noted that subsection 79(5) of the Act explicitly states that the mere exercise of an IP right is not an anti-competitive act within the meaning of the abuse of dominance provisions.

Regarding the second broad category of conduct addressed in the Guidelines (i.e., conduct involving more than the "mere exercise" of IP rights), one of the more helpful guidelines offered is that the Bureau will only intervene to challenge licensing agreements if "they reduce competition substantially or unduly relative to that which would have likely existed in the absence of the license."[17]

11. *Id.*
12. *Id.*
13. *Id.* It was pointed out to the Bureau during the consultation process that this confuses the chilling impact that enforcement would have on future innovation by the IP holder and other inventors, with the impact that the exercise of an existing IP right is having on the innovation efforts of third parties.
14. *Id.* at 4.
15. *Id.* at 9.
16. *Id.*
17. *Id.* at 7.

Examples of where the general provisions (in Part VI or Part VIII) of the Act might be invoked in respect to joint conduct or other conduct involving "something more than the mere exercise of the IP right" include bid rigging, conspiracy, and joint abuse of dominance and mergers. To the extent that this conduct is not unilateral, it "clearly flows from something more than the mere exercise of the IP right to refuse."[18] Another example of where the general provisions of the Act might be applied is in relation to a transfer of IP rights. The Guidelines give a few illustrations of where the Bureau may intervene in this field. One such situation is "when a licensor ties a non-proprietary product to a product covered by its IP right."[19] Another is "when a firm effectively extends its market power beyond the term of its patent through an exclusive contract."[20] A third situation is where "an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement."[21] If these or other types of arrangements between an IP holder and a third party lead to the creation, enhancement, or maintenance of market power so as to substantially lessen or prevent competition, the Bureau may intervene.

B. Proposed Amendments

In April 2000, the Commissioner of Competition launched, at the request of the Minister of Industry, a consultation process in respect of the principles underlying four Private Members' bills to amend the Competition Act, which were introduced earlier in the year.[22] To facilitate the gathering and synthesis of views expressed by various stakeholders, the Commissioner retained the Public Policy Forum (PPF), a non-partisan, non-profit research-based organization. The impetus for the amendments is a concern within the House of Commons Standing Committee on Industry (Committee) that the Act may not contain sufficient tools to address certain practices, particularly in the gasoline and grocery retailing businesses, which have been a significant focus of the Committee's attention.[23]

The principal changes proposed by the four Private Members' bills would: (1) completely overhaul the approach of the Act to horizontal agreements; (2) create a new right of private access to the Competition Tribunal (Tribunal), together with a new power for the Tribunal to issue summary judgments and make cost awards; (3) provide the Commissioner with the ability to issue cease and desist orders; (4) create a new regime for international enforcement cooperation in respect of non-criminal matters; (5) expand the list of anti-competitive practices in the abuse of dominance provisions of the Act; (6) create a framework for references

18. *Id.* at 8.
19. *Id.*
20. *Id.*
21. *Id.* at 7.
22. *Amending the Competition Act: A Discussion Paper on Meeting the Challenges of the Global Economy* (Competition Bureau, Can., Apr. 2000) [hereinafter Discussion Paper]. The four Private Members' Bills are: (1) Bill C-402—*An Act to amend the Competition Act (abuse of dominant position)*; (2) Bill C-438—*An Act to amend the Competition Act (game of chance)*; (3) Bill C-471—*An Act to amend the Competition Act (international mutual assistance and references) and the Competition Tribunal Act (references)*; and (4) Bill C-472—*An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence.*
23. For constitutional reasons, federal legislation cannot target specific industries and therefore, the amendments that are being considered would apply to all industries.

to be made to the Tribunal to adjudicate specific issues (e.g., market definition, barriers to entry, business failure); and (7) create a new offense relating to games of chance sent through the mail system.

In launching the consultation process relating to the principles underlying these proposals, the Bureau's Discussion Paper stated that the proposals "are consistent with the kind of changes the Competition Bureau has advocated over the last two years and which it intended to put forward in its next round of consultations."[24] The Discussion Paper further noted, "[i]f there is broad public support for the principles behind these proposals, the Minister will consider the scope for developing government legislation which meets the spirit of the proposed improvements and anticipates the needs of enforcement in the changing global marketplace."[25]

In December 2000, the PPF issued its final report on its consultations (the Report).[26] Regarding the proposed changes to the manner in which horizontal restraints are dealt with under the Act, the Report states that there is, "general agreement that the existing conspiracy provisions need to be modernized."[27] However, there was also widespread recognition that the issues raised by the proposals are sufficiently complex that more consultation is required. Notwithstanding this conclusion, the Report notes, "[t]here was substantial support for having a dual-track approach for competitor agreements,"[28] (i.e., a criminal track for hardcore criminal cartel behavior and a civil track for potentially competitive forms of cooperation between competitors).

Regarding the proposal to create a right of access to the Tribunal, the Report concluded that there are "divided views as to whether this proposal should move forward."[29] In short, some opposed the proposal altogether, while others were strongly supportive, even to the point of suggesting that the proposed right of private access to the Tribunal be expanded to include the abuse of dominance provisions in the Act.

Turning to the proposal to provide the Commissioner with a power to issue cease and desist orders, the Report found that there was broad recognition of the need for an interim order power in the Act. However, it was also generally felt that "this power should reside in a third party adjudicator such as the Competition Tribunal or the courts, rather than being vested in one person."[30]

With respect to the proposal to create a new regime for international enforcement cooperation in respect to non-criminal matters, the Report found that there is "significant but qualified support," and that the "initiative to enhance international co-operation could move forward provided that a number of confidentiality and operational issues are addressed."[31]

24. *See* Discussion Paper, *supra* note 22, at 1.

25. *Id.*

26. *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations* (Public Policy Forum, Ottawa, Can., Dec. 21, 2000), *available at* http://www.ppforum.com.

27. *Id.* at 28.

28. *Id.*

29. *Id.* at 21. At the present time, a private right of action exists under the Act only in relation to criminal matters, which are adjudicated by the courts (as opposed to the Tribunal). No private right of action exists in respect of the non-criminal provisions in the Act, which are adjudicated by the Tribunal.

30. *Id.* at 26.

31. *Id.* at 32; *see also id.* at 14-17.

Regarding the remaining proposals, the Report found that there is general support to broaden the powers of the Tribunal to include cost awards, summary disposition, and the use of references to allow some key issues to be referred to the Tribunal for an early decision; general support for the proposal to prohibit the sending of deceptive contests by mail or any other system of delivery (including the Internet); and no consensus whatsoever with respect to the proposal to amend the abuse of dominance provisions in the Act to add examples of anti-competitive behavior specific to the retail industry.[32]

C. Final Information Bulletin on Immunity Released

In September 2000, the Bureau also released its final Information Bulletin entitled *Immunity Program under the Competition Act* (Bulletin).[33] In an accompanying press release, the Bureau stated that the Bulletin "reflects current practices jointly employed by both the Bureau and the Attorney General."[34] This is significant because it is the Attorney General who ultimately makes decisions regarding whether to grant immunity.

In short, the Bulletin confirms that the Commissioner *will* recommend to the Attorney General of Canada that immunity be granted to a party where:

(a) the Bureau is unaware of an offense, and the party is the first to disclose it; or
(b) the Bureau is aware of an offense, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.[35]

To obtain immunity, the party seeking immunity must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada (e.g., the Canadian party to a market allocation agreement). In addition, the party must reveal any and all offenses in which it may have been involved. Moreover, the party must provide full, frank, and truthful disclosure of all the evidence and information known or available to it or under its control, wherever located, relating to the offenses under investigation. Also, the party must cooperate fully, on a continuing basis, expeditiously, and (for companies) at its own expense throughout the investigation and with any ensuing prosecutions. Companies are further required to take all lawful measures to promote the continuing cooperation of their directors, officers, and employees for the duration of the investigation and any ensuing prosecutions. Finally, "[w]here possible, the party [must] make restitution for the illegal activity."[36] Based on the author's experience in the first case under the new policy, this may not be insisted upon in each case. If the first party to approach the Bureau fails to meet the requirements for immunity, "a subsequent party that does meet the requirements may be recommended for immunity."[37]

While the draft Bulletin circulated in February of 2000 would not have extended corporate immunity to past directors, officers and employees, the final Bulletin states, "Past

32. *See id.* at 32, 10-14, 21-23.

33. *Immunity Program Under the Competition Act* (Competition Bureau Information Bulletin, Can., Sept. 2000), *available at* http://strategis.ie.gc.ca/SSG/ct01990e.html.

34. *Immunity Program Under the Competition Act* (Competition Bureau Information Bulletin, Can., Sept. 21, 2000), *available at* http://strategis.ic.gc.ca/SSG/ct01993e.html.

35. *See infra* note 44, at 3.

36. *Id.*

37. *Id.*

directors, officers and employees who offer to co-operate with the Bureau's investigation may also qualify for immunity."[38] In the author's experience, this is realistically achievable.

For counsel representing parties to international cartels, it is important to note that the Bulletin states that the "Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favorable treatment in other jurisdiction."[39] Therefore, the fact that a U.S. or European whistleblower may have brought an end to the international conspiracy may not be given significant weight if that party loses the foot-race to Canada and finds itself in a position where it is not the first to approach the Bureau. A critical implication is that a foreign whistleblower wishing to protect itself in Canada should contact the Bureau immediately after contacting the U.S. Department of Justice or other foreign enforcement authority.

D. Precedent-Setting Merger Case

In August 2000, the Competition Tribunal dismissed the case brought by the Commissioner against the merger of ICG Propane Inc. and Superior Propane Inc. The decision highlights the first merger application to be decided on the basis of the efficiency defense contained in Section 96 of the Act. That provision precludes the making of an order against a merger that is likely to lessen or prevent competition substantially, where the efficiencies likely to be generated by the merger will be greater than, and offset, the effects of the lessening or prevention of competition. The case also addressed product and geographic market issues, as well as issues relating to barriers to entry and unilateral and coordinated effects.

Superior and ICG are the two largest distributors of propane and related equipment in Canada. In his application, the Commissioner alleged that the merger was likely to lessen or prevent competition substantially in the Canadian propane industry and that the anti-competitive effects of the merger were not outweighed and offset by the efficiencies it would generate. The Tribunal concluded that the merger of these two firms, with their combined share of approximately 70 percent of the propane sold in Canada, would likely lessen competition substantially in most areas where the parties had combined operations and would prevent competition substantially in Eastern Canada, a region into which it found ICG had plans to enter.

On the precedent-setting efficiencies issues in the case, the majority of the Tribunal adopted the total surplus approach set forth in the Commissioner's *Merger Enforcement Guidelines*.[40] (The Commissioner articulated a different approach in this case, which he has now appealed.)[41] In short, the Tribunal found that the annual efficiencies likely would be approximately $29.2 million for ten years, while the deadweight loss likely would be approximately $3 million per year for the same ten-year period.[42] It stated that the qualitative

38. *Id.* at 4.

39. *Id.* at 5.

40. Commissioner of Competition v. Superior Propane Inc. (2000) 7 C.P.R. (4th) 385, *available at* http://www.ct-tc.gc.ca.

41. In the case, the Commissioner took the position that the Tribunal should adopt a "balancing weight standard" pursuant to which the weight given to the wealth transfer (which is not counted in the trade-off analysis under the total surplus standard) would vary on a case-by-case basis. *Id.* at 484. The Commissioner also took the position that the efficiencies defense can never be invoked to save a merger to monopoly. *See id.* (The Commissioner believed that the merger would result in a monopoly in certain local markets.)

42. *See id.* at 502–504.

anti-competitive effects of the merger should not be given weight in excess of the aforementioned $3 million quantitative anti-competitive effects.[43] Therefore, taking both quantitative and qualitative effects into account, the trade-off analysis came out in favor of efficiencies.

III. Developments in the European Union

A. EC Merger Control Regulation

1. *Merger Control Regulation—Simplified Procedure for Routine Cases*

On July 26, 2000, the European Commission adopted a Notice[44] establishing a simplified procedure for certain transactions that do not raise competition concerns under the EC Merger Control Regulation.[45] Transactions eligible for the simplified procedure are cleared by means of a short-form decision within one month of notification. The new procedure applies to transactions notified since September 1, 2000.

The Notice identifies three types of cases eligible for the simplified procedure:

- joint ventures with no, or negligible, actual or foreseen activities within the European Economic Area (i.e., where the turnover of the joint venture and/or the contributed activities is less than €100m in the EEA and the value of the assets transferred to the joint venture is less than €100m in the EEA); and
- transactions involving parties, none of which is engaged in business activities in the same product and geographical market, or in a product market that is upstream or downstream of a product market in which any other party to the transaction is engaged; and
- transactions in which the combined market share of the parties does not exceed 15 percent in markets in which there is a horizontal relationship, and 25 percent in markets in which there is a vertical relationship.

If the Commission is satisfied that the transaction qualifies for the simplified procedure, it will normally adopt a short-form clearance decision at the end of the one-month review. The option of reverting to a normal first phase merger procedure and launching an investigation and/or adopting a full decision, however, remains open to the Commission, should it judge this appropriate in respect of any transaction.

In its Notice, the Commission emphasizes the efficacy of pre-notification contacts between the parties and its Merger Task Force in relation to transactions, which may be candidates for the simplified procedure.

43. *See id.* at 504. These qualitative effects were identified as including reduced levels of service, product quality, product choice, and innovation.

44. *See* Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under Council Regulation (EEC) No. 4064/89, 2000 O.J. (C 212), *available at* http://europa.eu.int/comm/competition/mergers/legislation/simplified_procedure.

45. *See* Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1989 O.J. (L 395); corrected version, 1999 O.J. (L 257) as amended by Regulation 1310/97, 1998 O.J. (L 180), corrected version, 1998 O.J. (L 40) [hereinafter Merger Regulation], *available at* http://europa.eu.int/comm/competition/mergers/legislation/c406489_en.pdf.

2. *Merger Control Regulation—Substantive Analysis—"Gate-Keeper" Effects*

In its substantive review of mergers during 2000, the European Commission identified "gate-keeper" effects as a major concern. Evaluation of these "gate-keeper" effects has been particularly apparent in the Commission's assessment of transactions affecting new economy sectors where, in the Commission's judgment, access to networks is becoming essential if parties are to be able to provide a wide range of services. The European Commissioner with responsibility for competition, Mr. Mario Monti, speaking at the Fordham Corporate Law Institute in October 2000, explained that "gate-keeper" effects refer to "*situations where a company is in control of an infrastructure that is essential for other players to develop their business and innovate.*"[46]

In the Commission's analysis, "gate-keeper" effects can occur in the context of both horizontal and vertical mergers. The Commission's concern in relation to "gate-keeper" effects in horizontal cases has tended to focus on mergers between two network operators that might lead, through the combination of their assets to the creation of a facility that cannot be replicated by competitors. The Commission identified horizontal "gate-keeper" effects in two transactions it dealt with during 2000—*Vodafone/Mannesmann* and *MCI WorldCom/Sprint.*

In *Vodafone/Mannesmann*,[47]the Commission reviewed the effect of the transaction on the emerging market for pan-European seamless mobile telephony services. It took the view that the merged company, with its extensive network, would be in a unique position vis-à-vis its competitors to roll out these services. The Commission found that following the acquisition Vodafone would have a pan-European footprint, which would enable it to provide seamless mobile telecommunication services to corporate customers. The Commission also concluded that other mobile operators would not be in a position to provide the same type of services. The replication of Vodafone's network footprint in the form of mergers and/or agreements would, it found, be highly difficult in the short to medium term.

In order to remedy the Commission's concerns, Vodafone agreed to give its competitors non-discriminatory access to its integrated network. However, due to the rapid nature of developments in the mobile telecommunications sector, the award of third generation mobile licenses, and the fact that competitors will in all likelihood try to build alternative infrastructure the Commission was satisfied that Vodafone's undertakings could be limited to a period of three years.

The *MCI WorldCom/Sprint*[48] transaction was one of only two cases in respect of which the Commission adopted a prohibition decision during 2000.[49] The Commission prohibited the merger on the grounds that it would have resulted in the creation of a dominant position in the market for top-level universal Internet connectivity. The Commission found that the combination of the parties' extensive Internet networks and large customer bases would have allowed the merged entity to dictate terms and conditions for access to its Internet

46. European Competition Commissioner Mario Monti, Address at the Fordham Corporate Law Institute (Oct. 2000) [hereinafter Monti Address].

47. *See* Case COMP/M.1795 Vodafone Airtouch/Mannesmann (Apr. 12, 2000), *available at* http://europa.eu.int/comm/competition/mergers/cases/.

48. *See* Case COMP/M.1741MCI WorldCom/Sprint (June 28, 2000), *available at* http://europa.eu.int/comm/competition/mergers/cases/.

49. For the other case involving a prohibition order, see Case COMP/M.1672, Volvo/Scania (Mar. 15, 2000), *available at* http://europa.eu.int/comm/competition/mergers/cases/.

networks and would have led to the creation of such a powerful force that both competitors and customers would have been dependent on the new company to obtain universal Internet connectivity. The Commission found that, despite liberalization, regional and local providers are still dependent on the largest top-level providers to gain full and effective access to the Internet. The parties' proposal to divest Sprint's Internet business was judged by the Commission to be insufficient to resolve the competition concerns resulting from the merger.

In relation to vertical "gate-keeper" effects, Commissioner Monti explained at Fordham that, "foreclosure concerns are only likely to arise where one of the merging parties enjoys significant market power. Mergers in the media sector, between content providers and delivery operators, can lead to such concerns."[50] The Commission's approach to "gate-keeper" effects can be seen in its review of the *AOL/Time Warner* and *Vivendi/Seagram* transactions.

The European Commission approved the *AOL/Time Warner*[51] merger only after AOL agreed to sever all structural links with the German media group Bertelsmann AG. The Commission had been concerned that AOL, because of the merger with Time Warner (which in turn had planned to merge its music recording and publishing activities with EMI) and because of its European joint ventures with Bertelsmann, would have controlled the leading source of music publishing rights in Europe. Time Warner, EMI, and Bertelsmann together would have held approximately 50 percent of European music publishing rights. The Commission was concerned that AOL could have emerged as the "gate-keeper" in the emerging market for Internet on-line music delivery. The Commission judged that the undertakings proposed by the merging firms (which ensured that Bertelsmann, Europe's largest media company, was freed to compete alone) and the fact that the EMI/Time Warner deal did not take place were sufficient to ensure that the merged entity would not have the critical mass in terms of music publishing rights to dominate the market.

In *Vivendi/Seagram*,[52] the Commission reviewed the acquisition of Seagram by Vivendi (and its subsidiary Canal+, Europe's largest pay-TV operator). The Commission's analysis focused on the effect of the proposed transaction in the pay TV market. It found that, due to the likelihood of Canal+ having exclusive access to the premium films produced and co-produced by Universal (a Seagram subsidiary), Canal+ would have strengthened its dominant position in a number of countries. Vivendi offered a package of commitments to resolve these competition problems. It agreed to allow access for competitors to Universal's film productions and co-productions. In particular, the parties undertook not to grant to Canal+ "first window" rights covering more than 50 percent of Universal productions and co-productions. (Films shown on pay-TV shortly after cinema exhibition and video rental are said to be released on "first window," that is, before they are available more widely on television.) Vivendi also agreed to divest its stake in the British pay-TV company, BSkyB. In the Commission's view, this enabled BSkyB to be an independent competitor to Canal+ and at the same time severed any links between Universal and another major film producer controlled by the BSkyB group, Fox Studios.

50. Monti Address, *supra* note 46.

51. *See* Case COMP/M.1845, AOL/Time Warner (Oct. 11, 2000), *available at* http://europa.eu.int/comm/competition/mergers/cases/.

52. *See* Case COMP/M.2050, Vivendi/Canal+/Seagram, 2000 O.J. (C 311), *available at* http://europa.eu.int/comm/competition/mergers/cases/.

B. EC Competition Law

1. *European Commission—Block Exemption Regulations for Specialization Agreements and R&D Agreements*

On November 29, 2000, the Commission adopted two block exemptions in respect of horizontal agreements. Commission Regulation (EC) No 2658/2000[53] applies Article 81(3) of the EC Treaty to certain specialization agreements (Specialization Block Exemption) and Commission Regulation (EC) No. 2659/2000[54] applies Article 81(3) to certain research and development agreements (R&D Block Exemption). These new Regulations replace the existing block exemption regulations on specialization (Commission Regulation (EEC) No. 417/85)[55] and R&D (Commission Regulation (EEC) No. 418/85).[56]

The Specialization Block Exemption applies to agreements entered into between two or more firms that relate to the conditions under which those firms specialize in the production of products. Three types of arrangements are specifically referred to in the Specialization Block Exemption:

> *Unilateral specialization agreements:* one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing firm, while the competing firm agrees to produce and supply those products;
>
> *Reciprocal specialization agreements:* two or more parties on a reciprocal basis agree to cease or refrain from producing certain but different products and to purchase these products from the other party, who agrees to supply them;
>
> *Joint production agreements:* two or more parties agree to produce certain products jointly.

The R&D Block Exemption applies to agreements entered into between two or more firms that relate to joint research and development of products or processes. The exemption also covers joint exploitation of the results of joint research and development.

The new block exemptions are intended, the Commission has said, to embody a shift from the formalistic regulatory approach underlying the regulations they replace toward an approach based on the economic assessment of horizontal cooperation agreements. The Commission has said that its basic aim is to allow collaboration between competitors where it contributes to economic welfare without creating a risk for competition.

The new block exemptions replace the existing system of specifically exempted "white list" clauses by a general exemption of all conditions under which firms undertake R&D and specialization. This move away from a clause-based approach is intended to give greater contractual freedom to the parties to such agreements and to remove the "strait-jacket" imposed by the old Block Exemption Regulations. For specialization agreements, the max-

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53. *See* Commission Regulation 2658/2000 of 29 November 2000 on the Application of Art. 81(3) of the Treaty to Categories of Specialisation Agreements, 2000 O.J. (L 304), *available at* http://europa.eu.int/eur-lex/en/dat/2000/l_304/l_30420001205en00030006.pdf.

54. *See* Commission Regulation 2659/2000 of 29 November 2000 on the Application of Art. 81(3) of the Treaty to Categories of Research and Development Agreements, 2000 O.J. (L 304), *available at* http://europa.eu.int/eur-ex/en/dat/2000/1_304/l_30420001205en00070012.pdf.

55. *See* Commission Regulation 417/85 of 19 December 1984 on the Application of Art. 85(3) of the Treaty to Categories of Specialisation Agreements, 1985 O.J. (L 53), *available at* http://europa.eu.int/comm/competition/antitrust/legislation/41785_en.html.

56. *See* Commission Regulation 418/85 of 19 December 1984 on the Application of Art. 85(3) of the Treaty to Categories of Research and Development Agreements, 1985 O.J. (L 53), *available at* http://europa.eu.int/comm/competition/antitrust/legislation/41885_en.html.

imum market share threshold for all the parties combined is set at 20 percent. For R&D agreements, the market share threshold is set at 25 percent. Beyond these market shares, R&D or specialization agreements are not automatically prohibited but have to be assessed individually. However, "hardcore" restrictions (price fixing, output limitation, or allocation of markets or customers) generally remain prohibited irrespective of the parties' market power.

The new rules enter into effect on January 1, 2001. Agreements already in force on that date continue to be covered by the old block exemption Regulations until June 30, 2002. The new Block Exemptions expire on December 31, 2010.

2. *European Commission—Guidelines on Vertical Restraints*

In October 2000, the European Commission published Guidelines on Vertical Restraints.[57] These Guidelines complement the Commission's Vertical Agreements Block Exemption adopted in December 1999.[58]

It should be recalled that the Vertical Agreements Block Exemption embodies a shift in the Commission's assessment of vertical agreements away from the formalistic regulatory approach, which underlies the old legislation, toward an approach based more on prevailing economic analysis. The Commission has said that the basic aim of this new approach is to simplify the rules applicable to supply and distribution agreements and to reduce the regulatory burden, especially for firms lacking market power, while ensuring a more effective control of agreements entered into by firms holding significant market power. The new Vertical Agreements Block Exemption allows firms whose market share is below 30 percent to benefit from a so-called safe harbour under the EU competition rules, subject to their not including any "hardcore" restrictions (e.g., resale price maintenance) in their agreements.

Above the 30 percent market share threshold, vertical agreements will not be covered by the Vertical Agreements Block Exemption, but are not automatically presumed illegal. They may require individual examination under Article 81 of the EC Treaty. However, the Commission now seeks to encourage firms that cannot benefit from the block exemption to do a self-assessment in relation to the application of EC competition law to their vertical agreements. The Guidelines are intended to assist those firms in carrying out this assessment under the EC competition rules.

In the Guidelines, the Commission explains:

- Which vertical agreements generally do not distort competition and therefore fall outside Article 81(1). This concerns, in particular, agreements between small and medium-sized enterprises, true agency agreements, and agreements where neither the supplier nor the buyer holds a significant degree of market power;
- Which vertical agreements benefit from the "safe harbour" created by the Vertical Agreements Block Exemption. The Guidelines describe the conditions for application of the block exemption and the circumstances that might lead to the block exemption being withdrawn by the Commission or the competition authorities in the Member States;

57. *See* Commission Notice of Guidelines on Vertical Restraints, 2000 O.J. (C 291), *available at* http://europa.eu.int/comm/competition/oj_extracts/2000_c_291_10_13_0001_0044_en.pdf.

58. *See* Commission Regulation 2790/1999 of 22 December 1999 on the Application of Art. 81(30) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336), *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc31999R2790; *cf.* 34 INT'L LAW 409.

- A number of market definition and market share calculation issues that may arise when companies apply the 30 percent market share threshold in connection with the Vertical Agreements Block Exemption;
- The enforcement policy of the Commission in cases not covered by the Vertical Agreements Block Exemption. A general framework of analysis is provided and this framework of analysis is applied to the most important specific vertical restraints, such as single branding, exclusive distribution, and selective distribution.

The Guidelines will be revised in 2004 in view of market developments and experience gathered by the Commission in applying the new policy.

3. *European Commission—Procedural Reform—Proposal for Regulation*

In 1999, the Commission published a White Paper on the modernization of EC competition law.[59] In September 2000, following wide consultations, the Commission published a Proposal for a Council Regulation[60] (the Proposal) to replace Council Regulation 17/62 (and the equivalent rules in the transport sector) and to reform radically the procedural rules for the application and enforcement of EC competition law.

The principal proposal (in line with the Commission's preferred option set out in the White Paper) is the creation of a new enforcement system referred to as the "directly applicable exception system." Under this system both the prohibition rule set out in Article 81(1) of the EC Treaty and the exception rule contained in Article 81(3) can be directly applied not only by the Commission but also by the national courts and national competition authorities. Agreements will be enforceable or void depending on whether they satisfy the conditions of Article 81(3). No authorization decision will be required for enforcing agreements complying with Article 81 as a whole.

The core of this new system is set out in Article 1 of the Proposal. It effectively abolishes the notification system and permits national courts and competition authorities to rule on the availability of an exemption under Article 81(3). Article 2 proposes a burden of proof rule under which the party to litigation who alleges a breach of Article 81(1) would have the burden of proving the allegation. Equally, a party to litigation who claims the benefit of the exception provided for in Article 81(3) would have the burden of proving that the exception applied.

Article 3 of the Proposal sets out an approach for resolving any conflict between EC competition law and national competition law. It provides that when an agreement or practice is capable of affecting trade between Member States only EC competition law applies. In this way, the national competition authorities, which will be empowered to apply Articles 81 and 82 in their entirety, will apply Community law rather than their national rules in all cases affecting trade between Member States.

Article 4 (together with Article 28) provides for the Commission's power to take decisions in individual cases and to adopt block exemption regulations. The Commission anticipates that a system of block exemptions and guidelines will be of considerable importance in operating the "directly applicable exception" system. Article 4(2) proposes a system of reg-

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59. *See* White Paper on Modernization of the Rules Implementing Articles 85 and 86 [now 81 and 82] of the EC Treaty - [Commission programme 99/027], COM (99) 101, *available at* http://europa.eu.int/comm/competition/antitrust/wb_modernisation_en.pdf.

60. *See* Proposal for Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, COM (2000) 582, *available at* http://europa.eu.int/comm/competition/antitrust/others/modernisation/comm_2000_582/en.pdf.

istration. Under this provision (not envisaged in the White Paper), the Commission is given power to introduce a registration requirement for certain types of agreements, decisions or practices that fall under Article 81(1) and are not covered by block exemptions. Articles 5 and 6 make provision for the direct application of Article 81 in its entirety by the national courts and the national competition authorities.

Articles 7 to 10 deal with the Commission's role in the enforcement of EC competition law. The Commission is empowered to make findings of infringement and order termination of infringements. These findings may be made on foot of an investigation initiated as a result of a complaint or on the Commission's own initiative (Article 7).

Articles 11 through 16 deal with co-operation between the Commission and the national authorities and courts. The Commission will retain a supervisory role. Article 11 sets out the basic information and consultation mechanisms. Under Article 11(3), the national competition authorities are required to inform the Commission at an early stage of cases being dealt with under Articles 81 and 82. Under Article 11(6), the Commission is empowered to withdraw a case from a national competition authority and deal with the case itself. There are also provisions for the exchange of information between the Commission and the national competition authorities (Article 12) and for the suspension of a case or the rejection of a complaint where the issue is being or has been dealt with by another authority (Article 13). Article 15 deals with cooperation between the Commission and the national courts. Article 15(1) establishes a right for national courts to obtain from the Commission information in its possession for the purpose of applying Articles 81 and 82. A national court can also ask for an opinion from the Commission on questions relating to the application of the Community competition rules. Article 15(2) obliges the national courts to transmit a copy of their judgments applying Articles 81 or 82 to the Commission. Article 15(3) introduces a right for the Commission and the national competition authorities to make submissions to national courts in written or oral form. In the case of the national competition authorities the power is limited to the courts of their own Member State. The Commission may act under this provision only in the Community public interest (as *amicus curiae*) and not in the interest of one of the parties. Article 16 is aspirational in nature; it imposes on national courts and national competition authorities an obligation to make every effort to avoid taking decisions that conflict with decisions adopted by the Commission.

Articles 17 through 21 deal with the Commission's powers of investigation. The current Article 11 power to request information remains substantially unchanged and is covered by Article 18 in the Proposal. Under Article 19 of the Proposal, the Commission would be given the power to interview natural or legal persons, whether or not they are themselves the subject of the proceedings, and to record their statements. The Commission's powers of inspection (currently set out in Article 14 of Regulation 17) are enhanced by: (1) the extension of the power to search to private homes if there is a reason to suspect that professional documents are kept there, (2) the power to seal cupboards and offices in order to make sure that no documents disappear during the inspection, and (3) the extension of the power to ask questions to all issues relating to the subject matter of the inspection (rather than to explanations relating to documents, as currently provided).

Articles 22 and 23 relate to penalties. The principal sanction for infringements (fines of up to 10 percent of annual turnover) remains unchanged. Fines for procedural violations are strengthened. Articles 24 and 25 of the Proposal concern limitation periods. Articles 26 and 27 set out the rules on hearing and professional secrecy, which remain largely unchanged.

Articles 28 to 30 of the Proposal relate to block exemptions. The procedure for the adoption of block exemption regulations will remain largely unchanged although the Commission anticipates that under the "directly applicable exception" system block exemptions will be of greater importance than under the current system. Article 29(1) provides that the Commission may withdraw the benefit of a block exemption if it finds on individual assessment that a specific agreement does not fulfill the conditions of Article 81(3). Article 29(2) proposes to give the national competition authorities the power to withdraw the benefit of a block exemption for their own territory on condition that the territory constitutes a distinct relevant geographic market. To ensure consistency in the application of block exemption regulations, prior consultation of the Commission is proposed in respect of national decisions withdrawing the benefit of a block exemption. Article 30 provides that the Commission may include in block exemption regulations a clause entitling it to exclude, by way of regulation, from their scope certain agreements or practices that are applied within a particular relevant market. The Commission has said that this provision is required to deal with the situation in which anti-competitive effects are caused in a market by the existence of a number of parallel agreements or networks of agreements.

Articles 31 to 42 (the final Articles in the Proposal) deal with general procedural and transitional issues. Article 35 (which deals with transitional arrangements) has attracted some criticism. It provides, at paragraph 1, that notifications for exemption submitted under the existing rules will "lapse" when the new regulation becomes applicable. Article 35(1) also includes a second sub-paragraph, which provides that all existing exemption decisions will cease to be valid on the date of the new regulation's application.

IV. Developments in Japan

The year 2000 saw an important development in the Japanese Antimonopoly Act.[61] Since the Act was enacted more than fifty years ago, only the Japanese Fair Trade Commission (JFTC) has had the exclusive authority to enforce the Act, and private parties have been unable to seek court injunctions to prevent violations of the Act. An amendment to the Act in 2000 (Amendment)[62] will, for the first time, allow private parties injured by violation of the Act to directly seek court orders to prevent illegal conduct under the Act.

Additionally, the Amendment will extend to trade associations (*Jigyosha Dantai*) the strict liability for compensation for damages resulting from prohibited acts. Strict liability will also attach to business entities that have engaged in unreasonable restraints of trade or employed unfair trade practices through international agreements or contracts.

Another development is the amendment to the Antimonopoly Act resulting from the introduction of the new corporate division system under the Japanese Commercial Code.[63]

Finally, on June 30, 2000, the JFTC announced new guidelines concerning unjust representation of pricing under the Law Against Unjustifiable Premiums and Misleading Representations.[64]

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61. *See* Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Japan), Law No. 54 of 1947, as amended [hereinafter Antimonopoly Act].

62. *See* Amendment to the Antimonopoly Act, Law No. 76 of 2000 (Japan).

63. *See id.*

64. *See* Law Against Unjustified Premiums and Misleading Representations, Law No. 134 of 1962, as amended (Japan).

A. Introduction of Private Parties' Right to Seek Injunctions

1. *Prior System*

In Japan, the JFTC has had sole responsibility for enforcing the Antimonopoly Act. If the JFTC, as a result of an investigation, decides that the Act has been violated, it has the power to order remedial measures to eliminate the illegality.[65] Implementation of remedial measures is enforced by fines[66] and criminal penalties.[67]

Neither the JFTC nor private parties have been able to seek court injunctions to enjoin violations of the Antimonopoly Act. The Act, however, makes specific provision for the issuance of an emergency suspension order. At the request of the JFTC, if a court determines that emergency action is required, the court can order those suspected of violating the Act to temporarily suspend the impermissible activities, the exercise of voting rights or the exercise of business activities by corporate officers.[68]

2. *Private Parties' Right to Seek Injunctions*

As a result of the Amendment, which is effective as of April 1, 2001,[69] a private party injured by unfair trade practices that are illegal under the Antimonopoly Act will be able to seek a court injunction.[70]

a. Entities Entitled to Seek Injunction

Any entity, including business entities and consumers whose profits have been damaged, or threatened by unfair trade practices of business entities or of a trade association, can seek court injunctions.[71]

b. Illegal Acts Subject to Injunction

There are three cornerstones of the Antimonopoly Act, namely, the prohibitions against monopolization,[72] unreasonable restraints of trade,[73] and unfair trade practices.[74] Actions subject to injunction as a result of the Amendment are limited, however, to unfair trade practices. Private monopolization and unreasonable restraints of trade still may not be enjoined upon the petition of private parties.

While there is no theoretical reason to limit private litigants' right to seek injunctive relief to particular types of violations of the Antimonopoly Act, it was considered extremely difficult for private parties to demonstrate the private monopolization and cartels that are prohibited as unreasonable restraints of trade, given the limited evidential discovery system under the Japanese Code of Civil Procedure.[75] Having considered these practical difficulties,

65. *See* Antimonopoly Act, *supra* note 61, §§ 7, 8-2, 17-2, and 20.
66. *See id.* § 97.
67. *See id.* § 90, ¶ 3.
68. *See id.* § 67, ¶ 1.
69. *See* Cabinet Ordinance No. 512 of 2000 (Japan).
70. *See* Antimonopoly Act, *supra* note 61, § 24.
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.* § 19.
75. *See* Law No. 109 of 1996 (Japan).

it was decided that private parties' rights to seek injunctive relief should be limited to unfair trade practices, proof of which was considered to be less difficult.

c. Standard for Relief

In order to prevail, a private party must show that it has suffered "a significant loss or is threatened to incur a significant loss." Interpretations in the area of general tort law under the Civil Code[76] require a higher degree of illegality to justify a claim for an injunction than that necessary to support an award of damages.[77] A similar degree of loss and illegality is considered necessary to support the granting of an injunction under the Amendment.

d. Order to Make an Appropriate Deposit (*Soto-no Tanpo*)

In order to protect a defendant from an unfair or frivolous claim for an injunction, the court can order the plaintiff to provide an appropriate deposit upon the petition of the defendant.[78] To make such a petition, the defendant must provide *prima facie* evidence that the injunctive relief claim was filed for an unjust purpose, such as for obtaining unjust profits or in order to intentionally damage the defendant.[79]

e. Relationship with the JFTC

When a lawsuit seeking an injunction is filed, the court must notify the JFTC of the suit,[80] and the court can request the JFTC's opinion on the applicability of the Antimonopoly Act to the case.[81] Also, with the court's permission, the JFTC can provide its opinion on the Antimonopoly Act's applicability to the case.[82]

f. Jurisdiction and Transfer of Suits

Private parties may, based upon the jurisdictional provisions of the Code of Civil Procedure, bring lawsuits in District Court for injunctive relief against acts of unfair trade practices,[83] as well as bring such lawsuits in Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu.

In the event a lawsuit is filed for injunctive relief, and another lawsuit is in progress in another court concerning the same or similar acts, the first court, when it deems appropriate, may, upon request or *sua sponte*, transfer all or a part of the case for injunctive relief to the other court or any other court with jurisdiction over the matter, considering the residence or location of the parties involved, residence of witnesses to be examined, the commonality of issues or evidence, or other circumstances.[84]

B. Expansion of Strict Liability Under the Antimonopoly Act

Section 25 of the Antimonopoly Act imposes strict liability for damages suffered as a result of a business entity that engaged in private monopolization or unreasonable restraint

76. *See* Law No. 89 of 1896, as amended (Japan).
77. 49 Minshu 7, 2599 (Sup. Ct. July 7, 1995).
78. *See* Antimonopoly Act, *supra* note 61, § 83-2, ¶ 1.
79. *See id.* ¶ 2.
80. *See id.* §83-3, ¶ 1.
81. *See id.* ¶ 2.
82. *See id.* ¶ 3.
83. *See id.* § 84-2, ¶ 1.
84. *See id.* § 87-2.

of trade, or employed unfair trade practices. The amendment to the Antimonopoly Act will extend strict liability for such damages to trade associations that have committed prohibited acts as well as to business entities that effected unreasonable restraints of trade or employed unfair trade practices through international agreements or contracts.[85]

C. Amendment Resulting from Adoption of Corporate Division System

1. *Corporate Division System*

Providing a new method for corporate reorganization, the corporate division (*Kaisha Bunkatsu*) system was adopted in the Commercial Code on May 24, 2000.[86] This amendment is effective as of April 1, 2001.[87]

The new corporate division system is—in substance—the opposite of a merger and thus may be considered a "de-merger." There are two types of the corporate divisions. One is called *Shinsetsu-Bunkatsu*[88] (or corporate division by way of incorporation of a new corporation), in which the divided business of a corporation (A Corporation) is transferred to a newly incorporated corporation (B Corporation) in exchange for B Corporation's newly issued shares, and such new shares of B Corporation are distributed either to A Corporation itself or to A Corporation's shareholders, or both. In the case of a *Shinsetsu-Bunkatsu*, there is a clause in the Commercial Code that contemplates that two or more corporations divide their businesses and jointly transfer them to the same newly incorporated corporation.[89] In other words, there could be multiple A Corporations. This method is called *Kyodo Shinsetsu-Bunkatsu* (or corporate division by way of joint incorporation of a new corporation).

The other type of corporate division is called *Kyushu-Bunkatsu*[90] (or corporate division by way of absorption), in which the divided business of a corporation (A Corporation) is transferred to an existing corporation (B Corporation) in exchange for newly issued shares of B Corporation and such new shares are distributed either to A Corporation itself or to A Corporation's shareholders, or both. While there is no clause in the Commercial Code that contemplates that two or more corporations divide their businesses and jointly transfer them to the same existing corporation, such division is not prohibited by the Commercial Code. This method is called *Kyodo Kyushu-Bunkatsu* (or corporate division by way of jointly causing absorption).

While in a traditional asset acquisition of a business (*Eigyo*), procedures to perfect the transfer of each item of the acquired tangible and intangible properties, rights, contracts, and debts must be taken to make such transfer valid against third parties, in a corporate division, the transfer of all properties, rights, contracts, and debts is valid against third parties automatically by operation of law (similar to the treatment of a merger of corporations) when the corporate division becomes effective.[91]

2. *Regulation of the Antimonopoly Act over Corporate Divisions*

A *Tandoku-no Shinsetu-Bunkatsu* (or corporate division by a single corporation) is the corporate division conducted by a single corporation and, therefore, is considered reorga-

85. *See id.* § 25.
86. *See* Law No. 90 of 2000 (Japan).
87. *See* Cabinet Ordinance No. 546 of 2000 (Japan).
88. *See* Commercial Code, § 373 (Japan).
89. *See id.* § 374, para. 1, subpara. 11.
90. *Id.* § 374-16.
91. *Id.* § 374(10), para. 1, and § 374(26), para. 1.

nization within the single corporation. Consequently, it is not subject to regulation under the Antimonopoly Act. However, a *Kyodo Shinsetsu-Bunkatsu* (or corporate division by way of joint incorporation of a new corporation) and a *Kyushu Bunkatsu* (or corporate division by way of absorption) give rise to new combinations between companies in a manner similar to mergers or transfers of business and, thus, these corporate divisions are subject to regulation under the Antimonopoly Act.[92] Some countries other than Japan have already passed legislation regarding the corporate division system, and certain corporate divisions effected outside of Japan will also be subject to regulation under the Japanese Antimonopoly Act.[93]

The Antimonopoly Act prohibits amalgamation (i.e., mergers and consolidations), stock acquisitions, acquisitions of businesses, and interlocking directorates (collectively referred to as "Business Combinations") if their effect may be to substantially restrain competition in a particular field of trade or if they occur as a result of unfair trade practices.[94]

As stated above, when a corporate division is effected by two or more companies jointly, it may have an impact on a market similar to a merger. Accordingly, simultaneous with the amendment of the Commercial Code, which created the corporate division system, the Antimonopoly Act was amended, and both amendments will come into effect on April 1, 2001.[95]

The amendment to the Antimonopoly Act resulting from the adoption of the corporate division system treats corporate divisions involving two or more companies the same way as mergers. Under the amended Antimonopoly Act, corporate divisions are prohibited if their effect may be to substantially restrain competition in a particular field of trade or if they occur as a result of unfair trade practices.[96]

On December 21, 1998, in relation to the application of laws concerning the regulation of Business Combinations, the JFTC issued new Business Combinations Guidelines directed at ensuring transparency and increasing the predictability of business entities. Since the corporate division system was created after the Business Combinations Guidelines were announced, the Guidelines do not address corporate divisions. Nevertheless, it is believed that the Guidelines will likewise be applied to corporate divisions as well.

3. *Prior Notification of a Corporate Division*

The adoption of the corporate division system will also trigger the prior notification requirement applicable to mergers. In the event multiple domestic companies desire to jointly form a new company through a corporate division (*Kyodo Shinsetsu-Bunkatsu*) if, when all of the businesses to be included are transferred to the new company, the total assets of one of the companies in the division and its direct parents and subsidiaries exceed ¥10 billion, and the total assets of another company exceed ¥1 billion, then prior notification is required.[97] When an important part of a company's business is to be divided, the sales from that part are used as the standard instead of the value of the assets.

92. Antimonopoly Act, *supra* note 61, § 15(2).

93. *See id.* at para. 5.

94. Mergers and consolidations are provided for in Section 15 of the Antimonopoly Act, stock acquisitions in Section 10, business acquisitions in Section 16, Paragraph 1, and interlocking directorates in Section 13.

95. Cabinet Ordinance No. 513 of 2000 and Cabinet Ordinance No. 546 of 2000 (Japan).

96. Antimonopoly Act, *supra* note 61, § 15(2), para. 1.

97. *See id.* at para. 2; Cabinet Ordinance No. 513 of 2000 (Japan).

In the event that domestic companies desire to engage in a *Kyushu-Bunkatsu*, if, when all of the businesses to be included are transferred to another domestic company, the total assets of one of the companies and its direct parents and subsidiaries exceed ¥10 billion, and the total assets of another company exceed ¥1 billion, then prior notification also is required.[98] As in a *Kyodo Shinsetsu-Bunkatsu*, when an important part of business is to be divided, the sales from that part are used as the measurement standard.

In a corporate division, if one company owns more than 50 percent of the other company's stock, there is no requirement to notify the JFTC.[99] In corporate divisions between foreign companies, as in the case of mergers involving foreign companies, the standard for measurement is the sales of the companies' offices in Japan (including the offices of any subsidiaries).[100]

The waiting period for corporate divisions and the JFTC's examination period for such proposed corporate divisions are the same as for mergers.[101] Companies may not effect a corporate division until the expiration of a thirty-day period from the date on which the notification for the corporate division was received by the JFTC.[102] The JFTC may shorten this thirty-day waiting period if it chooses.[103]

After receiving a notification of a corporate division, the JFTC may request submission of reports, information, or documents necessary for its examination of the corporate division during the waiting period. If such a request is made, the JFTC's examination period lasts up to the later of 120 days after the date of receipt of the notification, or ninety days after the date of receipt of the additionally requested information. During the examination period, the JFTC may decide to initiate hearing proceedings or to make a recommendation.[104] However, even if the examination period is extended, the waiting period will not be extended, and thus the corporate division can be consummated after the expiration of the waiting period. In addition, if the companies involved in the corporate division do not take material measures to correct problems with respect to the Antimonopoly Act that were identified in the corporate division plans, as notified before the deadline, the JFTC has the authority to initiate hearing proceedings or to make a recommendation up to one year from the deadline date.[105]

Even if the JFTC initiates hearing proceedings or makes a recommendation, the companies involved in the corporate division can proceed with the corporate division when the thirty-day waiting period (or the shortened waiting period) lapses. Therefore, in order to prevent the corporate division from coming into existence during the period for ordering measures, in addition to initiating hearing proceedings or making a recommendation, the JFTC also may file a petition for an emergency order for suspension of the proposed corporate division with the Tokyo High Court.[106]

98. *See* Antimonopoly Act, *supra* note 61, § 15-2, para. 3; Cabinet Ordinance No. 513 of 2000 (Japan).

99. *See* Antimonopoly Act, *supra* note 61, § 15-2, para. 4.

100. *See id.* at para. 5.

101. *See id.* § 15-2, para. 6, and § 15, paras. 4 & 5.

102. *See id.* § 15-2, para. 6, and § 15, para. 4.

103. *See id.*

104. *See id* § 15-2, para. 6, and § 15, para. 5.

105. *See id.*

106. *See id.* § 67, para. 1.

V. Developments in Mexico

A. Merger Enforcement

1. *The CINTRA (Aeroméxico/Mexicana) Case*

The Federal Competition Commission (FCC) has indicated that it would oppose the merger between two major Mexican airlines, Aeroméxico and Mexicana.

a. Background

Before the Federal Law on Economic Competition (FLEC) was enacted in 1993, the Ministry of Communications and Transport permitted Aeroméxico to own part of the shares of stock in Mexicana, which at the time was allegedly in financial trouble, provided such ownership was maintained in accordance with (the future) competition rules.

As a result of the Mexican financial crisis of 1994-95, both airlines were unable to meet their debt obligations and creditor banks acquired control over Aeroméxico and Mexicana. The companies had already integrated several services (joint ownership of feeder airlines, cargo and reservations, among others). The banks then created CINTRA, a holding company designed as a vehicle to control both airlines. The creation of CINTRA met the FLEC's thresholds for pre-merger notification to the FCC.

b. The FCC's 1995 Ruling

In reviewing the notification, the FCC defined the relevant market as national passenger and cargo air transportation. Airport and city pairs were also viewed as relevant markets. Combined market shares in 1995 (passengers transported) were over 65 percent. Another carrier, TAESA, had a 13.5 percent share. The principal entry barrier identified was a 25 percent limit to foreign investment, among other substantial regulatory hurdles. Citing the financial recovery of the airlines as the main objective, the FCC permitted the creation of CINTRA, provided: (a) Aeroméxico and Mexicana remained separate firms; (b) in the absence of effective competition, the transportation regulator would set official fares; and (c) in the event of "deteriorating competition conditions," the FCC could order the divestiture of the two firms. As a result of the banking restructuring following the 1994-95 Mexican crisis, some of the corresponding loans of the airlines were transferred to the Federal Government (FOBAPROA-IPAB), which acquired about 64 percent of CINTRA's capital stock.

c. The FCC's 2000 Opinion

CINTRA has now overcome its financial difficulties. In the meantime, CINTRA's competitors either have gone out of business, or have faced a substantial loss of market share. IPAB then consulted with the FCC regarding a proposal to offer CINTRA for sale. The FCC, following significant debate, concluded that CINTRA must spin-off its assets, maintaining two separate companies to be sold to different purchasers.

With the new Fox administration, it is expected that the CINTRA issue will be discussed in the context of the need for a long-term plan to restructure the Mexican airline industry, along with the unsettled topics in the international context: deregulation, airline alliances, safety, and other essential issues. However, current market conditions clearly reflect CINTRA's overwhelming dominance of over 85 percent of the passenger transportation national market share: high prices, scarce consumer choice, negative impact in related industries (i.e., tourism), and little investment in new equipment.

2. *The Televisa/Grupo Acir Merger*

In another significant case reviewed by the FCC in 2000, the Commission decided to block the acquisition by Televisa, the leading media firm in Mexico, of Grupo Acir, one of the main Mexican radio networks.

The FCC found significant overlaps in radio stations in Mexico City, Monterrey, Guadalajara, Veracruz, and San Luis Potosí. In terms of the number of stations controlled by each party, concentration appeared to be high in Mexico City (thirteen stations) and in Guadalajara (twelve). Overall, the merger would concentrate 194 stations across the country.

In addition, the Commission found that the transaction would have a significant impact in the advertising market: Televisa appears to control about 70 percent of the advertising budgets for TV and about 55 percent of all advertising (TV, radio, magazines, Internet, etc). Allegedly, Televisa, through this merger, would be able to increase rates, tie deals, cross-subsidize, and exercise predatory schemes against its competitors in this market.

It is expected that the parties will appeal this decision and/or possibly ask for judicial review of this FCC ruling.

B. International Enforcement Cooperation

Mexico and the United States signed an Antitrust Cooperation Agreement in July 2000. This agreement is similar to those that the United States has entered into with the EU, Canada, Germany, Australia, Israel, Japan, and Brazil. Mexico has also signed similar agreements with the EU, Israel, and (a more general scheme) with Canada and the United States in the NAFTA context.

The principal provisions of the Mexico/U.S. agreement are a notification mechanism pursuant to which each agency must communicate with the other regarding enforcement actions that may affect important interests of the other country; efforts to cooperate and coordinate law enforcement assistance and sharing of non-confidential information; and the usual positive comity provisions (a request by a country to investigate anticompetitive activity in its territory when such activity affects negatively the interests of the requesting country).

Interesting features of this agreement are

- Notification—there are provisions that address notification, even when an agency requests that a person renders information, documents or other materials located within the other agency's jurisdiction, or requires to obtain oral testimony from someone located in the other's jurisdiction. Parties also recognize that officials from the agencies may visit the other jurisdiction's territory to carry out "investigations in accordance with their corresponding antitrust statutes," although such visits are subject to the notification mechanism.
- Cooperation—the agreement provides for cooperation, upon request, to locate and obtain evidence and testimony, information that the other agency possesses, as well as reports regarding enforcement activity.
- Coordination—there are certain principles that will guide coordination efforts, such as the relative capacity of each agency in pursuing tasks, possible cost reductions, and obtaining confidentiality waivers from parties involved in investigations.

Other topics covered include general provisions on positive comity, avoidance of conflicts, technical cooperation, consultations, periodic meetings, and confidentiality of information.

This agreement came into force on July 11, 2000.

VI. Developments in New Zealand

Developments in competition law in New Zealand for the year 2000 might best be characterized as comprising a move away from "generic" competition law (also known as "light handed regulation") to more sector-specific regulation, coupled with stronger enforcement action by the Commerce Commission (the Commission). For example, in the past year the new Labor government implemented telecommunications and electricity industry inquiries, both of which will result in industry-specific regulation. It also progressed planned reforms to the Commerce Act that will "toughen" the thresholds for mergers and abuse of market power and increase penalties for breaches. In addition, the Commission commenced a number of court proceedings and began inquiries into electricity line business pricing and airport charges.

A. Merger Activity

Notwithstanding a high level of international merger activity, the Commission received only thirty-two applications for clearance of business acquisitions, only six more than the previous year. (New Zealand has a voluntary pre-notification system.) Of those thirty-two, twenty-two were cleared, four have yet to be determined, five were declined, and one withdrawn. As well as the voluntary notifications, the Commission reviewed 317 non-notified acquisitions, and of those, it went on to investigate seventy-five. The Commission also received two applications for authorization, which were granted on the basis that the Commission was satisfied that the "public benefits" (essentially economic efficiencies) of the merger would outweigh the detriments from the increased market power that the merged entity would have.

1. *Shell's Proposal to Acquire Fletcher Challenge Energy*[107]

One of the more high profile mergers was Shell's application relating to Fletcher Challenge Energy.

As part of the separation of Fletcher Challenge Limited (one of New Zealand's largest companies, also listed on the New York Stock Exchange), Shell Exploration Company applied to the Commission for clearance to acquire all of the shares in Fletcher Challenge's Energy Division, Fletcher Challenge Energy.[108]

While Shell's first application was declined,[109] the Commission did subsequently grant clearance to the second application[110] based on a greater number of assets to be divested. Of particular interest was the Commission's approach to market definition. The Commission defined the market as including those for

107. Commerce Commission Decision No. 411 of 17 November 2000 (N.Z.).

108. Although the application was made by Shell, it nevertheless related to the acquisition of Fletcher Energy by both Shell and Apache Corporation of the United States.

109. *See* Commerce Commission Decision No. 408 of 13 October 2000 (N.Z.).

110. *Supra* note 107.

(a) current (natural gas) gas production; and
(b) the post-2009 gas production market.

The Commission adopted the second market definition stating, "where a market exhibits distinct differences . . . at different time periods it may be appropriate to include a time element."[111] In this instance, given that one of the major fields (accounting for 80 percent of current gas production) would likely be depleted in 2009, the Commission considered that this required the finding of two distinct markets. This is one of the few times the Commission has adopted such an approach, and subsequent developments have perhaps highlighted some of the dangers in looking this far forward. In particular, at least two of the gas production fields (yet to come on stream) have been reassessed to show significantly greater potential than first thought; information no doubt relevant to any competition assessment.

Given the complexity of the separation process and the public interest surrounding the transaction (valued at approximately NZ$3 billion), Shell has applied for a court-sanctioned arrangement with the Fletcher Challenge Energy shareholders. A meeting is scheduled for early March 2001, when it is expected that shareholders will approve the sale. In the meantime, Shell has appealed the Commission's decisions to the High Court, although no date has yet been allocated for any hearing.

2. *Southern Cross's Acquisition of Aetna Health New Zealand*[112]

Another interesting merger was the acquisition by Southern Cross (the country's largest private health insurer with around a 60 percent market share) of the New Zealand operations of Aetna (the country's second largest health insurer). The merger was ultimately cleared by the Commission on the third application for clearance,[113] subject to an undertaking that Southern Cross would divest all of Aetna's health insurance policies (but keeping Aetna's other health business and its "state of the art" IT system). The Commission required the divestment because it was "not satisfied" that the acquisition would not result in Southern Cross gaining or strengthening dominance in the New Zealand health insurance market, notwithstanding its findings that barriers to entry and expansion are not high, and that there are a large number of existing competitors. The Commission's determination was influenced by Southern Cross's status as a not-for-profit (and tax-exempt) organization, low industry margins, and uncertainty about the role of the comprehensive public health system. The Commission also stated that, notwithstanding its finding of low barriers to expansion, the critical mass and economies of scale that Southern Cross would have post-acquisition would constitute a barrier to expansion.

Southern Cross has appealed the Commission's decision to the High Court of New Zealand. The hearing took place in late January, but the court has yet to hand down its decision.

3. *Liquor Industry Developments*

This year saw interesting developments in the liquor industry. DB Breweries, one of the two principal beer breweries, which is ultimately controlled by Heineken, opted to sell its

111. Commerce Commission Decision No. 411, at 8, para. 33.

112. Commerce Commission Decision No. 407 of 13 October 2000 (N.Z.).

113. The Commerce Commission's Decisions on the two earlier applications are Decision No. 399 of 25 August 2000 and Decision No. 404 of 13 September 2000 (N.Z).

interests in Corbans, New Zealand's second largest wine producer. Montana, the country's largest wine producer, subsequently sought and obtained clearance to acquire Corbans.[114]

The Commission defined the relevant markets as being separate national markets for the production or importation of each of white, red and sparkling wine and the supply of wine producing grapes. Although the merged entity was to have a substantial market share in each of these markets, the Commission held that barriers to entry were low and that supermarkets exercised a high degree of counterveiling buyer power. The Commission was also influenced by the fact that wine imports account for a significant amount of domestic consumption and are continuing to grow. The Commission considered that the merged entity would face effective competition from Australian distributors.

Given DB Breweries' decision to exit the wine industry, it was perhaps surprising that the year ended with Lion Nathan, New Zealand's other main beer brewer, seeking and obtaining clearance to acquire the merged Montana/Corbans.[115]

B. Enforcement Activity

1. *Predatory Pricing—the INZCO Decision*[116]

One case that dealt with an often-vexed issue was the High Court's imposition of a NZ$525,000 fine for predatory pricing against INZCO. INZCO manufactured a fibreglass insulation product (pink batts), which it sold nationally to distributors (hardware outlets and chains). A new entrant, New Wool Products (NWP) began manufacturing a competing woollen insulation product (Wool Bloc), which it sold directly to end-users on a regional basis. NWP soon obtained a local market share of 30 to 40 percent. INZCO responded with a wool/polyester product, but sales were low as it was priced significantly higher. INZCO introduced a "2-for-1" promotion, which effectively allowed INZCO's distributors to sell within a banded price broadly equal to NWP's.

The Commission prosecuted INZCO, claiming it was guilty of "predatory pricing" by pricing "below cost." INZCO denied the allegations noting that it was merely responding to competition. The Commission claimed breach of Section 36 of the Commerce Act (which prohibits use of market dominance for a prohibited purpose) and Section 27 (which prohibits anti-competitive contracts or arrangements).

In upholding the Commission's complaint, the High Court nevertheless accepted that there was *no evidence of an intention to recoup* INZCO's losses by raising its prices at a later stage (contrary to accepted theories in many other jurisdictions that this is a key ingredient of predatory pricing). The Court considered that nonetheless the promotion was still predatory in the sense that INZCO priced a comparable product at a level and in circumstances that it knew would undermine a rival's business and so preserved *another* highly profitable product (pink batts) from harm. This decision is currently on appeal.

2. *Price Fixing—The Carwash Case*

Penalties totaling NZ$1.175 million were ordered against Caltex, Mobil, and Shell for

114. *See* Commerce Commission Decision No. 401 of September 2000 (N.Z.).

115. *See* Commerce Commission Decision No. 406 of 8 December 2000 (N.Z.).

116. Commerce Comm'n v. Carter Holt Harvey Bldg. Prod., Ltd. [2000] 9 TCLR 535 (N.Z.); *see also* Commerce Comm'n v. Carter Holt Harvey Bldg. Prod., Ltd. (Penalty) [2000] 9 TCLR 635 (N.Z.).

breaching the price fixing provisions of the Commerce Act.[117] The Commission prosecuted the oil companies alleging that they had colluded to withdraw a free car wash previously offered to customers who spent $20 or more on fuel. The court found that the free car wash amounted in effect to a discount in relation to the price of petrol, or alternatively, was an integral part of petrol pricing. The oil companies had previously applied unsuccessfully to strike out the Commission's case alleging that as there was no agreement regarding the subsequent price for car washes, and that a mere agreement to withdraw free car washes could not "fix, control or maintain" prices in the future.[118]

C. Developments in Telecommunications

When Telecom New Zealand, the former state monopoly telecommunications provider, was privatized in 1990, it retained ownership of the existing infrastructure. Disputes over the terms of access to Telecom's network have been a constant feature of the New Zealand telecommunications industry ever since. Following a Ministerial Inquiry in Telecommunications,[119] the government announced major reforms to the industry on December 20, 2000, which adopt some, but not all, of the Inquiry's recommendations.[120]

The key proposed amendment is the appointment of an industry funded "Telecommunications Commissioner" as a specialist Commissioner within the Commission. While industry members will still be expected to negotiate between themselves on interconnection and other issues, the Commissioner will have powers to resolve disputes over *"Designated Services"* where commercial negotiations fail, to report to the Minister of Communications on whether additional services should be Designated Services, and to monitor and enforce Telecom's "Kiwi Share Obligations." (The Kiwi Share Obligation is essentially a contractual agreement between Telecom and the government established when Telecom was privatized, obliging it to maintain a free local calling option for all residential telephone customers.) At this stage, the main designated service will be interconnected with Telecom's fixed line network (using either a "total service long run incremental cost," cost based pricing methodology reflecting forward looking costs of an efficient operator, or "bill and keep").

1. *Third Generation Mobile*

Like many other governments, the New Zealand government began its auction of 3G spectrum in 2000. Late in the year, and before completion of the auction, Vodafone, one of the two existing mobile telephony service providers, sought clearance from the Commission to acquire additional radio frequency spectrum rights in the auction. In granting clearance,[121] the Commission defined the two relevant markets as ***mobile telephony services*** and ***third generation mobile telephony services*** (3G), notwithstanding the fact that 3G mobile services are not currently being offered and the technology is still being developed.

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117. *See* Commerce Comm'n v. Caltex New Zealand Ltd. & Ors [2000] 9 TCLR 366. *See also* earlier substantive judgment of the court in Commerce Comm'n v. Caltex New Zealand Ltd. & Ors [1999] 9 TCLR 305 (N.Z.).

118. Commerce Comm'n v. Caltex New Zealand Ltd. & Ors [1998] 2 NZLR 78.

119. Ministerial Inquiry in Telecommunications, Final Report (Sept. 27, 2000) (N.Z.), *at* http://www.teleinquiry.govt.nz/reports/final/final.pdf.

120. Government Response to the Telecommunications Inquiry (Dec. 2000) (N.Z.), *at* http://www.med.govt.nz/pbt/telecom/response/index.htm.

121. *See* Commerce Commission Decision No. 413 of 8 December 2000 (N.Z).

D. Developments in the Electricity Industry

The electricity industry has also been subjected to scrutiny (and change) given a perception that markets have not, to date, been characterized by competition. Early reliance on information disclosure regimes was viewed as unsuccessful and, in 1998, the Electricity Industry Reform Act was passed prohibiting electricity companies from being involved in both distribution (lines) and retail (the legislation in fact forced the splitting of many electricity companies into separately owned lines and retail companies). Since then the industry has been under further scrutiny. And on December 7, 2000, the Minister of Energy released the final version of a Government Policy Statement on the further development of New Zealand's electricity industry.[122]

The government has stated that it wishes to see the self-regulatory arrangements deliver specific outcomes, such as ensuring that

- The full costs of producing and transporting each additional unit of electricity are signaled so that investors and consumers can make decisions consistent with obtaining the most value from electricity;
- Delivered electricity costs and prices are subject to sustained downward pressure;
- The quality of electricity services and in particular trade-offs between quality and price should as far as possible reflect customers' preferences;
- Transmission losses and constraints are signaled to ensure that overall costs to the economy including the costs of insufficient competition in local regions are minimized.

Following the announcement of the government's policy, the Commission announced its own inquiry into the electricity industry under the price control provisions of the Commerce Act.[123] The purpose of the inquiry is to put the Commission in a position to report to the Minister of Energy on price control for electricity line services. The Commission will focus on the degree to which electricity line function services are supplied in a market (or markets) where competition is limited and whether it is necessary or desirable for the prices of those services to be controlled. Public submissions will be sought on the Commission's initial issues paper, and a final report is scheduled for June 2001.

E. Amendments to the Commerce Act

Long heralded amendments to the Commerce Act are also expected to be passed into law early this year. Changes were expected to be passed and take effect in late 2000 but, notwithstanding the government's apparent commitment to reform, did not make it into last year's legislative timetable. Key changes include lowering the "dominance" test as it appears in both Sections 36 and 47.

Section 36 will prohibit parties with a substantial degree of market power from taking advantage of that power for a proscribed anti-competitive purpose. (The current prohibition is on using market dominance for certain proscribed anti-competitive purposes.) Section 47 will prohibit business acquisitions that result in a substantial lessening of compe-

122. Government Policy Statement: Further Development of New Zealand's Electricity Industry, *at* http://www.med.govt.nz/ers/electric/package2000/gps/index.html.

123. Commission Announces Inquiry into Electricity Line Business Pricing (N.Z), *at* http://www.comcom.govt.nz/publications/display_mr.cfm?mr_id = 725.

tition. This is regarded as a significantly lower threshold than the current prohibition on acquisitions that result in a gaining or strengthening of market "dominance," which has been interpreted by the courts as requiring a very high degree of market power. While these changes are meant to align New Zealand competition law with the Australian equivalent (the Trade Practices Act), decisions will still necessarily be case-specific.

The lowering of the thresholds will lead to many more mergers being caught, and the business acquisitions provisions extend to those foreign mergers that "affect a market in New Zealand." In theory, therefore, an offshore acquisition involving the two major suppliers of a particular product to a New Zealand market could fall within the business acquisitions regime under the Commerce Act. In practice, the ability of New Zealand authorities to enforce any orders made against offshore companies would limit the application of this extraterritorial provision. The Commission has indicated (informally) that it is only likely to initiate proceedings if at least one of the parties is resident in, or has a presence in, New Zealand, but this issue must be carefully thought through in each case. Other changes will include an increase in penalties for breaches by corporates from NZ$5 million to NZ$10 million, and the introduction of treble damages.

F. International Cooperation

New Zealand, like many other countries, has also been developing its cooperation on antitrust issues at an international level—in particular with Australia, with which it already has a high degree of cooperation. In August 2000, representatives of the Australian and New Zealand governments signed a Memorandum of Understanding on Coordination of Business Law,[124] replacing an earlier agreement entered into in 1988.

The memorandum notes that the existing business law coordination includes "competition laws enforced by the Commerce Commission in New Zealand and Australian Competition and Consumer Commission."[125] Notwithstanding the existing coordination, "*exploring the potential for greater consistency in trans-Tasman application and enforcement of competition laws*"[126] is included in the work program as a "candidate" for further coordination of business law. New Zealand has also entered a Closer Economic Partnership (CEP) with Singapore that envisages recognition of APEC competition principles (while permitting anti-dumping actions), but does not include a competition test.

At the regulatory body level, the Commission has entered into a Tripartite Cooperation Arrangement with the Australian Competition and Consumer Commission and the Canadian Competition Bureau.[127] This agreement is seen as a necessary response to the increased levels of cross-border commerce. The agencies will share information where permitted by existing privacy and confidentiality laws, coordinate enforcement activities where appropriate, and endeavor to avoid any conflict in enforcement actions.

Mr. Belgrave, Chair of the Commission, has commented, "the co-operation arrangement is part of ongoing efforts to ensure that the Commerce Commission has the tools to deal

124. Memorandum of Understanding Between the Government of New Zealand and the Government of Australia in coordination of Business Law, *at* http://www.mfat.govt.nz/foreign/regions/australia/austlaw.html.

125. *Id.*

126. *Id.*

127. *See* Media Release 2000-105, Commerce Commission, Commerce Commission in Tripartite Arrangement with Australian and Canadian Agencies, *at* http://www.comcom.govt.nz/publications.

effectively with increasingly globalised markets."[128] The cooperation arrangement will also allow the Commission to cooperate and coordinate better with the Commission's counterparts in Australia and Canada.

VII. Developments in the United States

A. Procedural Law

1. *Personal Jurisdiction and Venue*

In *In re Vitamins Antitrust Litigation*, a civil case concerning allegations of price fixing in the global vitamins manufacturing business, a year of motions practice before the U.S. District Court for the District of Columbia produced several notable opinions concerning the law and discovery procedures to be used to resolve whether the court may properly exercise personal jurisdiction over the foreign firms and individuals contesting its jurisdiction.

In its March 27, 2000, opinion,[129] the court reversed its prior decision concerning the interaction of the venue and service of process provisions of Section 12 of the Clayton Act. In its previous decision, the court held that Section 12 establishes a "national contacts" test, meaning that the court must consider the totality of each defendant's contacts with the United States as a whole to evaluate whether jurisdiction exists.[130] Although it suggested that the national contacts test "comports with the goals of the antitrust laws and the practice of consolidating pretrial proceedings for multidistrict litigation,"[131] the court nonetheless determined that it was required by the decision of the Court of Appeals for the District of Columbia in *GTE New Media Servs., Inc. v. BellSouth Corp.*[132] to apply a local contacts test, and granted plaintiffs' jurisdictional discovery on matters related to the defendants' local contacts with the relevant forum states.[133] In reaching this result, the district court rejected the argument that *GTE* could be distinguished because it involved a domestic corporation, not alien corporations like those contesting the existence of personal jurisdiction in the *Vitamins* cases.[134] The court also held that the allegations of the pleadings were not sufficient to establish jurisdiction in Illinois on either of two grounds claimed by plaintiffs.[135] Finally, because plaintiffs maintained that the defendants had sufficient contacts with Illinois, the court held that jurisdiction could not be based on Federal Rules of Civil Procedure 4(k)(2), which establishes a last resort provision for jurisdiction over certain defendants "not subject to suit in the courts of general jurisdiction of any state," but that have sufficient contacts with the United States as a whole.[136] In a later opinion considering a motion to dismiss for lack of personal jurisdiction over a foreign individual defendant who served as an executive

128. *Id.*

129. *In re* Vitamins Antitrust Litig., 94 F. Supp. 2d 26 (D.D.C. 2000), *amended in part by* 2000 WL 33142129 (D.D.C. Nov 22, 2000).

130. *Id.* at note 2 (describing prior unreported decision).

131. *Id.* at 27, note 3 at 30.

132. *See* GTE New Media Servs. Inc. v. Bellsouth Corp., 199 F.3d 1343, 1350-52 (D.C. Cir. 2000) (adopting a restrictive interpretation of § 12 venue and service of process provisions).

133. *See Vitamins Antitrust Litig.*, 94 F. Supp. 2d at 31, 35-36.

134. *See id.* at 30-31.

135. *See id.* at 31-34. The court applied Illinois law because the suit in which the motions to dismiss were ripe for adjudication was initiated in that state, and later transferred by the Judicial Panel on Multi-District Litigation to the District of Columbia. *Id.* at n.4.

136. *Id.* at 34-35.

of one of the foreign corporate defendants, the court again held that plaintiffs had not alleged facts adequate to support the exercise of personal jurisdiction under Illinois law.[137] The court also held that the individual defendant's agreement to plead guilty to related criminal charges was not sufficient to establish personal jurisdiction,[138] and that the fiduciary shield doctrine, which protects some employees operating wholly in the interest of their employers, did not protect the individual defendant from Illinois jurisdiction.[139]

In its September 20, 2000 opinion, the court determined that it could order jurisdictional discovery from the eight foreign defendants under the Federal Rules of Civil Procedure.[140] The court rejected defendants' proposed rule of "first resort" to the Hague Evidence Convention[141] in situations where personal jurisdiction had not been established.[142] Instead, the court applied a multi-part balancing test drawn from a Supreme Court decision considering application of the Hague Convention to merits discovery,[143] and determined that jurisdictional discovery under the Federal Rules was appropriate.[144]

In *In re Cardizem CD Antitrust Litig.*,[145] the U.S. District Court for the Eastern District of Michigan found that the plaintiffs had established a *prima facie* showing of personal jurisdiction, and denied German defendant Hoechst AG's motion to dismiss on the basis of just the pleadings and affidavits of Hoechst executives. The court found the allegations of the pleadings sufficient to overcome the argument that Hoechst, as the German parent of a wholly owned U.S. subsidiary, had no presence in, or connection to, the forum states.[146]

2. *Substantive Reach of U.S. Antitrust Law*

The Third Circuit reversed the district court's grant of a motion to dismiss for lack of subject matter jurisdiction over Sherman Act claims based on allegations of exclusionary conduct directed at a new entrant by wholesale importers of oriental rugs.[147] Defendant wholesalers persuaded the district court that the Foreign Trade Antitrust Improvement Act[148] (FTAIA) deprived the court of subject matter jurisdiction because the challenged conduct did not involve "import trade or import commerce" within the meaning of the act.[149] After revisiting in detail the evidence offered to support jurisdiction, the Third Cir-

137. *See Vitamins Antitrust Litig.*, 120 F. Supp. 2d at 58, 70 (D.D.C. 2000).

138. *See id.* at 69.

139. *See id.* at 70-71.

140. *See id.* at 58.

141. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. § 1781 (1994).

142. *See Vitamins Antitrust Litig.*, 120 F. Supp. 2d at 51.

143. *See id.* at 48-55 (applying test articulated in Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987)).

144. *See id.* at 58.

145. *See In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 671-676 (E.D. Mich. 2000); *but see* Information Res., Inc. v. Dun & Bradstreet Corp., 127 F. Supp. 2d 411, 415 (S.D.N.Y. 2000) (claimant lacks standing to sue for antitrust injuries suffered by its subsidiaries in foreign markets).

146. *See Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d at 676. On the other hand, two British corporate defendants successfully resisted personal jurisdiction in cases raising antitrust allegations and other claims. *See* Lyons v. Philip Morris Inc., 225 F.3d 909, 915 (8th Cir. 2000) (affirming dismissal for lack of personal jurisdiction over B.A.T. Industries); Carell v. The Shubert Org., Inc., 104 F. Supp. 2d 236, 268-70 (S.D.N.Y. 2000) (dismissing for lack of personal jurisdiction claims against three UK corporations).

147. *See* Carpet Group Int'l v. Oriental Rug Importers Assoc., Inc., 227 F.3d 62, 78 (3d Cir. 2000).

148. *See* Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (1997).

149. *See Carpet Group*, 227 F.3d at 70.

cuit reversed holding that the trial court improperly construed the import trade exception to the FTAIA and, in view of the facts presented to the court, committed clear error by dismissing the action.[150]

In another case involving application of Section 6(a) of the FTAIA, a Wisconsin federal district court dismissed Sherman Act claims based on alleged price manipulation occurring on the London Metal Exchange.[151] To reach this result, the court broadly construed the FTAIA's limitations on a federal court's exercise of subject matter jurisdiction over "foreign transactions," holding that "a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury."[152]

B. Non-Merger Enforcement

1. *Criminal Prosecutions of International Cartel Behavior*

In 2000, the Antitrust Division of the U.S. Department of Justice (DOJ) continued its vigorous enforcement of criminal prohibitions against international cartel behavior.

The year began with indictments of Mitsubishi Corporation of Tokyo and a former executive of its U.S. affiliate, UCAR International, in the ongoing investigation of alleged price fixing in the graphite electrodes industry.[153] The indictments followed guilty pleas of UCAR, three other Japanese corporations, and one German company for participation in the graphite electrodes conspiracy. During the time of the conspiracy Mitsubishi owned 50 percent of UCAR, the world's largest producer of graphite electrodes.

The year 2000 also saw more guilty pleas by individuals and corporate defendants in the vitamin price fixing investigation. Three former executives of BASF AG and one former executive of F. Hoffman-La Roche Ltd. pled guilty and agreed to pay fines and serve prison sentences in the United States for their roles in international conspiracies to set prices and allocate contracts for certain vitamins sold in the United States and elsewhere.[154] The executives were two German citizens and two Swiss citizens; the sentences ranged from three to four months; the fines ranged from $75,000 to $350,000. The DOJ also obtained guilty pleas and fines from Nepera, Inc. and Reilly Industries, Inc. (U.S. companies), and the German pharmaceutical manufacturers, Merck KgaA and Degussa-Hüls AG.[155]

Auctioneer Sotheby's Holdings, Inc. and the company's former president pled guilty to charges of price fixing based on a variety of conduct related to sellers' commissions (fees charged by the auction house for its services in selling art and other valuable collectibles at

150. *See id.* at 71-72.

151. *See In re* Copper Antitrust Litig., 117 F. Supp. 2d 875, 889 (W.D. Wis. 2000).

152. *Id.* at 877.

153. *See* Press Release, Dept. of Justice, Mitsubishi Corporation and Former UCAR Executive Indicted in International Graphite Electrode Price-Fixing Conspiracy (Jan. 19, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/4047.htm.

154. *See* Press Release, Dept. of Justice, Four Foreign Executives of Leading European Vitamins Firms Agree to Plead Guilty to Participating in International Vitamin Cartel (Apr. 6, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/4494.htm.

155. *See* Press Release, Dept. of Justice, Two German Firms and Two U.S. Corporations Agree to Plead Guilty to Participating in International Vitamin Cartels (May 5, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/4684.htm.

auction).[156] Specifically, Sotheby's and rival auctioneer Christie's International allegedly agreed to raise fees and publish them in non-negotiable sellers' commission rate schedules. The government also alleged that Christie's and Sotheby's exchanged customer information for the purpose of monitoring and enforcing the commission rate schedules.[157]

In a case illustrating the broad reach of the criminal prohibitions of Section 1 of the Sherman Act, a German company pled guilty and agreed to pay a $30 million fine for its participation in a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development in Egypt.[158]

On appeal following the convictions of two corporate officers of Archer Daniels Midland, the DOJ won its cross-appeal of the trial court's denial of sentencing enhancements based on individual defendants' leadership roles in a price fixing conspiracy.[159] The Seventh Circuit also affirmed the trial court's decision that improper comments by the government during closing argument were harmless and did not warrant a mistrial.[160]

2. *Civil Enforcement Actions*

In 2000, the government challenged international agreements allegedly affecting U.S. consumers in two civil enforcement actions.

The DOJ sued two U.S. tomato seed companies and their equally owned and controlled joint venture to enjoin them from enforcing a non-competition agreement with an Israeli tomato seed producer.[161] According to the allegations in the government's complaint, the Israeli firm and one of the U.S. defendants entered an agreement to develop genetically modified tomato seeds for the U.S. market, which contained a noncompete covering both cooperatively and individually developed tomato seeds. The noncompete gave rise to litigation and arbitration between the parties, which were settled by an agreement, later incorporated into a stipulated arbitration order, extending the noncompete beyond the term of the initial contract and indefinitely into the future. The result was that the Israeli company was prevented from developing a longer-shelf-life tomato for the North American market.

In 1998, the U.S. partner and its largest domestic tomato seed competitor entered a joint venture and conveyed certain tomato seed assets, including the noncompete, into two newly created joint venture entities. The governance agreement gave both of the joint venture partners equal rights to enforce the restrictive clause against the Israeli company, and, in 1999, an action to enforce the noncompete was brought in Israel. The government alleged that the noncompete was an unreasonable restraint of trade, which delayed or inhibited innovation, and may also have elevated prices, in a relevant market defined as "seeds designed to grow fresh-market tomatoes in North America during the winter months."[162] The

156. *See* Press Release, Dept. of Justice, Sotheby's and Former Top Executive Agree to Plead Guilty to Price-Fixing on Commissions Charged to Sellers at Auctions (Oct. 5, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/6639.htm.

157. *See id.*

158. *See* Press Release, Dept. of Justice, German Company Pleads Guilty to Rigging Bids on USAID Construction Contracts in Egypt (Aug. 18, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/6222.htm.

159. *See* United States v. Andreas, 216 F.3d 645, 679-81 (7th Cir. 2000).

160. *See id.* at 671-77.

161. *See* United States v. LSL Biotechnologies, Inc. et al. (Complaint), *available at* http://www.usdoj.gov/atr/cases/f6500/6503.htm.

162. *Id.* at ¶ 33.

defendants' share of this market likely exceeded 70 percent, and the noncompete agreement with "one of the few firms with the experience, track record and know-how likely to develop seeds"[163] for North America extended forever, covering seeds and technology beyond those cooperatively developed by the U.S. and Israeli companies.[164]

In another case alleging an unlawful international market allocation, the Federal Trade Commission (FTC) settled an enforcement action against U.S. and Japanese producers of microcrystalline cellulose (MCC), a binder used in the manufacture of pharmaceutical tablets.[165] According to the allegations of the complaint, the two firms entered a written licensing agreement governing the use of their shared trademark for the most commonly used grades of MCC. The trademark license granted the Japanese firm an exclusive right to use the shared brand in connection with the sale of MCC in Japan and certain other Asian markets, but reserved the right to use the brand in North America to the U.S. company. A second, verbal agreement provided that the Japanese firm would not sell any MCC product in North America, and the U.S. firm would not sell any MCC product in certain Asian markets, without the consent of the other party. The U.S. firm allegedly declined to enter global supply agreements with several large pharmaceutical manufacturers because of the unwritten territorial allocation agreement. The complaint also alleged additional anticompetitive conduct on the part of the U.S. company towards third parties designed to protect its position as a supplier of MCC to the North American market. The FTC alleged that the market allocation agreement and other conduct violated Section 5 of the FTC Act[166] as a market division, unreasonable restraint of trade, conspiracy to monopolize, and attempt to monopolize the world market for MCC.[167] The relief obtained by the FTC included a ten-year ban on the U.S. company serving as the U.S. distributor of any competing manufacturer of MCC.[168]

C. International Merger Enforcement

In 2000, as mergers continued to transcend national boundaries, so too did merger review. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[169] the DOJ and the FTC reviewed numerous mergers with international components and, in certain circumstances, negotiated consent decrees to address the potential anticompetitive consequences. In conducting these reviews, and in devising potential divestiture remedies to resolve anticompetitive concerns, both agencies continued to engage in substantial cooperation and coordination with European competition authorities undertaking parallel investigations. On a "regular and continuing basis," the two enforcement authorities now share their information and views on individual transactions, coordinate the timing of their

163. *Id.* at ¶ 39.

164. *See id.* at ¶ 42.

165. *See In re* FMC Corp. and Asahi Chem. Indus. Co. (Complaint), File No. 981-0237, *available at* http://www.ftc.gov/os/2000/12/fmcasahicomplaint.htm.

166. *See* Federal Trade Commission Act, 15 U.S.C. § 45 (1997).

167. *See FMC/Asahi Complaint, supra* note 165, ¶¶ 20-24.

168. *See In re* FMC Corp. and Asahi Chem. Indus. Co., Analysis of Proposed Consent Orders to Aid Public Comment, Federal Trade Comm'n (Dec. 21, 2000), *available at* http://www.ftc.gov/os/2000/12/fmcasahianalysis.htm.

169. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1997), *amended by* P.L. No. 106-553 (Dec. 21, 2000), 114 Stat. 2762.

review processes, and work together towards achieving consistent remedies.[170] Cooperation between the United States and Canada has reached a similar level.[171]

An example of the level of coordination that can be reached between the United States and EU competition authorities is the review of the merger of Alcoa, Inc., and Reynolds Metals Company. After extensive consultations between the DOJ and European competition authorities, the result was a coordinated and harmonious resolution of the anticompetitive concerns.[172] Each side of the Atlantic required the divestment of certain facilities and interests that together resulted in the divestment of all of Reynolds' global capacity for alumina, and the enforcement actions were announced on the same day.[173] Similar cooperation resulted in more drastic results in the high profile U.S. and EU reviews of the proposed merger of Sprint Corp. and WorldCom, Inc. The DOJ and the EU both decided to block the transaction, which the parties subsequently abandoned.[174]

It remained common practice for the U.S. and European enforcement authorities to take an active approach to mergers involving solely foreign companies when the merger was viewed as having a significant impact on the reviewing authority's market. The largest transaction of 2000—the merger of the U.S.-based America On-Line, Inc., and Time Warner, Inc.,[175]—was approved (subject to conditions) by the EU only after substantial negotiation. Similarly, the United States required concessions before permitting a number of important transactions involving European companies, including the merger of Novartis's and AstraZeneca's agriculture chemical businesses, and the acquisition by Aktiebolaget Volvo of Renault, V.I.[176]

D. International Cooperation

In July 2000, the DOJ and FTC entered into an antitrust law enforcement agreement with the government of Mexico, which provides for enforcement cooperation and coordination, notification of enforcement actions that could affect the other's jurisdiction, conflict avoidance, and the confidentiality of sensitive information provided by the other party. The

170. *See* Robert Pitofsky, EU and U.S. Approaches to International Mergers – Views from the U.S. Federal Trade Commission (Sept. 14-15, 2000), *available at* http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm.

171. *See* Debra Valentine, Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions (Apr. 15, 2000), *available at* http://www.ftc.gov/speeches/other/dvcrossborder.htm.

172. *See* Press Release, Dept. of Justice, Justice Department Requires Significant Divestitures in Alcoa/Reynolds Aluminum Merger (May 3, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/4666.htm.

173. *See id.*

174. *See Mergers and Acquisitions: DOJ Challenges Merger of WorldCom and Sprint*, 78 Antitrust & Trade Reg. Rep. (BNA) 648 (2000); Press Release, Dept. of Justice, Statement by Joel I. Klein on the Abandonment of the WorldCom/Sprint Transaction (July 13, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/5142.htm.

175. *See* Neal E. Boudette & Stephanie Gruner, *In Europe, AOL Isn't a Dominating Factor*, Wall St. J., Dec. 21, 2000, at B6. Another large transaction, the proposed joint venture between by Time Warner and EMI, was subsequently abandoned by the parties in the face of opposition from the EU Commission. *See* How a Backbeat from Rivals Nixed EMI-Time Warner, Wall St. J., Nov. 23, 2000, at 1.

176. *See* Press Release, Dept. of Justice, Justice Department Requires Divestiture in AB Volvo's Acquisition of Renault V.I. (Dec. 18, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/7152.htm; Press Release, Fed. Trade Comm'n, Federal Trade Commission Clears Combination of Novartis AG's and Astrazeneca's Agricultural Chemical Businesses (Nov. 1, 2000), *available at* http://www.ftc.gov/opa/2000/11/astrazeneca.htm.

agreement is similar to those already reached with Brazil, Canada, the EU, Israel, and Japan, but is not a comprehensive antitrust mutual legal assistance agreement (authorized by the International Antitrust Enforcement Assistance Act of 1994).[177]

The International Competition Policy Advisory Committee, which was established by DOJ officials in November 1997 to address future global antitrust problems, issued its final report in February 2000, which sets forth its recommendations to U.S. and international competition agencies.[178] The report recommended the removal of governmental friction from the review of international mergers by (1) increasing transparency by issuing publications (e.g., guidelines, notices, reports, speeches, and articles) that explain the manner in which mergers are analyzed in the jurisdiction, and articulating clear reasons for decisions to challenge (or not to challenge) important transactions; (2) developing more disciplined merger review procedures, which are appropriately insulated from concerns such as the nationality of the merging firms, the interests of competitors of the merging firms that do not align with consumers' interests, and domestic political concerns; and (3) facilitating cooperation across jurisdictions by the creation of transparent legal cooperation frameworks that contain appropriate safeguards to protect the privacy and fairness interests of private parties. The report also recommended the adoption of certain best practices in order to limit the transaction costs of merger review, including sufficiently high and transparent notification thresholds (with the opportunity for the reviewing authority to review mergers that do not satisfy those thresholds), two-tiered systems to avoid undue burdens on mergers that do not raise significant competitive issues, and harmonized rules on the timing of notifications for each jurisdiction. The report also issued recommendations to (1) promote international enforcement of laws against horizontal cartels (e.g., by using transparent standards that encourage cartel participants to come forward and cooperate with government enforcement efforts); (2) address private restraints that may impede open access to markets (e.g., by permitting an affected nation to request an enforcement action in the nation where the relevant conduct is occurring); and (3) promote a global competition initiative to achieve the above goals and to promote global competition and consumer welfare.

In December 1999, the Antitrust Law and International Law and Practice Sections of the American Bar Association published their *Report on the Internationalization of Competition Law Rules: Coordination and Convergence*.[179] The report surveyed international competition laws and determined that although the laws of many jurisdictions are converging, important substantive differences remain. The report considered various approaches to the international harmonization of competition law, and the costs and benefits of each, including a strategy of selective harmonization around certain core principles (perhaps as a condition for entering the World Trade Organization). Examples of such core principles include prohibiting cartels, anticompetitive mergers, and abusive practices by firms with market power. The report emphasized that additional prohibitions in each jurisdiction should be

177. *See* Press Release, Dept. of Justice, DOJ and FTC Sign Antitrust Cooperation Agreement with Mexico (July 11, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/5137.htm.

178. *See* Press Release, Dept. of Justice, International Competition Policy Advisory Committee Delivers Final Report to Attorney General Reno and Assistant Attorney General Klein (Feb. 28, 2000), *available at* http://www.usdoj.gov/atr/icpac/4272.htm; Dept. of Justice, Final Report of the International Competition Policy Advisory Committee (Feb. 20, 2000), *available at* http://www.usdoj.gov/atr/icpac.htm.

179. *See* American Bar Assoc., Report on the Internationalization of Competition Law Rules: Coordination and Convergences (Dec. 1999), *available at* http://www.abanet.org/antitrust/convexe.html.

added and enforced in a non-discriminatory manner (suggesting that the United States, European Union, Canada, Mexico, and possibly Japan, already satisfied these criteria) and that competition laws should be enacted in nations without them. The report suggested that selective harmonization, as opposed to attempts to proliferate a uniform and more detailed antitrust code, would allow attention to be focused on key issues, which the report identified as, among other things: (1) defining the relevant market, (2) identifying anticompetitive restraints or mergers, and (3) minimizing certain "hybrid" restraints on market access (e.g., unnecessary or discriminatory government regulation that favors particular private entities or cartels, and discriminatory procurement practices by government or private entities that control essential facilities).

Also in December 1999, the Antitrust Law and International Law and Practice Sections of the American Bar Association published their *Report on Private Anticompetitive Practices as Market Access Barriers.*[180] This report concluded that: (1) the U.S. government should develop and implement an approach for addressing the increasingly important issue of private anticompetitive conduct occurring abroad that has the effect of restricting access to the foreign market, and (2) such an approach should not attempt to discourage conduct that is not unlawful under U.S. law. Making use of a principle derived from U.S. law, the report expressed the view that international commerce would generally benefit by each government taking action against private conduct that restrains market access in a way that "substantially lessens competition" in the market within that government's jurisdiction.[181] The report also suggested that each government "provide a fair, transparent, and impartial process whereby an aggrieved private party may complain to that government and under which a resolution of that matter will be reached in a reasonable time."[182] The report further noted that action by each government on these matters should be taken in a manner that is consistent with the World Trade Organization's principles of national treatment and most-favored-nation treatment.

180. *See* American Bar Assoc., Report on Private Anticompetition Practices as Market Access Barriers (Dec. 17, 1999), *available at* http://www.abanet.org/antitrust/marketaccess.html.

181. *Id.* at Executive Summary.

182. *Id.*