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International Antitrust

Gabriel Castaneda

Damian Collins

Paul S. Crampton

Ronan P. Harty

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Gabriel Castañeda, Damian Collins, Paul S. Crampton, Ronan P. Harty, Andrew M. Peterson, Andrew Matthews, Ezekiel Solomon, and Eric J. Stock*

I. Developments in Australia

A. Merger Regulation in a Global Context

The Australian Competition & Consumer Commission (ACCC) cleared a number of high profile mergers during 2001 across a broad range of industry sectors, including the merger of BHP Broken Hill Pty Co Limited and Billiton Pty Limited Corporation, which had a global impact, and Singapore Telecommunications Limited's acquisition of Cable & Wireless Optus Limited.

In the past year, the ACCC, subject to obtaining satisfactory undertakings from the parties, allowed a number of mergers and acquisitions, which would have substantially lessened competition. These included Qantas Airways Limited's acquisition of Impulse Airlines Holdings Limited, which was cleared after significant undertakings were given in relation to terminal access, pricing, and takeoff and landing slots at Sydney airport. Woolworths Limited's acquisition of Franklins Supermarkets Limited was also given clearance, notwithstanding that it would have substantially lessened competition in the retail and wholesale supermarket industry, after Woolworths undertook to divest a number of stores across Australia.

Unusually, the "failing firm" argument was successful in a number of applications for informal clearance submitted to the ACCC. This included Qantas/Impulse discussed above.

*Gabriel Castañeda is the managing partner of Castañeda y Asoćados in Mexico City and is the former Executive Director of the Mexican Comision Federal de Competencia. Damian Collins is a partner with McCann FitzGerald; resident in Brussels, he specializes in EU and Irish antitrust and regulatory law. Paul S. Crampton is Head of the Paris-based Outreach Unit of the Competition Division of the Organization for Economic Co-operation and Development (OECD), and a former Special Advisor to the Canadian Bureau Director of Investigation and Research. Ronan P. Harty is a partner and Eric J. Stock is an associate with Davis Polk & Wardwell in New York City. Andrew M. Peterson is a partner and Andrew Matthews is a senior associate at the law firm of Minter Ellison Rudd Watts in Auckland, New Zealand. Ezekiel Solomon is a senior partner of Allens Arthur Robinson in Sydney, Australia; he has practiced extensively in the international corporate mergers and acquisitions and antitrust areas.

B. Access to Essential Services

1. *Telecommunications*

On December 21, 2001, the Federal Government released the Productivity Commission's final report entitled "Telecommunications Competition Regulation."[1] The Productivity Commission recommended the retention of Parts XIB and XIC of the Trade Practices Act (TPA), while recommending that a number of changes be made to those Parts to facilitate their operation.

The ACCC also commenced three public inquiries. The first is whether to make a line sharing service a "declared service," which should facilitate competition in the provision of broadband services to residential customers. The second relates to a possible variation to the existing GSM originating and terminating access service to include CDMA networks. The third involves whether the service declaration for domestic transmission services should be varied by removing intercapital transmission as a declared service.

During 2001, a number of proceedings were brought by market participants against their competitors primarily involving allegations of misleading and deceptive conduct. Three of the four Federal Court cases involved conduct in the mobile telephone market.

2. *Electricity*

There were a number of developments in this sector in 2001, including the implementation of changes in the National Electricity Code for the introduction of full retail competition and the introduction of an appropriate revenue cap to apply to the Queensland electricity transmission network for a five and a half year period commencing January 2002.

C. Price Fixing

1. *International Animal Vitamins Cartel*

In the Federal Court decision in *ACCC v Roche Vitamins Australia Pty Ltd and Others*,[2] Justice Lindgren imposed record penalties totalling $26 million against Roche Vitamins Australia Pty Ltd, BASF Australia Ltd, and Aventis Animal Nutrition Pty Ltd for alleged price fixing and market sharing in contravention of section 45 of the TPA. The conduct was considered extremely serious, particularly given that it involved local companies giving effect to global arrangements made by multi-national corporate groups.

2. *Credit Card Interchange Fees Allegations*

The ACCC commenced proceedings in 2000 against the National Australia Bank, alleging price fixing in relation to credit card interchange fees in the Visa, MasterCard, and Bankcard schemes. A number of other banks were joined in the proceedings. Interchange fees are the fees that banks charge for processing one another's credit card transactions.

In March 2001, the ACCC referred the matter to the Reserve Bank of Australia (RBA), recommending that it use its statutory powers to reform the credit card scheme arrangements. The RBA released a consultation document in December setting out proposed reforms, which are expected to reduce interchange fees by several hundred million dollars

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1. Productivity Commission, Telecommunications Competition Regulation: Inquiry Report (2001), *available at* http://www.pc.gov.au/inquiry/telecommunications/finalreport/index.html.

2. ACCC v. Roche Vitamins Pty Ltd. (2001) FCA 150.

each year and to permit merchants to recover the fees from cardholders at the point of sale.[3] Another proposed reform is to remove the restriction on non-authorized deposit-taking institutions issuing Visa and MasterCard credit cards.

D. Misuse of Market Power

Section 46 of the TPA provides 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.

1. *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd*[4]

The primary question for appeal before the High Court in this case concerned the meaning of the phrase "taking advantage" in section 46 of the TPA. Melway did not dispute the fact that it had substantial market power in the Melbourne street directory market. However, 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 a prospective distributor.

All the members of the High Court upheld the Federal Court's finding that by refusing to supply the prospective distributor, Melway was acting for a prohibited purpose. However, it was found that Melway had not taken advantage of its market power. The majority found that section 46 requires a connection between market power, the conduct, and the proscribed purpose, not merely coexistence of these factors. Melway was permitted, therefore, to refuse to supply the distributor on the basis that it could continue to act as it had done when it did not have market power.

2. *Record Company Case*

In 1998, the ACCC commenced an investigation into the conduct of Universal Music and Warner Music after complaints that they had threatened to withdraw trading benefits from retailers who stocked parallel imported CDs and had threatened to withdraw supplies from retailers who stocked parallel imports. Amendments to the Copyright Act 1968 were passed in 1998 to permit parallel importation of CDs, provided those CDs were manufactured with the license of the copyright owner in the country of manufacture.

Proceedings were instituted in September 1999. The ACCC's allegations included that the defendants had breached section 46 of the TPA by taking advantage of their market power to deter retailers from engaging in competitive conduct. In a landmark decision, Justice Hill, writing for the court, held that a particular record company could have a substantial degree of market power even if its market share was less than 30 percent and that this was not an industry in which market share would be the sole determinant of market power.[5] For instance, the court found that the statutory requirement of copyright proof

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3. Reserve Bank of Australia, Reform of Credit Card Schemes in Australia (2001), *available at* http://www.rba.gov.au/PaymentsSystem/PaymentsPolicy/CreditCardSchemes/index.html.

4. Melway Publishing Pty Ltd. v. Robert Hick Pty Ltd. (2001) HCA 13.

5. Australian Competition and Consumer Commission v. Warner Music Australia Pty Ltd. (2000) FCA 647; Australian Competition and Consumer Commission v. Universal Music Australia Pty Ltd. (2001) FCA 1800.

prior to parallel importation and the behavior of incumbent firms could constitute barriers to new entry. A hearing on appropriate orders as to penalties was to be heard in early February 2002.

E. Penalties

In June of 2001, the ACCC issued a media release calling for criminal sanctions, including imprisonment, as a penalty for hard-core cases of collusion such as price-fixing, bid-rigging, and market-sharing.[6] This would bring Australia into line with some of its major trading partners such as the United States, Canada, Japan, and South Korea.

F. E-commerce

In October 2001, the ACCC released a discussion paper on the competition issues arising from electronic commerce.[7] It notes that while new technologies, distribution channels, on-line business, B2B electronic market places, and e-procurement services have generated economic efficiencies and created new ways of doing business, they have also generated new modes of anti-competitive conduct. Potential trade practices issues noted included price fixing, primary boycotts, third line forcing, misuse of market power, anti-competitive agreements, mergers between e-hubs, market definition, and other issues such as standard setting agreements, distribution channel management, bundling and tying arrangements and information aggregation, and the effect of e-commerce on small business.

G. Amendments to the Act

In June 2001, the Federal Government agreed to the amendments proposed in the Trade Practices Amendment Bill (No. 1) 2000. The definition of "market" for the purposes of section 50 of the TPA (the prohibition on anti-competitive mergers and acquisitions) has now been amended to include a substantial market in a region of Australia.

Major changes in the field of consumer protection included:

- Increasing fines for contravention of the provisions of Part V to a maximum monetary penalty of 2,000 penalty units for an individual and 10,000 penalty units for a corporation (which would currently translate into $220,000 and $1,100,000 respectively);
- Extending of the time limit for starting a court action for loss of damages from three to six years;
- Adding new remedies, including community service orders, probation, and adverse publicity orders; and
- Allowing the ACCC to take class actions and to intervene in private cases if the issues involve the public interest.

6. Press Release, Australian Competition and Consumer Commission, ACCC calls for Stronger Criminal Sanctions Including Jail Sentences for Price-Fixing Offences under the Trade Practices Act (June 8, 2001), *available at* http://www.accc.gov.au/media/mediar.htm.

7. E-commerce and Competition: issues under the Trade Practices Act: discussion paper, Australian Competition and Consumer Commission, Oct. 2001, *available at* http://www.accc.gov.au/new/pdf/ecom.pdf.

H. Review of the Act

The government proposes to carry out a comprehensive review of the provisions of the TPA, which relate to restrictive trade practices and their administration.[8] The terms of reference of the review include whether the legislation and its administration continue to encourage an environment where Australian businesses can grow and compete internationally. The review is also expected to examine the current regime for the regulation of mergers under the TPA and its enforcement by the ACCC. The review will have an independent Chairman, and will report by August 2002.

II. Developments in Canada

A. Commissioner Reappointed

On December 7, 2001, the current Commissioner of Competition, Konrad von Finckenstein, was reappointed to a second five-year term. The appointment became effective January 28, 2002.

B. Proposed Amendments

On December 10, 2001, *Bill C-23, An Act to amend the Competition Act and the Competition Tribunal Act* passed its Third Reading in the House of Commons. Unless changed by the Senate, Bill C-23 will amend the Competition Act by:

- Creating a limited right of private action before the Competition Tribunal with respect to sections 75 (refusal to supply) and 77 (exclusive dealing, tied selling and exclusive territories, and other forms of market restriction). These provisions creating a right of private access to the Tribunal were added to the bill just prior to the Second Reading at the suggestion of the Standing Committee on Industry, after the Commissioner agreed to demands for additional safeguards to minimize the scope for strategic litigation. These safeguards include a higher threshold for standing, the substitution of normal cost rules for the "frivolous and vexatious" test that originally had been proposed for cost awards, the inclusion of language to make it clearer that damage awards cannot be granted by the Tribunal, and the elimination of double jeopardy by preventing a party from commencing a private action if the matter is under inquiry by the Commissioner or if the Commissioner has already taken action in respect of the matter.
- Creating a framework for cooperation with foreign enforcement authorities in non-criminal matters, which essentially mirrors the existing arrangements with respect to criminal matters under the Mutual Legal Assistance in Criminal Matters Act.
- Streamlining the Competition Tribunal's processes by providing for cost awards, summary judgments, and references on consent for determinations of any question of law, mixed law and fact, jurisdiction, practice, or procedure in relation to the non-criminal provisions of the Competition Act. (There is a similar provision that would enable the Commissioner to bring a reference without the consent of the parties.)
- Enabling the Competition Tribunal to issue temporary orders prior to the commencement of litigation to prevent irreparable harm to competition or to a competitor.
- Providing the Competition Tribunal with the power to make orders for administrative monetary penalties up to C$15 million when it finds that an air carrier operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, has engaged in a

8. Press Release, Prime Minister of Australia, Securing Australia's Prosperity (Oct. 15, 2001), *available at* http://www.pm.gov.au/news/media-releases/2001/media-release1338.htm.

practice of anti-competitive acts which are likely to prevent or lessen competition substantially within the meaning of the abuse of dominance provisions of the Competition Act.

C. Increased Merger Enforcement Activity

There was a significant increase in merger enforcement activity during 2001, relative to prior years. In two cases, the Commissioner took the rare, if not unprecedented, step of appointing a third party to conduct divestitures. In the first of these cases, the trustee was unable to sell the stores in question, so they reverted to the merged entity. That case involved the acquisition of Chapters Inc., the leading Canadian book retailer, by Trilogy Retail Enterprises L.P. The principals of Trilogy also had a significant shareholding interest in Indigo Books & Music Inc., a key competitor of Chapters. Following Trilogy's acquisition of control of Chapters, Indigo and Chapters were merged.

A consent order issued in June 2001 contained a package of measures to address the Commissioner's competition concerns, including the divesture of thirteen large-format bookstores, ten shopping mall stores, a distribution center, certain on-line assets of Indigo, and up to three store brands. In addition, the parties agreed to the imposition of a Code of Conduct that set minimum standards of trade between the merged company and publishers for a period of five years. However, after the parties were unable to sell any of the assets to be divested, a trustee was appointed for that purpose in September 2001. In January 2002, the Competition Bureau stated publicly that the period for the trustee to divest the assets had expired without any divestitures being made and that the assets would revert back to the merged entity.

The second case in which a third party was appointed to conduct the sale of assets concerned Abitibi Consolidated Inc.'s acquisition of Donohue Inc. In February 2001, Abitibi provided an undertaking to resolve the Commissioner's concern that its acquisition of Donohue likely would result in a substantial lessening or prevention of competition in the supply of newsprint in Eastern Canada. As part of the settlement, Abitibi agreed to divest its Port-Alfred newsprint mill. The undertaking also permitted the Commissioner to appoint an agent to sell the Port-Alfred mill if Abitibi was unable to do so within the allotted time. As it turned out, Abitibi was unable to sell the mill, with the result that the Commissioner applied to the Competition Tribunal on December 17, 2001 to formalize the February undertaking and to transfer responsibility for the divesture of the mill to an agent.

In August 2001, the Competition Tribunal issued a consent order in connection with Lafarge S.A.'s acquisition of Blue Circle Industries plc. That order largely paralleled a similar order obtained by the U.S. Federal Trade Commission, as it related to requiring Lafarge to sell the majority of the Canadian Blue Circle cement assets as well as related cement and distribution assets in Canada and the United States. It may be noted that many of the provisions of the U.S. order were incorporated into the Canadian consent order. In addition, the Canadian consent order also contained the requirement that certain aggregates and asphalt operations in Ontario be divested.

Notwithstanding that the Commissioner insisted on taking the foregoing cases to the Tribunal, several other cases during the year were resolved in the more traditional and less formal way, i.e., through undertakings. For example, in October 2001, the Competition Bureau announced that it had reached a settlement with Diageo plc to resolve competition concerns arising from the proposed acquisition of the Spirits and Wine Business of The Seagram Company Limited by Diageo and Pernod Ricard S.A. In short, Diageo undertook to divest the Gibson's Finest brand of Canadian whisky and related assets to address con-

cerns that its purchase of the various whisky brands, including Crown Royal and Seagram's VO, likely would result in a substantial lessening of competition in the supply of premium Canadian whisky products in various provincial markets.

A particularly noteworthy development in the mergers area during the year was the Federal Court of Appeal's decision in the *Superior Propane* case. This decision represents the first appellate consideration of the "efficiencies defense" in section 96 of the Competition Act. The Court held that the Competition Tribunal should not have adopted a "total surplus" interpretation of the trade-off analysis contemplated by section 96. Under that approach, "wealth transfers" from consumers to producers are considered neutral and disregarded in the determination of whether the requirements of section 96 have been met. The Court held that section 96 requires an analysis that is "more reflective than the total surplus standard of the different objectives of the Competition Act."[9] However, rather than substituting its own interpretation of section 96, the Court remitted the case back to the Competition Tribunal for a re-hearing, with specific instructions to the Tribunal to take into account all of the purposes of the Act (as opposed to just the promotion of efficiency), including "the ability of medium and small businesses to participate in the economy, and the availability to consumers of a choice of goods at competitive prices."[10]

D. Abuse of Dominance Guidelines

In July 2001, the Competition Bureau released its final *Enforcement Guidelines on the Abuse of Dominance Provisions* (Guidelines).[11] The Guidelines outline the Bureau's approach to enforcing the civil abuse of dominance provisions set forth in sections 78 and 79 of the Competition Act. The Guidelines purport to reflect existing Tribunal jurisprudence under section 79, as well as to articulate the Bureau's enforcement position in areas where there is little or no jurisprudence. As with other guidelines that have been issued by the Bureau, these Guidelines do not provide hard and fast rules for all situations.

Among other things, the Guidelines adopt the same 35 percent safe harbor articulated in the Bureau's *Merger Enforcement Guidelines*[12] and *Predatory Pricing Enforcement Guidelines*,[13] and adopt a 60 percent safe harbor threshold for joint dominance.[14] Cases involving firms with shares in excess of these thresholds will simply "prompt further examination," as opposed to giving rise to an adverse presumption regarding "market power or dominance."[15] In contrast to the European notion of abuse of dominance, the Guidelines state that the imposition of high prices, in and of itself, does not constitute an abuse of dominance.[16] Furthermore, the focus of the Bureau's analysis is "on competition, rather than on individual competitors."[17] Dominance is defined as "conduct that constitutes exclusionary,

9. Comm'r of Competition v. Superior Propane Inc., 11 C.P.R. (4th) 289 at 327 (2001).

10. *Id.* at 315.

11. *Enforcement Guidelines on the Abuse of Dominance Provisions*, Competition Bureau, June 2001, *available at* http://strategis.ic.gc.ca/pics/ct/aod.pdf [hereinafter *Enforcement Guidelines*].

12. Competition Bureau, Merger Enforcement Guidelines (1991), *available at* http://strategis.ic.gc.ca/SSG/ct01026e.html

13. Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (1992, Supply and Services Canada), at § 2.2.1.1.

14. *Enforcement Guidelines*, *supra* note 11, at 2.

15. *Id.*

16. *Id.* at 1.

17. *Id.* at 3.

disciplinary or predatory behavior towards competitors or potential competitors, with the result that competition is prevented or lessened substantially."[18] Joint dominance is defined as coordinated actions involving "something more than mere conscious parallelism," by firms with market power.[19]

E. International Cooperation

On December 17, 2001, the Bureau announced that it had signed a Memorandum of Understanding (MOU) with Chile's competition agency regarding the application of their competition laws. The MOU formalizes a cooperation arrangement built on commitments under the Canada-Chile Free Trade Agreement and closely tracks the "Cooperation Arrangement" between the Commissioner, the Australian Competition and Consumer Commission, and the New Zealand Commerce Commission that was signed in October 2000. Although somewhat less comprehensive in scope than the state-to-state agreements signed with the United States in 1995 and the European Communities in 1999 (for example, with respect to notification, coordination, cooperation, avoidance of conflict, and confidentiality), the MOU contains provisions that are similar to many of the provisions regarding notification, coordination, and cooperation that are set forth in those state-to-state agreements.

This development followed the announcement of a cooperation agreement on competition law enforcement between the governments of Canada and Mexico, on November 14, 2001. For the most part, the provisions of that agreement, which has not yet received senate approval in Mexico, are virtually identical to the 1995 Canada-U.S. cooperation agreement. There are three noteworthy differences between the Canada-U.S. agreement and the Canada-Mexico agreement. First, the Canada-Mexico agreement does not contain specific provisions relating to deceptive marketing practices. Second, it includes specific provisions relating to technical assistance. And third, it contains more streamlined provisions relating to the confidentiality of information exchanged under the agreement. There are also some slight differences in the provisions relating to notification.

III. Developments in European Union

A. Introduction

During 2001, EU competition law and its application by the European Commission attracted perhaps more attention from the media than in any previous year. This increased interest focused mainly on the Commission's controversial decision in *GE/Honeywell*.[20] Commentators' interest was also attracted by a series of cartel cases in which the Commission imposed exceptionally heavy fines: zinc phosphate,[21] vitamins (record fines of over 855 million),[22] citric acid,[23] graphite electrodes,[24] Belgian and Luxembourg brewers,[25] and

18. *Id.* at 6.
19. *Id.* at 16–17.
20. Press Release, European Commission, Commission Prohibits GE's Acquisition of Honeywell (July 5, 2001), *available at* http://europa.eu.int/comm/competition/ speeches/text/sp2001_037_en.pdf.
21. Press Release, European Commission, Commission Fines Six Companies in Zinc Phosphate Cartel (Dec. 11, 2001) (on file with the author).
22. Press Release, European Commission, Commission Imposes Fines on Vitamin Cartels (Nov. 21, 2001) (on file with the author).
23. Press Release, European Commission, Commission Fines Five Companies in Citric Acid Cartel (Dec. 5, 2001) (on file with the author).

German banks.[26] However, in terms of substantive developments, 2001 was a relatively quiet year in EU antitrust law, as will be seen from the summary of legislative or quasi-legislative measures below. The year 2001 did not see the adoption of any of the major proposals for change in EU competition law currently under debate. For example, the project to overhaul and modernize EC competition law was still under discussion at the end of 2001. Likewise, the public consultation on the Green Paper relating to the review of the EC Merger Control Regulation[27] only began in December 2001.

B. EC Merger Control Regulation

1. *Merger Control Regulation—Prohibition of Conglomerate Mergers—GE/Honeywell, Tetra Laval/Sidel*

During 2001, two of the European Commission's most noteworthy decisions under the EC Merger Control Regulation, *GE/Honeywell* and *Tetra Laval/Sidel*,[28] involved the prohibition of mergers on grounds relating to conglomerate or vertical effects. The Commission's prohibition decision in *GE/Honeywell* was particularly controversial because it concerned a transaction involving two U.S. firms, and U.S. antitrust authorities did not challenge the transaction.

In *GE/Honeywell*, the Commission found that GE, prior to the proposed merger, had a dominant position in the market for jet engines for large commercial and large regional aircraft. This finding was based not only on GE's strong market position in those markets, but also on the combination of that market position with GE's financial strength and its vertical integration into aircraft leasing. Honeywell, the Commission concluded, was the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters.

In analysing the effects of the proposed merger, the Commission found that the combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics, and corporate jet engines, as well as strengthening GE's existing dominance in jet engines for large commercial and large regional jets. This dominance, the Commission found, would have resulted, in part, from horizontal overlaps but also through the extension of GE's financial power and vertical integration to Honeywell's activities and from the combination of the complementary products of each of the parties. The combined entity, the Commission concluded, would have

24. Press Release, European Commission, Commission Fines Eight Companies in Graphite Electrode Cartel (July 18, 2001) (on file with the author).

25. Press Release, European Commission, The Commission Fines Brewers in Market Sharing and Price Fixing Cartels on the Belgian Market (Dec. 5, 2001) (on file with the author).

26. Press Release, European Commission, Commission Fines Five German Banks for Fixing the Price for the Exchange of Euro-zone Currencies (Dec. 11, 2001) (on file with the author).

27. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. L 395, 30 December 1989, p. 1; Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, O.J. L 180, 09 July 1997, p. 1; Corrigendum to: Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, O.J. L 40, 13 February 1998, p. 17.

28. Press Release, European Commission, Commission Prohibits Acquisition of Sidel by Tetra Laval Group (Oct. 30, 2001) (on file with the author).

had the ability and the incentive to leverage market power in one market into other markets, in particular through "bundling." The Commission was concerned that this would foreclose competitors and eventually eliminate competition.

The parties sought to resolve the Commission's concerns by offering commitments, but these were not acceptable to the Commission. In July 2001, the Commission adopted its decision prohibiting the merger.

In *Tetra Laval/Sidel*, the Commission reviewed the acquisition of the French equipment manufacturer, Sidel, by the packaging company, Tetra Laval. The Commission found Tetra to be the world's uncontested leader for carton packaging, with an overall market share in Europe in excess of 80 percent. Sidel, it found, was the leading manufacturer of plastic PET packaging equipment. The Commission concluded that the combination of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment would provide the merged entity with the ability and incentive to leverage its dominant position in cartons to gain a dominant position in PET packaging equipment. In addition, by eliminating Sidel as a competitor in a closely neighbouring market, Tetra's existing dominant position in cartons would also be strengthened. Furthermore, the Commission took the view that the merged entity's dominant positions in two closely neighbouring markets would be likely to further reinforce one another, to raise barriers to entry, and to reduce competition in the overall market for the packaging of sensitive products.

Tetra Laval offered undertakings, which the Commission judged insufficient. The merger was prohibited by a decision adopted in October 2001.

2. *Merger Control Regulation – The Ancillary Restraints Notice*

In July 2001, the Commission published a Notice on "ancillary restraints."[29] The Notice replaces the 1990 Notice[30] and sets out a new approach to ancillary restraints, which are "restrictions directly related and necessary to the implementation of concentrations."[31] Common examples of "ancillary restraints" in merger agreements are non-competition clauses, licence agreements, purchase and supply obligations.

Where the Commission decides to clear a concentration under the EC Merger Control Regulation, that decision also covers the restrictions that are ancillary to the concentration. Until the adoption of the 2001 Ancillary Restraints Notice, the Commission's practice had been to review individually the restrictions claimed by the parties to be ancillary to each notified transaction. The 2001 Notice brings this practice to an end. From now on it will be the task of the parties and their advisors to determine whether the restraints included in their merger agreement are really ancillary (thus covered by the Commission's clearance decision), and are covered by applicable block exemptions, or give rise to issues under Article 81 of the EC Treaty. The Commission believes that this "self-assessment" approach is in line with its modernization proposals[32] and is consistent with its simplified procedure for mergers.[33]

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29. Commission Notice on Restrictions Directly Related and Necessary to Concentrations, 2001 O.J. (C 203) 5.

30. Commission Notice Regarding Restrictions Ancillary to Concentrations, 1990 O.J. (C 203) 5.

31. *Cf.* Merger Control Regulation, 25th Recital, Article 6(1)(b), second paragraph and Article 8(2), second paragraph, second sentence.

32. Gabriel Castañeda et al., *International Antitrust*, 35 INT'L LAW. 243, 262 (2001). *See* International Antitrust, Developments in the European Union, 35 INT'L LAW. 262 (2001).

33. Commission Notice on Simplified Procedure for the Treatment of Certain Concentrations, 2000 O.J. (C 217) 32; *see* Castañeda et al., *supra* note 32, at 257.

The purpose of the new Ancillary Restraints Notice is to provide guidance on which restrictions can be regarded as ancillary and to set out the principles to be used in the analysis of commonly occurring clauses. The most noteworthy features of the guidelines are:

- The duration of "ancillary" non-competition clauses has been limited to two years for cases involving the protection of goodwill only, and to three years for cases involving the protection of both know-how and goodwill; and
- The duration of non-competition clauses in the case of joint ventures has been limited to five years in general and may, in any event, not exceed the lifetime of the joint venture if they are to be considered "ancillary." Clauses with duration in excess of three years need to be justified, based on the particular circumstances of the case.

3. *Merger Control Regulation – The Remedies Notice*

In March 2001, the Commission published its Mergers Remedies Notice.[34] The Notice is intended to provide guidance on the substantive and procedural issues to be considered by merging parties when proposing remedies to the Commission in order to obtain clearance for their transactions.

The following points in the Notice are noteworthy:

- Remedial measures may be offered and implemented in advance of clearance; however, it is more common for parties to submit commitments, which are implemented within a specific period following clearance.
- Commitments must be capable of being implemented effectively and within a short period; they should not require additional monitoring.
- The remedy proposed must restore conditions of effective competition on a permanent basis; commitments, which are structural in nature, are preferred over other types of commitments.
- Commitments can be accepted in either phase of the merger control procedure. Commitments given in Phase I must be sufficient to rule out the "serious doubts" identified by the Commission.
- In Phase II, just as it is the Commission's responsibility to show that a transaction will create or strengthen a dominant position, it is the parties' responsibility to show that the remedies proposed will eliminate the creation or strengthening of the dominant position identified by the Commission.
- The Notice provides guidance in respect of specific types of remedies: divestiture, termination of exclusive agreements, access to infrastructure or key technology, intellectual property licences. It also deals with packages of remedies.
- In cases facing prohibition, the Commission believes that divestiture is usually the most effective way to restore effective competition.

4. *Merger Control Regulation – European Commission's Green Paper*

In December 2001, the European Commission published a Green Paper on the Review of the Merger Control Regulation. In the Green Paper, the Commission invited comments on a number of suggested changes to the current regime, in three distinct areas: jurisdictional, substantive, and procedural.

In relation to jurisdictional issues, the following points are noteworthy:

34. Commission Notice on Remedies Acceptable under Council Regulation (EEC) No 4064/89, 2001 O.J. (C 68) 3.

- The "Community dimension" turnover thresholds are set out in Article 1(2) and the two-thirds rule are regarded as functioning satisfactorily.
- It is suggested that the "Community dimension" test in Article 1(3) (dating from 1997 when a second set of lower thresholds were introduced) could be replaced by the automatic transfer to the Commission of cases subject to national filing in more than three Member States.
- The application of the Article 9 procedure for referral back to a Member State might be facilitated in the case of merger the effects of which are primarily focused on one Member State.
- In relation to minority shareholdings and strategic alliances, the Commission's view is that Article 81 of the EC Treaty remains the most appropriate instrument for assessment.
- The Commission argues that the retention of the Article 2(4) spill-over analysis is justified and does not accept arguments for the extension of the Regulation to partial function joint ventures.
- The Commission explores the feasibility of limiting the Regulation's application in relation to "growth capital/technology investments" venture capital transactions.
- The Green Paper also considers the appropriateness of harmonising the group concept in Article 5(4) with that of control in Article 3(3).

On substantive issues, the Green Paper initiates a debate on the respective merits of the current "dominance" test and the US/Australian "substantial lessening of competition" test. In relation to transactions unlikely to have negative effects on competition, the Commission indicates its satisfaction with the operation of the Simplified Procedure Notice. It raises the possibility of the introduction of a block exemption, which could eliminate the obligation to review, and decide on cases unlikely to have negative effects; some information requirement might be retained.

The Green Paper also covers a wide range of procedural issues. The most important proposal concerns a reorganization of the time schedule for the submission and discussion of commitments in the first and second phases of investigation, with a view to allowing all those involved (and not just the parties to the merger) more time to participate in the settlement discussions. The Green Paper also looks at the triggering event for notification, the "standstill obligation," electronic filing, direct submission of notification copies to the Member States, filing fees, the declaration of incompleteness, the undoing of mergers already implemented, and the calculation of deadlines.

IV. Developments in Mexico

A. Exclusionary Practices Investigated

1. *Access Unreasonably Obstructed by Telmex*

On an appeal from a 2000 ruling (*Avantel et al vs. Telmex*, DE-03-99), the Federal Competition Commission (FCC) affirmed a finding that the Mexican telephone company, Telmex, had engaged in a series of anticompetitive practices designed to obstruct its competitors access to Telmex's telephone signals and inter-urban transport facilities. The FCC confirmed that Telmex had substantial power in the relevant markets and declared in substance that it had unreasonably (a) increased the cost of long distance service to discriminate against competing firms, (b) imposed other unreasonable terms and conditions unilaterally, and (c) refused to provide requested capacity and imposed service blockages to reduce the quality of competitors' services. The FCC ordered Telmex to discontinue such practices and imposed a monetary fine on Telmex.

2. *Pemex, Guilty of Illegal Exclusive Dealing*

Following an investigation and proceedings that took more than two years to complete, the FCC ruled (RA-08-2001) that the Mexican gasoline company, Pemex, had unreasonably imposed exclusive dealing clauses on its gasoline station franchisees, with the result that only Pemex's lubricants could be sold at those stations (the only gas stations authorized by law in Mexico). The FCC confirmed that such contracts were beyond the scope of Pemex's constitutionally designated monopoly, that it was illegal for Pemex to leverage its market power in gasoline distribution into the lubricants market, and that competitors were prevented from selling their lubricants to gasoline and diesel stations (a relevant market according to the FCC). The antitrust agency ordered Pemex to eliminate the exclusivity clauses and imposed undisclosed fines.

B. Merger Enforcement

1. *Televisa Blocked from Acquiring a Major Radio Conglomerate*

The FCC confirmed its ruling blocking a transaction through which Televisa would have acquired 50.01 percent of the capital stock of Grupo Acir, the largest radio conglomerate in Mexico. The FCC focused principally on two issues: (a) the transaction would have allowed Televisa, the largest Mexican television network, to control the most significant radio broadcasting firm in Mexico: Televisa already accounts for 55 percent of advertising sales through electronic media, and (b) through the control of both the most important television and radio stations, Televisa could bundle multimedia advertising schemes and could impose unreasonable terms and conditions upon its clients, to the detriment of competition.

2. *Grocery Stores's Vouchers Firm Declared to be an Illegal Concentration*

The FCC ruled that the formation of Prestaciones Universales (PU), a firm created by the largest grocery and department stores as a vehicle for the distribution and marketing of vouchers for the purchase of merchandise within their chains, was an illegal concentration. The FCC found that, through PU, the stores could disadvantage consumers, would have the ability to act jointly to unfairly displace firms offering competing vouchers, and could exert anticompetitive pressure on firms from which the stores obtain merchandise. The FCC ordered the dissolution of PU.

C. Mexican Competition Policy Trends

In a recent speech before the Mexican Bar, the Chairman of the FCC, Fernando Sánchez Ugarte, discussed the future of Mexican antitrust policy. The speech was noteworthy for several reasons: there is a new federal administration in power, the FCC is an independent agency, and the FCC has opposed the government on a number of important issues (e.g., Aeromexico-Mexicano was not permitted to be sold as a combined package). The issues addressed by the FCC Chairman were:

- Principles: What is the ideal reach of competition policy? What should be the scope of the powers entrusted to the enforcement agency? Does the current competition statute prevent or inhibit future investment?

- Potential areas for reform: strengthening the FCC's current legal powers, restructuring procedures to maximize efficiency, and reinforcing competition policy within regulated sectors.
- Continuity: President Fox will be appointing three new commissioners (out of five) during his term in office. What can be expected?
- FCC rulings before federal courts: there are over 200 proceedings currently being litigated, challenging FCC decisions and orders (five before the Supreme Court). What will the future bring to this growing trend?

V. Developments in New Zealand

A. Introduction

The year 2001 was arguably the most significant year in New Zealand competition law since the enactment of the Commerce Act (Act) in 1986. There was an unprecedented level of legislative activity, including major amendments to the Act (such as new business acquisition provisions and further regulation of the electricity industry) and the introduction of industry-specific legislation for the dairy and telecommunications industries. These changes greatly increased the role of the Commerce Commission (Commission), New Zealand's competition regulator. The Commission also had a busy year, in which it issued proceedings against British American Tobacco, conducted an inquiry into airport pricing charges (and issued a subsequent report), published its Practice Note No. 4 (Practice Note)[35] setting out its approach to the new business acquisition provisions, published a "Compliance" newsletter outlining its new role and responsibilities in the dairy industry, appointed economic experts and released a discussion paper to assist it with its new role in telecommunications, and released a paper on its approach to the valuation and audit of large electricity lines businesses as part of its new responsibilities in monitoring electricity prices. The year also saw two important cases decided by the Court of Appeal, the *INZCO* predatory pricing case and the *Southern Cross/Aetna* merger decision.

As foreshadowed in last year's report,[36] New Zealand has clearly moved from "generic" competition law (also known as "light handed regulation") to more sector-specific legislation and stronger enforcement action.

B. Legislative Changes

1. *The Commerce Act*

On May 26, 2001, the Commerce Amendment Act 2001 came into force, significantly amending the Act. Key changes included: the lowering of the threshold for business acquisitions (mergers), an amendment to the misuse of market power provisions, and an increase in penalties. The Act also now provides for the Commission to issue "cease and desist" orders (but the relevant amendments have not yet come into force) and the price control provisions in the Act are strengthened.

Previously, business acquisitions were prohibited if they were likely to result in the acquisition or strengthening of "market dominance." The new test is whether the acquisition

35. Commerce Commission Practice Note No. 4 – The Commission's approach to adjudicating on business acquisitions under the changed threshold in section 47—a test of substantially lessening competition.

36. Castañeda et al., *supra* note 32, at 272.

has the effect or likely effect of "substantially lessening competition" (SLC) in a market. This test was adopted to lower the threshold for business acquisitions (which had been seen as too high) and to adopt the same test as Australia, New Zealand's largest trading partner. The Commission's new Practice Note provides guidance on its approach to the new test, with the Commission equating a SLC with a strengthening of market power. The Practice Note also sets out the Commission's "safe harbors;" post-acquisition market shares where the Commission considers that a business acquisition is unlikely to substantially lessen competition. These are where either (a) the market share of the combined entity is less than about 40 percent, unless there is a "concentrated market" (for example, where the combined market share of the largest three firms in the market is around 70 percent or more) or (b) there is a "concentrated market," the combined market share of the three largest firms in the market is less than about 20 percent. The first safe harbor (a) relates to unilateral market power, whereas the second safe harbor (b) relates to coordinated market power (explicit cartels or tacit collusion). These safe harbors are only administrative guidelines and it is possible that they could be tested in court.

The previous provision relating to misuse of market power prohibited parties with a "dominant position in the market" from "using" that position for certain anti-competitive purposes. The new provision prohibits parties with a "substantial degree of power in the market" from "taking advantage" of that power for those anti-competitive purposes. The new law also allows for anti-competitive purpose to be inferred from relevant conduct and circumstances, codifying existing case law.

Penalties have been increased. The maximum penalty for companies for each breach of the restrictive trade practices (for example, non-business acquisition) provisions have been increased to the greater of NZ$10 million or three times the value of any actual or expected commercial gain. Where the commercial gain is not known, the penalty is 10 percent of the turnover of the New Zealand body corporate and any (domestic) interconnected bodies corporate. Maximum penalties for business acquisitions remain at NZ$5m per offence. The maximum penalty for individuals remains at NZ$0.5m but courts must impose penalties on individuals who breach restrictive trade practices provisions, unless there is a good reason for not doing so.

2. *Dairy Industry Restructuring Act 2001*

The Dairy Industry Restructuring Act 2001 (DIRA) provided for the regulatory and structural reform of the dairy industry, authorizing the amalgamation of New Zealand's two largest dairy co-operatives (New Zealand Co-operative Dairy Company Ltd. and Kiwi Co-operative Dairies Ltd.) into the new Fonterra Co-operative Group Limited (Fonterra). Fonterra now also owns the vast majority of all the shares in the New Zealand Dairy Board, which previously had an export monopoly and had been jointly owned by the exporting dairy companies. In order to address concerns that Fonterra might have substantial market power in the domestic dairy markets, the DIRA provides for certain safeguards and gives the Commission an additional regulatory and enforcement role. The Commission can now make determinations in response to applications from parties in dispute with Fonterra concerning exit and/or entry of its shareholders (Fonterra being a "co-operative" company, owned by its suppliers), or any regulations made under the DIRA (for example, relating to the supply and pricing of raw milk to independent processors) and making determinations

to resolve such disputes. It can also initiate an investigation in response to complaints and/or on the basis of its own monitoring of the industry, conduct investigations into any behavior by Fonterra that appears to breach those conditions, or any regulations made under the DIRA.

C. Merger Activity

Despite New Zealand's voluntary pre-notification regime and the slowdown in merger activity internationally, a relatively large number of applications for clearance were filed in 2001. Thirty-seven applications for clearance were made in 2001, up from thirty-two the previous year. Of these, twenty-eight were cleared, two were withdrawn, three were declined and four were undecided at the end of the year. Three applications from the previous year were cleared in 2001 and one such application was declined. The increase in applications was, in part, driven by a desire to make applications prior to the implementation of the more stringent business acquisitions test and the subsequent desire to have the comfort (and protection) of a formal clearance, given the uncertainty as to how the new test would be applied. The Commission had publicly stated that applications for clearance received before the new law change took effect would be considered under the test applying at the date of the application (i.e., dominance) rather than the date of the determination (when the SLC test would apply). This led to the Commission having eleven applications in process at once, at the time the highest number in ten years. The Commission's approach was, however, successfully challenged in one decision involving supermarkets (discussed below) leading the Government to pass the Commerce Clearance Validation Amendment Act 2001. This legislation provided that all of the Commission decisions (which had all been clearances) were valid, except for the supermarkets merger.

1. *The Supermarkets Case – Progressive/Woolworths*

In May 2001, the Progressive supermarket chain sought clearance to acquire the Woolworths supermarket chain, expecting to have the acquisition considered under the dominance test. Clearance was granted on July 13, 2001,[37] after the new SLC test had taken effect. Foodstuffs, the third major national supermarket chain, objected to this and issued proceedings in the High Court against Progressive and the Commission. The High Court[38] agreed with the Commission's approach, but Foodstuffs appealed this decision to the Court of Appeal. The appeal court considered that the Commission should have applied the test at the date the decision was made (the SLC test) and set aside the clearance.[39] This placed Progressive and the other ten parties, which had obtained clearances since the law change, in an uncertain position, given that the Commission had provided clearances under the "wrong" test. As noted above, the situation was subsequently remedied by the passing of the Commerce (Clearance Validation) Amendment Act 2001. The final blow for Progressive was the Commission's refusal to grant clearance to its subsequent application for clearance

37. Progressive Enterprises Ltd. and Woolworths (New Zealand) Ltd., Commerce Commission Decision No 438, 13 July 2001 (N.Z.).
38. Foodstuffs (Auckland) Ltd. v. Commerce Comm'n, CL14/01 (2001).
39. Foodstuffs (Auckland) Ltd. v. Commerce Comm'n, CA163/01 (2001).

under the new SLC test (for reasons described below).[40] It appears likely that Progressive will appeal the Court of Appeal's decision to the Privy Council (New Zealand's ultimate appeals court).

2. *Southern Cross' Acquisition of Aetna Health*[41]

In last year's edition,[42] we outlined the Commission's decision to decline clearance for the proposed acquisition by Southern Cross (the country's largest private health insurer) of the New Zealand operations of Aetna.[43] Southern Cross appealed that decision to the High Court, which allowed the appeal, concluding that the Commission ought to have cleared the proposed acquisition without the need for any divestment,[44] a decision that the Commission then appealed to the Court of Appeal. The Court of Appeal dismissed the Commission's appeal,[45] concluding (on the balance of probabilities) that the merged Southern Cross/Aetna would not be likely to be in a dominant position in the health insurance market, i.e., it would not have the ability to price or otherwise behave in a anti-competitive manner. Importantly, the Court reaffirmed that barriers to entry/expansion were fundamental to a finding of dominance, noting the Commission's findings of low barriers to entry and expansion. The Court rejected the Commission's argument that economies of scale enjoyed by the merged entity would constitute a significant barrier to expansion if the merged entity attempted to act anti-competitively. In doing so, it was noted that it was not sufficient simply to show economies of scale to establish a barrier to entry—economies of scale only constitute a barrier to entry when the minimum size for an efficient firm is very large relative to the size of the market. The Court accepted that the market shares had remained reasonably static, but that this may simply have reflected the fact that the market was contestable and efficient.

3. *Business Acquisitions Under the New Regime*

In 2001, the Commission considered sixteen applications under the new SLC test including, for example, the sale by British Telecommunications of CLEAR Communications to TelstraSaturn, and the Progressive/Woolworths supermarkets application discussed above. While the public copies of the Commission's decisions remove sensitive market share information, it seems clear that a number of the applications involved aggregations of market shares outside the Commission's "safe harbors." Despite this, the Commission has consistently applied the process set out in its Practice Note, only finding an SLC where there has been a strengthening of market power. In the Commission's view, this will only arise where the combined entity has the sustainable ability to raise price and/or reduce product quality or service, relative to what would have occurred in the absence of the acquisition. The anticipated price increase (or reduction in quality or service) has to be both material and sustained for a period of at least two years.

40. Progressive Enterprises Ltd. and Woolworths (New Zealand) Ltd., Commerce Commission Decision No. 448, 14th of December 2001 (N.Z.).

41. The Southern Cross and Medical Care Society and Aetna Health (N.Z.) Ltd., Commerce Commission Decision No. 399, 25th of August 2000 (N.Z.).

42. Castañeda et al., *supra* note 32, at 273.

43. *Id.*

44. S. Cross Med. Care Soc'y v. Commerce Comm'n (2001) 10 TCLR 25.

45. Commerce Comm'n. v. S. Cross Med. Care Soc'y, CA 89/01 (2001). The authors disclose that they were acting as counsel for Southern Cross throughout the process.

D. Enforcement Actions

1. *Predatory Pricing – the INZCO Decision*

In last year's report,[46] we outlined the case where the High Court imposed a penalty of NZ$525,000 on INZCO for "predatory pricing." While INZCO had priced "below cost," it had effectively matched the price offered by a more efficient new entrant (which was operating profitably). There was no evidence that INZCO had any intention to recoup its losses by raising prices at a later stage. Nevertheless, the court had held that this constituted a use of INZCO's dominant market position for a prohibited anti-competitive purpose (as the test was then stood).

This year, the Court of Appeal rejected INZCO's appeal against the High Court's decision.[47] In doing so, the court held that dominance had to be assessed by looking at the overall commercial situation—here the finding of dominance appears to have been based largely on the strong relationship INZCO had with its merchants, together with its strong brand name and barriers to entry. It is significant to note that the court found dominance despite the fact that the "target" of the pricing behavior had gained 30 percent market share in the local geographic market. The court was not swayed by the target's ease of entry and expansion in a relatively short period. Even though matching prices might be regarded as competitive behavior, when considering whether INZCO had "used" dominance for a "prohibited" purpose, the court appeared to apply a different test for dominant companies and seemed strongly influenced by the apparent cross-subsidisation by INZCO from its higher margin products and unhelpful "rhetoric" in its internal documents.

2. *British American Tobacco Merger*

In 2001, the Commission commenced court action against British American Tobacco Holdings (NZ) Limited (BAT) alleging that the acquisition by BAT of WD & HO Wills (New Zealand) Limited (Wills NZ) in 1999 contravened the business acquisition provisions of the Act. Despite there being substantial international competitors (albeit with a relatively smaller presence in New Zealand), the Commission appears to be alleging that the merged entity would not in fact be constrained by those competitors due to the prohibition on cigarette advertising in New Zealand (which would allegedly make existing and potential competitors unable to attract new customers so as to increase their market share). The proceeding is still at an early stage. If the court subsequently finds that BAT breached the Act, then it could order BAT to divest itself of Wills NZ, and could also impose a wide range of orders.

VI. Developments in the United States

A. Procedural Law

In 2001, United States federal courts continued to hold that the Foreign Trade Antitrust Improvements Act[48] bars antitrust claims that do not arise out of direct, substantial, and

46. Castañeda et al., *supra* note 32, at 274.

47. Carter Holt Harvey Bldg. Products Group Ltd. v. Commerce Comm'n, CA 180/00 and CA 184/00, (2001).

48. 15 U.S.C. § 6a (2000).

reasonably foreseeable effects on United States commerce.[49] In the context of litigation arising out of international cartels, courts have held that plaintiffs who purchased products abroad at allegedly supracompetitive prices may not premise U.S. jurisdiction upon the fact that the conspiracy as a whole had an effect on United States commerce, unless these domestic effects specifically "gave rise" to the plaintiffs' injury.[50]

In *Den Norske Stats Oljeselskap As v. HeereMac, vof*, a federal appeals court dismissed an action filed by a Norwegian oil company against the members of an alleged cartel providing heavy-lift barge services in various regions of the world.[51] The plaintiff, who had contracted for the relevant services in the North Sea, argued that the market for heavy-lift services was a global market and that the defendants were able to maintain anticompetitive pricing in the United States market due to an overall market allocation scheme encompassing the entire globe (including the North Sea).[52] The appeals court ruled, however, that even if the defendants' conspiracy had resulted in supracompetitive prices in the United States, jurisdiction was lacking because the inflated U.S. prices did not "give rise" to the plaintiff's claims.[53]

B. Cartel Enforcement

In 2001, the United States Department of Justice (DOJ) continued to engage in vigorous and successful criminal prosecutions of foreign companies and individuals involved in cartel behavior affecting the United States market. Following up on a number of guilty pleas entered into in 2000, the DOJ secured indictments of four top executives of Japanese chemical companies in the food preservatives industry and reached a plea agreement with the employer of three of them, Ueno Fine Chemicals Industry Ltd.[54] Ueno's fine of $11 million brought the total dollar value of fines imposed in the investigation to $130 million. The DOJ also continued its prosecution of an alleged price-fixing conspiracy in the auction house industry, indicting the former Chairmen of Sotheby's and Christie's.[55]

DOJ investigations have continued to result in significant fines for foreign companies accused of forming cartels in violation of the U.S. antitrust laws. Mitsubishi Corporation was convicted of participation in an international graphite electrodes price-fixing cartel and

49. *See, e.g.*, Den Norske Stats Oljeselskap As v. HeereMac vof, 241 F.3d 420, 428–29 (5th Cir. 2001); Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2001); In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715 (D. Md. 2001).

50. *See, e.g.*, Sniadio v. Bank Austria AG, 174 F. Supp. 2d 159, 164 (S.D.N.Y. 2001); Empagran, S.A. v. F. Hoffmann-La Roche Ltd., Civ. No. 00–1686 (TFH), at 10 (D.D.C. June 7, 2001).

51. *See Den Norske*, 241 F.3d at 431.

52. *Id.* at 425.

53. *Id.* at 427. In Prewitt Enterprises, Inc. v. OPEC, 2001 U.S. Dist. LEXIS 4141 (S.D. Ala. Mar. 21, 2001), the district court ruled that it had jurisdiction over antitrust claims by U.S.-based petroleum purchasers against OPEC because of the effects of OPEC's activities in the United States. *See* 2001 U.S. Dist. LEXIS 4141 at *18. The court also held that (i) OPEC's output restrictions and related price strategies were *per se* illegal under the U.S. antitrust laws, and (ii) OPEC's member states were not entitled to immunity from suit under the principles of sovereign immunity or the act of state doctrine because the relevant activities undertaken were commercial in nature. *See id.* at *20–*24.

54. Press Release, Dep't of Justice, Four Japanese Executives Indicted in Price-Fixing Conspiracy (Jan. 23, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/7310.htm.

55. Press Release, Dep't of Justice, Former Chairmen Of Sotheby's And Christie's Auction Houses Indicted In International Price-Fixing Conspiracy (May 2, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8128.htm. The former Sotheby's Chairman was subsequently convicted after a trial in the Southern District of New York.

was fined $134 million—the fourth largest fine ever imposed in an antitrust case.[56] A Swiss company based in Milan was fined $53 million after pleading guilty to participation in a conspiracy to rig bids on a construction contract funded by the United States Agency for International Development in the Republic of Egypt.[57] Further examples of the DOJ's international reach include the plea agreement by Dutch chemical company Akzo Nobel Chemicals BV, subjecting it to a $12 million fine for participating in a conspiracy to fix the price of monochloroacetic acid,[58] and the plea agreements by two Japanese companies and one Korean company resulting in over $9 million in fines for participating in a cartel in the food flavoring industry.[59]

The DOJ continued its practice of prosecuting foreign nationals residing abroad who were accused of violating U.S. antitrust laws. In connection with its investigation of a cartel in the isostatic graphite industry, the DOJ secured the first plea agreement where a Japanese executive agreed to the possibility of a prison sentence for the violation of U.S. antitrust laws.[60] The DOJ followed up a few months later with three more indictments of Japan-based executives.[61] In connection with the monochloroacetic acid cartel investigation, a plea agreement was reached with a Swedish executive of Akzo Nobel who agreed to a three-month prison sentence and a $20,000 fine.[62]

C. Merger Enforcement

In 2001, international mergers affecting competition in the United States continued to receive scrutiny by the U.S. antitrust agencies. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[63] the DOJ and Federal Trade Commission (FTC) reviewed numerous international mergers and entered into a number of consent decrees to address potential anticompetitive effects.

The U.S. antitrust agencies continue to review—and challenge—important international mergers where anticompetitive U.S. effects are anticipated, even when the transaction involved non-U.S. companies. In October 2001, the FTC authorized a challenge to the proposed acquisition of Seagram Wine and Spirits, owned by the French concern Vivendi

56. Press Release, Dep't of Justice, Mitsubishi Corporation Fined $134 Million For Its Role In International Price-Fixing Cartel (May 10, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm.

57. Press Release, Dep't of Justice, Abb Asea Brown Boveri Ltd. Subsidiary Pleads Guilty To Bid Rigging On USAID Construction Contract In Egypt, *available at* http://www.usdoj.gov/atr/public/press_releases/2001/7984.htm.

58. Press Release, Dep't of Justice, Dutch Chemical Giant Akzo Nobel Agrees To Plead Guilty And Pay $12 Million Fine For Its Role In Criminal Antitrust Conspiracy (June 27, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8468.htm.

59. Press Release, Dep't of Justice, Three International Companies To Plead Guilty In Food Flavoring Cartel (Aug. 27, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8918.htm.

60. Press Release, Dep't of Justice, Executive And U.S. Subsidiary Of Japanese Manufacturer Agree To Plead Guilty To International Price-Fixing Conspiracy Charges (Feb. 14, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/7476.htm.The executive also agreed to pay a $10,000 fine.

61. Press Release, Dep't of Justice, Three Japanese Executives Indicted in Price-Fixing Conspiracy (July 25, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8678.htm.

62. Press Release, Dep't of Justice, Dutch Chemical Giant Akzo Nobel Agrees To Plead Guilty And Pay $12 Million Fine For Its Role In Criminal Antitrust Conspiracy (June 27, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8468.htm.

63. *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.

Universal S.A., by Diageo Plc and Pernod Ricard S.A. (British and French, respectively).[64] The FTC alleged, among other things, that the transaction would result in anticompetitive concentration in the market for rum products. In December 2001, after Diageo agreed to a number of conditions, including the divestiture of one of its own brands of rum, the FTC allowed the transaction to proceed.[65]

Cooperation between the United States and foreign competition authorities continued in 2001. For example, in September 2001, the FTC negotiated a consent decree in connection with the proposal by Finnish company Metso Oyj's to acquire Svedala Industri AB, a Swedish company, for approximately $1.6 billion.[66] Concerned that the transaction would decrease competition in the rock processing equipment market, which the FTC considered to be a global market, the FTC required the parties to divest various worldwide businesses to two competing firms (also non-U.S. companies). In connection with its review of the transaction, the FTC stated that it cooperated, not only with the European Commission (pursuant to the bilateral treaty), but also with the competition authorities of Australia, Canada, and South Africa.

U.S. agency officials have reported that the close working relationship that has developed between the U.S. antitrust agencies and their counterparts in Europe has resulted in significant convergence in analytical approaches to cases of mutual concern.[67] However, where differing approaches remain (highlighted in 2001 by the contrasting merger analyses undertaken with respect to the proposed acquisition of Honeywell International, Inc. by General Electric), officials have not hesitated to point out their desire for further convergence.[68]

D. International Cooperation

In October 2001, the U.S. antitrust agencies announced the creation of a new International Competition Network (ICN) to provide a venue where senior antitrust officials from numerous nations can work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement.[69] Recognizing the global proliferation of antitrust regimes, the ICN is intended to contribute to the ability of the member nations to reduce inconsistent outcomes, decrease unnecessary procedural burdens, and make antitrust enforcement more efficient and effective. The concept for the ICN grew out of the recommendations of the International Competition Policy Advisory Committee.[70]

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64. *See* Press Release, Fed. Trade Comm'n, FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. (Oct. 23, 2001), *available at* http://www.ftc.gov/opa/2001/10/diageo.htm.

65. Press Release, Fed. Trade Comm'n, With Conditions, FTC Approves Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. (Dec. 19, 2001), *available at* http://www.ftc.gov/opa/2001/12/diageo.htm.

66. Press Release, Fed. Trade Comm'n, FTC Settlement Preserves Competition in Global Markets for Rock Processing Equipment (Sept. 7, 2001), *available at* http://www.ftc.gov/opa/2001/09/metso.htm.

67. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Chairman Muris Stresses Commitment to Cooperation with European Commission (Nov. 14, 2001), *available at* http://www.ftc.gov/opa/2001/11/euus.htm.

68. *See, e.g.*, *id.*; Charles A. James, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, International Antitrust in the Bush Administration, remarks before Canadian Bar Ass'n (Sept. 21, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9100.htm.

69. *See* Press Release, Dep't of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm.

70. *See* Press Release, Attorney General Janet Reno, AAG Joel I. Klein Issue Statements about International Competition Advisory Committee Report (Feb. 28, 2000), *available at* http://www.usdoj.gov/atr/icpac/4275.htm.