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International Antitrust Law

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I. Developments in Australia

A. Introduction

Australian antitrust law came under scrutiny in 2002. The government announced a long-awaited review of antitrust provisions of the Trade Practices Act 1974 (Cth) (TPA)[1] by a committee chaired by former High Court Justice Sir Daryl Dawson (Dawson Review).[2] The Dawson Review's examination of the legislation and the role of the regulator, the Australian Competition and Consumer Commission (ACCC) began in August 2002. The committee is expected to issue its recommendations in April 2003.[3]

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1. *See* Trade Practices Act, 1974, Cth (Austl.).

2. *See* Press Release, Commonwealth Treasurer, Review of the Competition Provisions of the Trade Practices Act 1974 (May 9, 2002), *available at* http://www.treasurer.gov.au/tsr/content/pressreleases/2002/023.asp?pf=1 [hereinafter TPA Review Committee Announcement].

3. The Dawson Report was in fact released by the Federal Government after the period covered in this report, on 16 April 2003. Overall, the committee concluded that the TPA has served Australians well. The TPA has sustained a competitive environment which has benefited consumers in terms of service and price. The recommendations for reform are designed to achieve certain objectives including:

- greater transparency, speed and certainty for business and consumers in the administration of the TPA by the ACCC; and
- modernising the TPA to deal with new business structures such as joint ventures and dual listed companies.

The Committee and the Government have heeded the call by the ACCC and others for the introduction of criminal sanctions including imprisonment for serious cartel type offences. Importantly, however, they have

On a separate front, following the collapse of Australia's largest insurer, HIH Insurance Ltd. (HIH), the Negligence Law Review Panel was established to consider, among other things, potential amendments to the TPA to limit damages claims for personal injury and death.[4]

The year was also marked by the ACCC aggressively pursuing high profile case and testing the boundaries of its investigative and enforcement powers. The ACCC launched an unprecedented number of cases in 2002, with approximately eighty cases still before the Federal Court. At least eight of these cases are awaiting determination by the High Court, the last court of appeal in Australia. The ACCC has also pushed for legislative amendments to introduce higher penalties and criminal sanctions for cartel conduct, and released a Leniency Policy for public comment.

B. The Federal Government's Review of Competition Regulations

On May 10, 2002, in line with its election promise to the Australian business community, the re-elected Howard government announced a formal review of the TPA.[5] The Dawson Review presented an opportunity for business and the ACCC to air polarized views on the proper scope and application of the TPA. The recommendations of note are outlined below.[6]

1. *ACCC: Increased Penalties and Criminal Sanctions*

The ACCC submitted that Australia should follow the United States by imposing criminal sanctions for "hardcore" collusion or aggressive cartel conduct.[7] In addition to imprisonment for executives and employees involved in cartel conduct, the ACCC recommended that the maximum pecuniary penalty should be up to three times the value of any commercial gain from the contravention, or alternatively, 10 percent of the corporation's Australian turnover.[8] While the Business Council of Australia (BCA) has argued that education and transparency provide better alternatives to increased sanctions, it decided not to oppose the introduction of criminal sanctions, but rather, to push for greater ACCC accountability.[9]

2. *Other Issues: Monopoly Conduct and Misuse of Market Power*

Section 46 of the TPA proscribes monopoly conduct in a manner equivalent to section 2 of the Sherman Act in the United States.[10] The legislation presents a significant evidentiary hurdle, for now the plaintiff and prosecutor must show that such conduct is undertaken

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both recognised that there is no straight forward way of introducing this into the Australian judicial system without weakening the effectiveness of the present system, and recommended that a committee should be established to consider this issue further. There are no plans to amend section 46 of the TPA at present.

4. *See* Press Release, Minister for Revenue, Minister Announces Review Panel (July 2, 2002), *available at* http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/076.asp.

5. *See* TPA Review Committee Announcement, *supra* note 2.

6. A complete listing of submissions to the Dawson Review can be found at http://tpareview.treasury.gov.au/submissions.asp.

7. *See* ACCC, Submission to the Trade Practices Act Review (July 2, 2002), *at* http://tpareview.treasury.gov.au/submissions.asp [hereinafter ACCC Submission to the Dawson Review].

8. *Id.*

9. *See* Business Council of Australia, Submission to the Dawson Review of the Trade Practices Act 1974 and its Administration (July 9, 2002), *available at* http://tpareview.treasury.gov.au/submissions.asp[hereinafter ACCC Submission to the Dawson Review].

10. *See* Trade Practices Act, 1974, § 46 (Austl.); Sherman Act, § 2, 15 U.S.C § 2 (1994).

for the prohibited *purpose* of either eliminating or damaging a competitor. The ACCC is seeking to amend section 46 to supplement the current "purposes" test with an "effects" test, which it argues will bring Australia into line with Europe and the United States.[11] That is, the legislation should prohibit conduct that has either the *purpose* or *effect* of damaging or inhibiting competition. The submission was opposed by groups within the business community, which claim that the current legislation presents an appropriate balance between fostering competition in international markets and policing competition in domestic markets.

3. *What will be the Likely Outcome?*

While the Dawson Review Committee's report will most likely support some of the proposals of both business and the regulator, the impact of the report is uncertain. ACCC Chairman Professor Allan Fels is due to resign from the ACCC on June 30, 2003.[12] The change in ACCC leadership could bring with it new modes of regulatory enforcement and accountability. The government may implement the Committee's recommendations, but is equally likely to be distracted by international politics and a stagnating economy.

C. Can the ACCC Require Access to Privileged Communications?

In 2001, the ACCC made an unprecedented move of requesting access to communications that were the subject of a claim of legal professional privilege in the course of its investigations. The move sparked a number of legal challenges as both the ACCC and companies under investigation sought to clarify the extent of the ACCC's investigative powers under the TPA. Proceedings were taken all the way to the High Court.

In November 2002, all seven members of the High Court held that the ACCC did not have the power to demand the production of privileged communications.[13] The High Court reaffirmed certain well-established principles concerning privilege as a foundation for its decision.[14] Privilege was characterized as a common law right or immunity, or even, according to one justice, a fundamental human right.[15] The Court further emphasized the longstanding position under Australian law that a legislative provision will not be interpreted to override common law rights, privileges, or immunities unless it does so by clear words or by necessary implication.[16] In this respect, the decision reflects the May 2002 decision of the House of Lords in the United Kingdom in *In re Morgan Grenfell & Co. v. Special Commissioner of Income Tax.*[17]

The Australian decision will have no practical impact on the ACCC's powers, given its longstanding practice of accepting privilege as a valid answer to a request for information. It may, however, have wide-ranging implications for other federal regulators, such as the corporate-affairs regulator and the taxation office, which have similar investigative powers and that have, on previous occasions, sought the production of privileged materials.

11. ACCC Submission to the Dawson Review, *supra* note 9.

12. Press Release, Australian Competition and Consumer Comm'n, ACCC Chairman, Professor Allan Fels, AO, to Step Down June 20, 2003 (Nov. 19, 2002), *available at* http://tpareview.treasury.gov.au/submission.asp.

13. Daniels Corp. Int'l Pty Ltd. v. Australian Competition and Consumer Comm'n (2002) 192 ALR 561 (Austl.).

14. *Id.*

15. *Id.*

16. *Id.*

17. *In re* Morgan Grenfell & Co. v. Special Comm'r of Income Tax (2002) WLR 1299 (U.K.).

D. Cartels, Collusions and the ACCC Leniency Policy

1. *Transformers case*

One of the key cartel cases in 2002 involved manufacturers of electrical distribution transformers. The ACCC brought proceedings against the senior executives of ABB Power Transmission (in liquidation), and principal manufacturers and suppliers, Wilson Transformer Company, Schneider Electric (Australia) and AW Tyree Transformer, alleging extensive market-sharing and price-fixing agreements throughout the 1990s.

The companies admitted to certain of the allegations and were ordered to pay penalties amounting to $14.5 million for their collusive behavior.[18] The Court stated that "[i]t will only be with the imposition of very high penalties that this conduct will be stamped out."[19] Notably, however, the penalties were not as high as the figures submitted by the ACCC, despite its receiving the benefit of the companies' cooperation.

E. Merger Developments in a Global Context

The year 2002 has also seen some large, international mergers occur, which were subject to ACCC scrutiny. Some of the significant mergers approved by ACCC in 2002 are discussed below.

1. *Arthur Andersen/Ernst & Young*

The merger of the Australian partnerships of Arthur Andersen and Ernst & Young was approved when the ACCC found that the proposed merger would not breach the concentration thresholds in any of the affected markets.[20] The ACCC also considered that Andersen's presence as a strong competitor in the Australian market would likely diminish even if the transaction did not take place.[21] Notably, the ACCC realized that despite the merger, the merged entity would face vigorous and effective competition from the remaining major accounting firms, as well as smaller global and Australian accounting outfits.[22]

2. *Compaq/Hewlett-Packard*

The ACCC did not oppose the merger between global computer providers Compaq and Hewlett-Packard.[23] Despite the fact that the two companies compete in a number of Australian markets, the ACCC was satisfied that the merged entity would likely face substantial competition from the remaining competitors in the market, namely, large global suppliers such as IBM and Dell.[24] The ACCC also took into account that the information technology industry was experiencing further growth, and that the proposed merger would be unlikely to dampen technological innovation in this area.[25]

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18. Australian Competition & Consumer Comm'n v. ABB Transmission and Distribution Ltd. (No. 2) (2002) 190 A.L.R. 169 (Austl.).
19. *Id.*
20. *See* Press Release, Australian Competition and Consumer Comm'n, ACCC not to Oppose Andersen/ Ernst & Young Merger (May 17, 2002), *available at* http://www.accc.gov.au/media/mediar.htm.
21. *Id.*
22. *Id.*
23. Press Release, Australian Competition and Consumer Comm'n, ACCC not to Intervene in the Proposed Merger Between Hewlett-Packard and Campaq (Mar. 13, 2002), *available at* http://www.accc.gov.au.media/ mediar.htm.
24. *Id.*
25. *Id.*

F. Misuse of Market Power under Judicial Scrutiny

Section 46 of the TPA[26] prohibits a corporation from misusing its substantial market power for a prohibited purpose such as eliminating or substantially damaging a competitor. The courts heard several significant cases alleging abuse of market power.

1. *Australian Competition & Consumer Commission v. Boral Ltd.*

The ACCC claimed that Boral Besser Masonry engaged in predatory pricing in the concrete masonry products market.[27] The Federal Court noted that the introduction of "tilt up" concrete walling products in the 1980s led to a decrease in the demand for concrete masonry products and a price war among producers.[28] Despite its relatively low market share, Boral was said to hold a substantial degree of power in a narrowly defined wholesale market for the supply of concrete masonry products in Melbourne.[29]

Boral's market power stemmed from its ability to engage in long-term pricing below avoidable cost. In other words, Boral had deep pockets. The Court's finding came as a surprise given that none of the traditional signs of market power were present in this case: there were no substantial barriers to market entry, Boral was particularly unable to impose sustainable price increases, and it had no ability to refuse to deal.[30]

Boral appealed to the High Court, which reversed the Federal Court's decision.[31] Boral's appeal was upheld on the grounds that Boral did not have the requisite degree of market power.[32] The High Court found that substantial market power required more than a financially well-resourced company in a concentrated market.[33] Although financial resources may point to the existence of market power, the Court also considered both Boral's commercial explanation for the price-cutting conduct and its ability to recoup its losses at a later stage.[34]

G. International Cooperation

The ACCC has continued to develop relationships with regulators abroad to foster greater understanding and to encourage additional cooperation between the Australian competition and consumer regulatory regime and its overseas counterparts. For example, in April, the ACCC signed a Memorandum of Understanding (MOU) with the Fijian Commerce Commission.[35] As a significant portion of Fijian legislation governing antitrust behavior is based on the TPA, such links are essential to a cooperative environment that encourages the sharing of information about such things as law enforcement and staff training.

26. *See* Trade Practices Act § 46.
27. Australian Competition and Consumer Comm'n v. Boral Ltd. (2001) 106 F.C.R. 328 (Austl.).
28. *Id.*
29. *Id.*
30. *Id.*
31. Boral Besser Masonry Ltd. (now Boral Masonry Ltd.) v. Australian Competition and Consumer Comm'n (2003) HCA 5 (Austl.).
32. *Id.*
33. *Id.*
34. *Id.*
35. *See* Press Release, Australian Competition and Consumer Comm'n, ACCC and Fiji Commerce Comm'n: MOU Promotes Cooperation (Apr. 30, 2002), *available at* http://www.accc.gov.au/media/mediar.htm.

II. Developments in Canada

A. Introduction

The year 2002 was characterized by intense legislative reform activities. Important amendments to the Competition Act[36] came into force in June, and the Government of Canada issued its strategy for the next round of legislative reform. The Competition Bureau also continued to enforce applicable merger and abuse-of-dominance rules.

B. Legislative Reform

On June 21, 2002, the Act to Amend the Competition Act and the Competition Tribunal Act came into force.[37] The new legislation introduced a limited private right of action before the Competition Tribunal in respect to refusal to deal, exclusive dealing, tied selling, and market restrictions.[38] The new right is not automatic: a prospective plaintiff must obtain leave of the Competition Tribunal in order to bring a case.[39] In order to be granted such leave, the applicant must satisfy the Tribunal that its business is "directly and substantially affected" by the alleged anti-competitive practice.[40] The Tribunal will not grant leave when the practice is already the subject of an inquiry or an application to the Tribunal by the Commissioner of Competition.[41] The Tribunal also will be able to sanction vexatious and improper applications with an award of costs.[42] Damages for anti-competitive conduct are not available through this new right of action, and the eventual remedy is injunctive.[43]

The new bill also established a framework for obtaining and transmitting evidence with foreign enforcement authorities in non-criminal competition matters. The bill essentially mirrors the existing arrangements with respect to criminal matters under the Mutual Legal Assistance in Criminal Matters Act.[44]

In April 2002, a Parliamentary committee issued a report containing recommendations to modernize the Competition Act.[45] The recommendations focus mainly on reforming the approach to horizontal arrangements among competitors and amending the principal criminal conspiracy provision found at section 45.[46] The Report proposes to create a "two-track" approach under which hardcore cartels (involving such obvious anti-competitive agreements as price fixing, market allocation and output restrictions) would now be

36. Competitive Act, R.S.C., ch. C-34 (1985) (Can.), *available at* http://laws.justice.gc.ca/en/c-34/text.html.

37. Act to Amend the Competition Act and the Competition Tribunal Act, S.C., ch. 16, (2002) (Can.), *available at* http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-23/C-23_4/C-23_COVER-E.html.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Mutual Legal Assistance in Criminal Matters Act, R.S.C., ch. 30 (4th Supp.) (1985) (Can.), *available at* http://laws.justice.gc.ca/en/m-13.6/text.html.

45. *See* House of Commons, Standing Committee on Industry, Science and Technology, A Plan to Modernize Canada's Competition Regime (Apr. 2002), *available at* http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06/03-cov-e.htm.

46. *Id.* ch. 4.

classified as per se criminal offences.[47] Other horizontal arrangements among competitors would be subject to a civil review.[48]

In addition, the Report recommends the decriminalization of certain pricing practices such as predatory pricing, vertical price maintenance, and price discrimination.[49] Such practices would, instead, be dealt with under the abuse of dominance provisions.[50]

In response to the Report, in October 2002, the Government of Canada published its strategy for modernizing Canada's competition laws.[51] The Government indicated that amending the conspiracy provisions of the Competition Act will be a priority in the next round of amendments, that it favors the creation of a two-track approach, and that proposed changes to price discrimination, predatory pricing, and abuse of dominance should be part of the consultation process for the next round of amendments.[52] The Government will issue a discussion paper in 2003 addressing specific amendments.

C. Merger Activity

In August 2002, the Competition Bureau announced its intention to increase the transaction-size threshold for merger notification and the filing fees associated with notification.[53] The Bureau is proposing to increase the current transaction-size threshold of CDN$35 million for merger notification to CDN$50 million.[54] The party-size threshold of CDN$400 million would remain unchanged.[55] The Bureau is also proposing to double its fees for merger notifications from the current CDN$25,000 to CDN$50,000 per transaction.[56] The proposed increases are the first since the current fees were introduced in 1997. The increases are expected to come into effect in early 2003.[57]

Once again in 2002, the so-called "efficiency defence" was the object of an important judicial decision. In April 2002, the Competition Tribunal handed down its decision in the redetermination of the *Superior Propane* matter.[58] In 2001, the Federal Court of Appeal had set aside the Tribunal's initial decision, rejecting its use of the "total surplus standard" to determine the sufficiency of efficiencies, and had instructed the Tribunal to redetermine the matter taking into account the redistributive effects of the merger.[59] In its

47. *Id.*

48. *Id.*

49. *Id.* ch. 5.

50. *Id.*

51. Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology "A Plan to Modernize Canada's Competition Regime" (Oct. 1, 2002), *available at* http://www.ic.gc.ca/cmb/welcomeic.nsf/vRTF/SpecialReports/$file/GovtResponse.pdf.

52. *Id.*

53. *See* Press Release, Competition Bureau, Competition Bureau Seeks Comments on Fee Increase Proposal and Proposed Threshold Increase for Merger Notification (Aug. 19, 2002), *available at* http://strategis.ic.gc.ca/SSG/ct02414e.html.

54. *Id.*

55. *Id.*

56. *Id.*

57. Note: since the writing of this article, the proposed changes referred to have been implemented. *See* Press Release, Competition Bureau, Thresholds and Fees for Merger Notification to Increase and Written Opinions to Become Binding on Commissioner of Competition on April 1, 2003 (Mar. 24, 2003), *available at* http://strategis.ic.gc.ca/SSG/ct02536e.html.

58. Comm'r of Competition v. Superior Propane Inc., 2000 Comp. Trib. 16 (Can.), *available at* http://www.ct-tc.gc.ca/english/cases/propane/0238a.pdf.

59. Comm'r of Competition v. Superior Propane Inc., [2001] 3 F.C. 185 (Can.).

redetermination decision, the Tribunal reaffirmed that economic efficiency is the paramount objective of the merger provisions of the Competition Act.[60] The Tribunal dismissed for lack of evidence all of the Commissioner's submissions regarding redistribution from qualitative effects.[61] Applying the "balancing weights" approach, which requires some balancing so as to give greater or lesser weight to the wealth transfer from consumers to producers, the Tribunal found that the merger was still saved by efficiencies.[62] The Commissioner appealed the decision once again[63] on the grounds that it could not accept the Tribunal's interpretation that efficiencies are the paramount objective of the merger provisions of the Competition Act.[64]

D. Developments in Abuse of Dominance

The Competition Bureau continued to increase enforcement of the abuse of dominance provisions by releasing its Interpretation Bulletin on abuse of dominance in the grocery sector.[65] The Bureau justifies the need for industry-specific guidance due to the fact that the four largest supermarket chains account for approximately 75 percent of total Canadian food store sales.[66] In accordance with the Enforcement Guidelines on the Abuse of Dominance Provisions released in August 2001, the Bulletin indicates that market share of a single firm that is 35 percent or more, and above 60 percent in a case of alleged joint dominance, will generally prompt further examination.[67] The Bulletin specifically identifies exclusive agreements, and "slotting allowances" or other listing fees as potential anti-competitive acts.[68] The Bulletin also indicates that the Bureau will consider allegations of joint dominance only where a series of facilitating practices, such as category management, are present in the market.[69]

E. Criminal Activities

On October 10, 2002, the Stroh Brewery Company was fined CDN$250,000 after pleading guilty to charges of price maintenance in connection with the retail sale of bottled beer products.[70] The fine is the largest imposed to date in a price maintenance case.[71] Stroh's supply and distribution agreements with various Quebec retail outlets provided for a

60. *Superior Propane Inc., supra* note 58.

61. *Id.*

62. *Id.*

63. *See* Press Release, Competition Bureau, Competition Bureau Appeals Tribunal Decision in Superior Propane Case (Apr. 17, 2002), *available at* http://strategis.ic.gc.ca/SSG/ct02354e.html.

64. Note: since the writing of this article, the Federal Court of Appeal confirmed the Competition Tribunal's redetermination decision in favor of the merging parties. The Federal Court of Appeal's second decision is available at http://decisions.fct-cf.gc.ca/fct/2003/2003fca53.html. The Commissioner has not appealed that latest decision.

65. *The Abuse of Dominance Provisions as Applied to the Canadian Grocery Sector*, Competition Bureau, Nov. 2002, *available at* http://strategis.ic.gc.ca/SSG/ct02467e.html.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Press Release, Competition Bureau, Competition Bureau Investigation Leads to a $250,000 Fine in a Price Maintenance Case (Oct. 10, 2002), *available at* http://strategis.ic.gc.ca/SSG/ct02435e.html.

71. *Id.*

volume-based discount program subject to the condition that the retailers maintained a minimum retail price specified by Stroh.[72]

III. Developments in the European Union

A. European Community Competition Law

1. *Adoption of New Procedural Regulation*

On December 16, 2002, following a consultation process which began in 1999, the European Community (EC) Council of Ministers, acting on a proposal from the European Commission, adopted a regulation setting out new procedural rules for EC competition law.[73] The regulation, which replaces Regulation 17 of 1962,[74] will apply from May 1, 2004. The principal innovations introduced by the new regulation are:

- Abolition of the notification system: Under Regulation 17, the Article 81(3) exemption from the consequences of the Article 81(1) prohibition of anti-competitive arrangements was available only to parties who notified the European Commission and obtained an exemption decision.[75] Only the Commission could grant an exemption.[76] The new Regulation abolishes the notification system and the Commission's monopoly of exemption.[77]
- Automatic application of exemption: The Regulation provides that, for arrangements coming within the scope of Article 81(3), the exemption applies automatically.[78] There is no notification requirement and parties may rely on Article 81(3) in national courts and before national competition authorities.[79]
- Decentralization and the establishment of a competition network: The national competition authorities will have the power to apply EC competition law in individual cases. The Regulation establishes a network consisting of the Commission and the national authorities in order to reduce the risk of inconsistent application of EC competition law.[80] Obligations of consultation are placed on the national authorities, and a system of information exchange is put in place.[81] National authorities are prohibited from dealing with cases in which the Commission has initiated proceedings.[82] National courts may ask the Commission's opinion on questions concerning the application of EC competition law.[83]
- Simultaneous application of EC and national competition law: The Regulation allows the national authorities (including courts) to apply both EC and national competition law, and sets out some rules in an attempt to avoid conflict.[84] National competition law

72. *Id.*
73. *See* Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.
74. Regulation 17 of 1962.
75. Council Regulation No. 17, Article 81(3), Feb. 6, 1962.
76. *Id.*
77. Council Regulation (EC) (No. 1/2003), *supra* note 73.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

may neither prohibit arrangements that are authorized under EC competition law nor authorize arrangements that are prohibited under EC competition law.[85] However, national authorities may apply in their territories stricter national laws that prohibit or sanction unilateral conduct.[86] National authorities also may apply national rules that predominantly pursue an objective different from that pursued by Article 81 and 82.[87]

- Enhanced powers of investigation and enforcement: One of the purposes of the procedural reform set out in the Regulation is to permit the Commission to focus its resources on cartel and monopoly abuse enforcement. In this connection, the Commission is granted new investigative powers, including the power to search the homes of senior employees of firms under investigation.[88] In relation to enforcement, where it has established a competition infringement, the Commission may impose not only behavioral remedies but also, in cases where there are no effective behavioral remedies, a structural remedy.[89] The Regulation also allows the Commission to accept binding commitments from parties without adopting a definitive infringement decision.[90] Breach of the commitments or a material change in circumstances may lead to the investigation being reopened.[91]

B. EC Merger Control Regulation

1. *Merger Control Regulation—EC Court of First Instance—European Commission Merger Decisions Overturned*

In July 2002, for the first time since the enactment of the EU Merger Control Regulation, the EC Court of First Instance overturned a European Commission decision prohibiting a merger. By the end of the year, two more merger prohibitions had been overturned. These cases laid to rest any doubts that the EC Courts are prepared to engage in a full assessment of the facts when reviewing the Commission's merger decisions. Two of the cases were carried out under the Court's expedited appeal procedure.

a. *Airtours v. Commission*

In 1999, the British short-haul package holiday operator, Airtours, launched a takeover bid for one of its competitors, First Choice. The Commission prohibited the merger on the grounds that it would give Airtours/First Choice and the other two large tour operators in the market a collective dominant position.[92]

The Court of First Instance annulled the Commission's decision.[93] It accepted the concept of collective dominance, but it found that the Commission had not proved that the transaction would actually have an adverse effect on competition.[94] The Court noted the

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. Comm'n Decision of 22 Sept. 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement, 2000 O.J. (L 93) 1.
93. Case T-342/99, Airtours Plc. v. Comm'n, 5 C.M.L.R. 7 (2002).
94. *Id.*

elements that must be proved in order to establish collective dominance. It found, in particular, that the Commission had erred in its assessment of the reaction of small tour operators, potential competitors, and U.K. consumers to the conduct of the large tour operators post-merger.[95]

b. *Tetra Laval BV v. Commission*

In October 2001, the Commission prohibited the acquisition of the French PET equipment manufacturer, Sidel, by the Swiss packaging company, Tetra Laval.[96] The Commission found Tetra to be the world's uncontested leader for carton packaging, with an overall market share in Europe of more than 80 percent.[97] The Commission prohibited the deal on the grounds that a combined Tetra Laval/Sidel would lead to the creation of a dominant position.[98] It focused also on the conglomerate effects of the merger (as it had previously done in its GE/Honeywell decision).[99]

On appeal, the Court of First Instance confirmed that it was permissible for the Commission to examine future conglomerate effects.[100] However, in overturning the Commission's decision, the Court held that the anti-competitive effects of the merger were overestimated on the markets identified by the Commission.[101] The Court concluded, for example, that while the merger could allow leveraging to occur, the Commission had not shown that the merged entity would have an incentive to do so, that is, to put pressure on carton packaging and equipment customers to use PET equipment produced by Sidel.[102]

In December 2002, the Commission announced that it was appealing the Court of First Instance's judgment to the EC Court of Justice.[103] It said that, in its view, the Court of First Instance had imposed a "disproportionate standard of proof for merger prohibition decisions."[104]

c. *Schneider Electric SA v. Commission*

In October 2002, the Commission prohibited Schneider's acquisition of Legrand.[105] Both companies are French-based producers of low-voltage electrical equipment such as circuit breakers, electrical panels, and switches.

The Court of First Instance noted that, while the Commission had concluded that the relevant markets are national, it had considered the merged entity's position across Europe and based its assessment of the impact of the concentration on transnational and global markets.[106] Similarly, the Court of First Instance found that the effect of the merger on wholesalers required more precise analysis at a national level.[107] As the Commission had

95. *Id.*

96. Case COMP/M.2416, Tetra Laval/Sidel (Jan. 30, 2002), *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2416_84_en.pdf.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Case T-5/02, Tetra Laval BV v. Comm'n. 5 C.M.L.R. 28 (2002).

101. *Id.*

102. *Id.*

103. Press Release, European Commission, Commission Appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice (Dec. 20, 2002), *available at* http://europa.eu.int/comm/competition/press_releases.

104. *Id.*

105. Case T-77/02, Schneider Electric SA v. Comm'n, *available at* http://europa.eu.int.

106. *Id.*

107. *Id.*

not engaged in a precise country-by-country examination of the markets affected, the Court was not convinced by the Commission's views concerning the portfolio effect of the brands involved.[108] It also held that the Commission's analysis lacked country-specific analysis on the detailed workings of distribution networks in the individual countries concerned.[109]

The Court said the factual evidence supported the Commission's conclusions regarding the levels of concentration that would result on French markets.[110] However, the Court held that the Commission had substantially changed the nature of its objections to the merger between the issuing of its written statement of objections (to which the parties had a chance to respond) and its final decision.[111] As a result, Schneider had been unable to propose appropriate corrective measures. The Court held that the Commission had infringed Schneider's defense rights and therefore annulled the prohibition decision in its entirety.[112]

2. *Merger Control Regulations—Proposals for Reform*

In a climate of introspection provoked by the criticisms of its performance contained in the EC court's judgments in the cases described above, the European Commission, on December 11, 2002, published a package of measures proposing reform of EC merger control law.[113] The reform package is the outcome of a process that began in December 2001 with the publication of a Green Paper on the Review of the Merger Control Regulation.[114]

"The package consists of: (a) a proposal for a revision of the Merger Regulation; (b) draft guidelines on the appraisal of horizontal mergers; and (c) a series of non-legislative measures intended to improve the decision-making process, some of which are contained in a set of Best Practices."[115] The following changes were proposed to the Merger Control Regulation:

- The Commission proposed new wording in order to confirm that both unilateral and coordinated effects arising from oligopoly situations are covered.[116] Despite pressure from a number of Member States, the Commission did not change the substantive standard by which mergers are reviewed. Rather than introducing the "substantial lessening of competition" standard that was advocated by some Member States, it retained the dominance-based test.[117]
- The Commission introduced the possibility of notification prior to the conclusion of a binding agreement and the abolition of the requirement that transactions be notified within a week of the conclusion of an agreement.[118]

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Press Release, European Commission, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002), *available at* http://europa.eu.int/comm/competition/press_releases [hereinafter Comprehensive Reform Package].
114. Green Paper on the Review of Regulation (EEC) No. 4064/89.
115. Comprehensive Reform Package, *supra* note 113.
116. *Id.*
117. *Id.*
118. *Id.*

- In relation to jurisdiction, the Commission proposed that where at least three Member States agree, a case that would otherwise fall outside its jurisdiction should be dealt with by the Commission[119] (under Article 22 of the EC Merger Control Regulation). For referrals from the Commission to the Member States (under Article 9 of the EC Merger Control Regulation), the proposal is that referral requests should be allowed on the basis that competition would be significantly affected on a distinct market within the Member State (rather than by reference to a dominance criterion, as is the case currently).[120] In addition, both Article 9 and Article 22 of the EC Merger Control Regulation would be applicable at the request of the parties, who could make their request a pre-notification stage.[121]
- The Commission proposed changes in the timeframe for the conduct of merger investigations, in particular, for complex cases.[122] Where a notified merger is the subject of an in-depth second-stage investigation, it is proposed that an additional three weeks should be added to the timetable following the submission of a remedy offer, to allow more time for the proper consideration of remedies, including the consultation of Member States.[123] It is proposed also that with the agreement of the merging companies, up to four weeks could be added to the timetable.[124] These proposals indicate an increasing awareness on the part of the Commission of the high evidentiary burden in cases where it proposes to intervene.[125]

The draft horizontal merger guidelines seek to explain how the Commission will analyze the effect of a merger on competition in a market. It also seeks to provide clarity as to how the Commission will apply the notion of dominance in oligopolistic markets.[126] The draft guidelines provide guidance about threshold limits for market dominance and also discuss particular factors that could mitigate an initial finding of likely harm to competition: factors such as buyer power, ease of market entry, "failing firm" issues, and efficiencies.[127]

The Commission's Best Practice Guidelines introduce a number of features intended to operate a "checks and balances" within the European Commission's Merger Task Force. They include the appointment of a Chief Competition Economist and, in all in-depth second-stage investigations, the appointment of a "peer review panel" to scrutinize the investigating team's conclusions.[128]

119. *Id.*

120. *Id.*

121. *Id.*

122. Comprehensive Reform Package, *supra* note 113.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Commission of the European Communities, *Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings* (Dec. 11, 2002), *available at* http://europa.eu.int/comm/competition/mergers/review/final_draft_en.pdf.

127. *Id.*

128. Comprehensive Reform Package, *supra* note 113.

IV. Developments in Mexico

A. Merger Cases

1. *Cadbury Beverages Inc. and Refremex AG*

A transaction was cleared without conditions when Cadbury Beverages, Inc. acquired the brands and formulas of Refremex-owned Squirt products in Mexico.[129] The relevant market was defined as carbonated beverages, including mixers and flavored mineral water, and the geographic market was nationwide.[130] The Federal Competition Commission (FCC) concluded that there were several other significant competitors in the market.[131] Moreover, the concentration indices calculated for the carbonated beverages market did not exceed FCC criteria.[132]

2. *Pepsi Bottling Group, Inc (PBG) and Pepsi Gemex, SA de CV*

Another approved merger involved the acquisition of the capital stock of Gemex by PBG, through a subsidiary.[133] The FCC reasoned that, because PepsiCo and Gemex already had partnership links, the transaction should be viewed as a consolidation between an agent and principal. For that reason, no competition concerns were presented.[134]

B. Monopolistic Practices

In March 2000, the FCC opened an investigation into possible monopolistic practices in the beer market.[135] The targets of the investigation were Grupo Modelo, SA de CV and its subsidiaries.[136] Especialidades Cerveceras, SA de CV (ECSA) filed a complaint against Modelo alleging monopolistic practices as a result of Modelo's use of exclusivity clauses for distributing beer.[137] Following its review of the matter, the FCC concluded that the allegations had not been proven.[138]

1. *Monopolistic Practices in the Market for the Production, Marketing, Distribution, and Sale of Citric Acid*

The FCC declared Archer Daniels Midland Company, Haarmann & Reimer Corporation, and F. Hoffmann-La Roche, Ltd. liable for monopolistic practices in the market for

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129. Federal Competition Commission, *Cadbury Beverages, Inc./Refremex AG* (Feb. 20, 2002), *at* http://www.cfc.gob.mx/EnContenido.asp?P = DirResults.asp?txtDir = http://xeon2/cfc01/Documentos/ing/Resolutions/Investigations (last visited Feb. 22, 2003).

130. *Id.*

131. *Id.*

132. *Id.*

133. Federal Competition Commission, *Pepsi Bottling Group, Inc./Pepsi Gemex, SA de CV* (July 4, 2002), *at* http://www.cfc.gob.mx/EnContenido.asp?P = DirResults.asp?txDir = http//xeon2cfc01/Documentos/ing/Resolutions/Investigations.

134. *Id.*

135. Federal Competition Commission, *Presumed Commission of Absolute Monopolistic Practices on the Brewing Market* (May 23, 2002), *at* http://www.cfc.gob.mx/EnContenido.asp?P = DirResults.asp?txDir = http//xeon2cfc01/Documentos/ing/Resolutions/Investigations.

136. *Id.*

137. *Id.*

138. *Id.*

the production, marketing, distribution, and sale of citric acid.[139] Between 1996 and 1998, several companies pleaded guilty before the U.S. Department of Justice for taking part in price fixing in the international citric acid market.[140]

In 1998, the FCC initiated an investigation of possible monopolistic practices consisting of price fixing for citric acid in Mexican territory.[141] As a result of this investigation, the FCC found that several importing and marketing companies imported citric acid at the price fixed by the companies investigated, and therefore the international price agreement had effects on the Mexican market.[142] The FCC determined that Archer, Haarmann, and La Roche were responsible for the monopolistic practices, and imposed a fine on each of them.[143]

2. *Monopolisic Practices in Public Bids by Health-care Sector Institutions*

In October 2000, Reliable de Mexico, SA de CV filed a complaint against GPP, Juama, and Kodak for alleged bid-rigging in the market for the supply of X-ray material to the government healthcare authorities.[144]

The FCC found that in eleven bids, Juama, GPP, and Kodak had coordinated their bidding activity.[145] The FCC imposed a fine on Kodak and concluded its investigation of the company with the acceptance of its commitments, which the FCC considered adequate and economically capable of restoring competitive conditions.[146] The FCC found that Juama and GPP were liable for monopolistic practices consisting of the execution of illegal agreements among competitors.[147]

V. Developments in New Zealand

A. Introduction

Following the significant amendments to the Commerce Act 1986[148] (Commerce Act) in 2001, and the introduction that year of industry-specific legislation for the telecommunications and dairy industries (outlined in last year's report),[149] 2002 was a year of implementation and consolidation for New Zealand's competition regulator, the Commerce Commission (Commission). The Commission expressed the view that, where there is significant structural and/or regulatory reform in the economy, there is likely to be an associated increase in the number of potential anti-competitive behavior matters that require

139. Federal Competition Commission, *Absolute Monopolistic Practices in the Market for Production, Marketing, Distribution and Sale of Citric Acid* (Jan. 31, 2002), *at* http://www.cfc.gob.mx/EnContenido.asp?P = DirResults.asp?txDir = http//xeon2cfc01/Documentos/ing/Resolutions/Investigations.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Federal Competition Commission, *Absolute Monopolistic Practices in Biddings Called by Health-Care Institutions* (Sept. 5, 2002), *at* http://www.cfc.gob.mx/EnContenido.asp?P = DirResults.asp?txDir = http//xeon2cfc01/Documentos/ing/Resolutions/Investigations.

145. *Id.*

146. *Id.*

147. *Id.*

148. Commerce Act 1986.

149. Gabriel Castañeda et al., *International Antitrust*, 36 INT'L LAW. 287 (2002); *see* International Antitrust, Developments in New Zealand, 36 INT'L LAW. 300 (2002).

investigation. It currently believes this to be the case in the dairy, electricity and telecommunications industries, which has prompted closer scrutiny of those sectors in 2002. Despite a reduction in merger activity for 2002, of the twenty-eight applications filed with the Commission requesting clearance of business acquisitions, only one was declined (nineteen were cleared, with the balance either withdrawn or pending).

B. Regulatory Control

1. *Electricity*

In 1998, legislative reform required the separation of electricity generation and retail businesses from transmission and distribution (lines) businesses. The responsibility for the regulation of lines businesses was devolved to the Commission last year, with the object of developing a "targeted control" regime.[150] The regime is intended for the long-term benefit of consumers, through ensuring that suppliers "are limited in their ability to extract excessive profits, [that suppliers] face strong incentives to improve efficiency and provide services at a quality that reflects consumer demands, and [that suppliers] share the benefits of efficiency gains with consumers, including through lower prices."[151] The Commission's primary responsibilities include the development of thresholds for the declaration of control of lines services, determining whether to declare control and, if necessary, taking control. This process has involved a comprehensive review by the Commission of asset valuation methodologies and an audit of the asset valuations of twenty-nine lines businesses, which culminated in the release of a discussion paper on October 1, 2002.[152]

In a series of draft decisions released on December 23, 2002, the Commission noted its intention to set three thresholds against which lines businesses will be assessed, to determine whether the objectives of the Act are being met.[153] Those thresholds are a "price path" threshold (which a lines business would breach if its prices were to rise in any year by more than CPI inflation less an efficiency factor); a "quality" threshold (which focuses on reliability over time); and an "excess profit" threshold (based on a specified WACC-based rate of return on investment).[154]

The Commission also authorized an application by the Electricity Governance Board (EGB), an industry body comprised of elected representatives of generators, purchasers, distributors, grid owners, and consumers, to enter into and give effect to an arrangement that had the potential to breach certain restrictive trade practice provisions of the Commerce Act. The arrangement, which proposes to restructure and rationalize the basis under which electricity is traded and delivered, represents the industry response to the government

150. New Zealand Commerce Commission, *Review of Asset Valuation Methodologies: Electricity Lines Businesses' System Fixed Assets*, Discussion Paper (Oct. 1, 2002), *at* http://www.comcom.govt.nx/electricity/pdfs/dDiscussion%20Paper%20-%20Review%20of%20Asset%20Valuation%20Methodologies%201%20October%202002.pdf.

151. *Id.*

152. *Id.*

153. *See* New Zealand Commerce Commission, *Regulation of Electricity Lines Businesses, Targeted Control Regime, Draft Decisions* (Dec. 23, 2002), *at* http://www.comcom.govt.nz/electricity/pdfs/Draft%20Paper%2023%20Dec%202002.pdf.

154. *Id.*

policy that the industry, rather than the government, develop an improved basis for the trading and delivery of electricity.

2. *Dairy*

As explained in last year's report,[155] the Dairy Industry Restructuring Act 2001 (DIRA),[156] which authorized the creation of dairy co-operative Fonterra (New Zealand's largest company), gives the Commission the power to determine disputes between Fonterra and other parties concerning the interpretation of the DIRA and regulations made under it. In September 2002, the Commission decided to adjudicate the first dispute referred to it under the DIRA, between Fonterra and Independent Dairy Producers Ltd. (IDP), relating to the price at which Fonterra supplies raw milk to IDP. A draft determination is due in early 2003. The Commission's powers to investigate and determine disputes under the DIRA are very broad and include many of its powers under the Commerce Act. It is not bound by technicalities, legal forms, or rules of evidence.

3. *Airports*

The Commission also completed its first regulatory control inquiry on whether regulatory control of airfield activities is required at New Zealand's three major international airports. The inquiry resulted in a recommendation to the government that Auckland International Airport be controlled.[157]

C. Merger Activity

The Commission's statistics for the first part of 2002 showed a reduction in the number of merger clearance applications, reflecting a general decline in the level of merger and acquisition activity in the market. The Commission granted clearance to all but one of the business acquisitions referred to it in 2002, including acquisitions by Hewlett-Packard Company of Compaq Computer Corporation, and a merger of the cinema advertising businesses of Val Morgan & Co (Austl.) Pty Ltd. (related to The Hoyts Corporation Pty Ltd. and Village Cinema Australia Pty Ltd.) and Media Entertainment Group Ltd. The Commission will be busy, however, during 2003 dealing with joint applications filed by Air New Zealand and Qantas in December 2002.[158] The applications are for market behavior and structure authorizations under the Commerce Act, relating, respectively, to a strategic alliance arrangement and a subscription by Qantas for up to 22.5 percent of Air New Zealand's voting equity. The deal is subject to the approval of both the New Zealand Commerce Commission and its Australian equivalent (the ACCC) and is likely to involve a close examination of the impact of the proposals on the domestic, trans-Tasman and trans-Pacific aviation markets.

155. Castañeda et al., *supra* note 149.

156. Dairy Industry Restructuring Act 2001.

157. New Zealand Commerce Commission, Final Report, Part IV Inquiry into Airfield Activities at Auckland, Wellington, and Christchurch International Airports (Aug. 1, 2002), *at* http://www.med.govt.nz/buslt/bus_pol/airports-full.pdf.

158. New Zealand Commerce Commission, Air New Zealand/Qantas – Applications for Authorizations, *at* http://www.comcom.govt.nz/adjudication/qantasairnz.cfm.

D. Enforcement Actions

1. *The Supermarkets Case—Progressive/Woolworths*

As anticipated by last year's report,[159] the Progressive supermarket chain appealed to the Privy Council against the decision of the Court of Appeal that the Commission should have applied the new test of "a substantial lessening of competition" (SLC) when considering Progressive's application to acquire the Woolworths supermarket chain. The proceedings arose due to the absence of any transitional provisions governing the new test. Following the Commission's decision to determine Progressive's application under the test at the time the application was filed (the old test of market dominance), a competitor of Progressive, Foodstuffs, brought proceedings in the High Court seeking a finding that the new SLC test (considered to be a higher threshold than the old test) should apply. Progressive favored a finding that the old test should have applied. This is not surprising since the Commission declined to grant clearance under the new SLC test, on the basis that the market exhibited characteristics likely to facilitate "tacit collusion" between competitors, whereas it had cleared the merger on the basis of the old dominance test. The High Court agreed with Progressive that the old dominance test should apply, although the finding was overturned by the Court of Appeal. However, Progressive's appeal to the Privy Council was successful, with the Privy Council finding that "a logical and fair transition" to the new test is achieved through including applications for clearance under the Commerce Act within the concept of a "proceeding" in terms of governing statutory interpretation legislation. Therefore, proceedings that are commenced prior to a legislative amendment are to be considered under the legislative provisions applicable at the time they were commenced.

VI. Developments in the United States

A. Procedural Law

In 2002, the U.S. Court of Appeals for the Second Circuit, in *Kruman v. Christie's Int'l PLC*, ruled that the Foreign Trade Antitrust Improvements Act (FTAIA)[160] permits U.S. courts to assert jurisdiction over antitrust claims that arise out of unlawful conduct with a direct, substantial, and reasonably foreseeable effect on U.S. commerce.[161] Jurisdiction may be asserted even where the claim itself is not based on the conduct's effect on the United States.[162] The case arose out of an alleged conspiracy between defendants Sotheby's and Christie's (U.S. and U.K-based auction houses) to fix prices for their services at auctions in the United States and the United Kingdom. The plaintiffs, who alleged that they had paid inflated commissions in auctions outside of the United States, were permitted to proceed with their claim, despite the fact that the conspiracy's alleged effects on the United States did not give rise to the plaintiffs' claim.[163] There is now a split of authority in the United States on this issue.[164]

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159. Castañeda et al., *supra* note 149.
160. 15 U.S.C. § 6a (2000).
161. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399–400 (2d Cir. 2002).
162. *Id.*
163. *Id.* at 389. The defendants had already settled with the plaintiffs who purchased or sold goods in U.S. auctions. *Id.*
164. *See, e.g.*, Den Norske Stats Oljeselskap AS v. HeereMac Vof, 241 F.3d 420, 431 (5th Cir. 2001), *cert.*

In *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*, the U.S. Court of Appeals for the Fourth Circuit held that U.S. consumers could not assert Sherman Act claims against alleged participants in an international price-fixing conspiracy that primarily involved foreign conduct without a substantial effect in the United States.[165] The case involved an alleged price-fixing conspiracy among foreign rubber thread manufacturers, who sold their products in a number of countries, including the United States. The court held that because the price-fixing conspiracy consisted of "primarily foreign" conduct, the standard for whether or not the alleged conduct could violate the Sherman Act was whether the conduct was intended to and did produce some substantial effect in the United States (the standard of *Hartford Fire Ins. Co. v. California*[166]).[167] The court rejected the plaintiffs' contention that the *Hartford Fire* standard applies only to "wholly foreign" conduct, and instead found it appropriate to engage in a more "flexible inquiry" in order to determine whether the conduct was "foreign conduct" subject to *Hartford Fire*. The court considered whether "the participants, acts, targets, and effects involved in [the] asserted antitrust violation [were] primarily foreign or primarily domestic."[168]

The U.S. Court of Appeals for the Ninth Circuit, in *Advanced Micro Devices, Inc. v. Intel Corp.*,[169] ruled that an investigation by the Directorate General for Competition (the Directorate), a "sub-unit" of the European Commission (EC), qualifies as a proceeding before a "foreign tribunal" for the purposes of a federal court's authority, pursuant to Section 1782 of the Judicial Code,[170] to order discovery from a person within its jurisdiction for use in a foreign proceeding.[171] The court rejected Intel's argument that the investigation by the Directorate of a complaint filed by Advanced Micro Devices alleging that Intel had abused its dominant position in Europe in violation of Article 82 of the EC Treaty[172] was merely

denied, 122 S. Ct. 1059 (2002); *see also* General Elec. Co. v. Latin American Imports S.A., Civil Action No. 99-92, 2002 WL 1603093 at *5 (W.D. Ky. July 16, 2002) (holding that, under the FTAIA, a distributor of GE's products in Peru could not assert a Sherman Act claim against GE for failing to renew the distribution agreement because the distributor had not shown a "direct, substantial and reasonably foreseeable effect on the domestic marketplace *and* that this anticompetitive effect on the domestic marketplace gave rise to [its] injuries").

165. Dee-K Enter. v. Heveafil Sdn. Bhd, 299 F.3d 281 (4th Cir. 2002).

166. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993). Because the case involved import commerce, which is exempted from the FTAIA, the FTAIA standard did not apply; *see* Dee-K Enter., 299 F.3d at 287.

167. Dee-K Enter., 299 F.3d at 285–86.

168. *Id.* at 285, 292–95. Because (i) the "bulk" of the conduct related to the conspiracy occurred abroad, (ii) the agreements were formed outside the United States, (iii) the target of the conspiracy was a global market, and (iv) only two of the dozens of individual participants were officers in U.S. companies, the court concluded that the conduct was primarily foreign. *Id.* at 294–95. Because the conduct was primarily foreign, and the jury in the lower court had found that the conspiracy had no substantial effect on U.S. commerce, the court affirmed the judgment in favor of the defendants. *Id.* at 285, 296.

169. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002).

170. 28 U.S.C. §1782 (2000).

171. *Advanced Micro Devices, supra* note 169, at 666. The appeals court found that because (1) the Directorate makes recommendations to the EC, whose decisions are binding and enforceable under EC law, and (2) the EC's decisions are appealable to the EC's Court of First Instance, the proceeding for which AMD sought discovery was "at minimum, one leading to quasi-judicial proceedings." *Id.* at 667–68. The court also refused to impose an absolute requirement that the information sought in the discovery request be discoverable in the EC proceeding. *Id.* at 668–69.

172. Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S 11, as amended by Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1, *reprinted in* 37 I.L.M 56 (1998).

an administrative process to determine whether to recommend that the EC proceed with a complaint, not a "proceeding" before a "foreign tribunal."[173] In addition, two federal courts held that a plaintiff was entitled to jurisdictional discovery from a foreign defendant to support its allegations of jurisdiction over the defendant.[174]

B. Cartel Enforcement

In 2002, the U.S. Department of Justice (DOJ) continued to engage in criminal investigations of foreign companies and individuals involved in cartel behavior affecting the U.S. market.

DOJ investigations continued to result in significant fines for foreign companies accused of forming cartels in violation of the U.S. antitrust laws. Bilhar International Establishment, a company based in Liechtenstein, was fined $54 million after pleading guilty to participation in a conspiracy to rig bids and to defraud the U.S. Agency for International Development in the Arab Republic of Egypt.[175] Luxembourg-based Arteva Specialties, S.a.r.l. (d/b/a KoSa), was fined $28.5 million after pleading guilty to participation in a conspiracy to fix prices and allocate customers in the polyester staple industry.[176] Other examples of the DOJ's international reach include agreement by French-based Elf Atochem S.A. to plead guilty and pay fines totaling $8.5 million for participating in two international conspiracies that suppressed competition in the industrial chemical markets for monochloroacetic acid (MCAA) and organic peroxides,[177] and the plea agreements by Nippon Electrode Company Ltd. (Japan) and VAW Carbon GmbH (Germany) subjecting them to $1.44 million in fines for participating in an international conspiracy to fix the price of carbon cathode block.[178]

The DOJ also took action against foreign companies allegedly interfering with its price-fixing investigations. The DOJ indicted a Japanese carbon fiber company (along with its

173. *Advanced Micro Devices*, 292 F.3d at 666.

174. *See* Texas Int'l Magnetics, Inc. v. BASF Aktiengesellschaft, 31 Fed. Appx. 738 (2d Cir. 2002) (allowing a discovery to substantiate specific allegations that a U.S. company that had participated in an alleged unlawful conspiracy had been merged with the foreign defendant); *In re* Automotive Refinishing Paint Antitrust Litigation, 2002-2 CCH Trade Cases ¶ 73,793, 94,482-85 (E.D. Pa. 2002) (allowing discovery by a plaintiff alleging jurisdiction based on section 12 of the Clayton Act, in order to substantiate its allegations that the defendants' contacts with the United States as a whole—as opposed to the relevant forum state—were sufficient to subject it to U.S. jurisdiction; recognizing a split of authority as to whether Section 12 of the Clayton Act permits an antitrust plaintiff to assert personal jurisdiction based on the defendant's "national contacts"). The court in *Automotive Refinishing* also held that the plaintiff could not assert jurisdiction over the foreign defendant based on the conduct of the defendant's U.S. subsidiary under the "alter ego" theory of jurisdiction, in part because of the lack of representation by the defendant's employees on the subsidiary's board of directors. *Id.* at 94,486.

175. *See* Press Release, Dep't of Justice, Former President of Liechtenstein Co. Found Guilty of Rigging Bids on U.S.-Funded Construction Contracts in Egypt (Feb. 12, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/February/02_at_073.htm..

176. *See* Press Release, Dep't of Justice, Company Agrees to Plead Guilty and Pay $28.5 Million Fine for Participating in Polyester Staple Cartel (Oct. 31, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/October/02_at_632.htm.

177. *See* Press Release, Dep't of Justice, International Chemical Corp. Agrees to Plead Guilty, Pay Fines for Participating in Multiple Criminal Antitrust Conspiracies (Mar. 14, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/March/02_at_151.htm.

178. *See* Press Release, Dep't of Justice, Japanese and German Companies to Plead Guilty and Pay Fines for Role in International Price-Fixing Conspiracy (Apr. 1, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/april/02_at_190.htm.

U.S. subsidiary and a Japanese executive) for obstruction of justice in connection with the DOJ's investigation of price fixing in the carbon fiber industry.[179] The DOJ also secured a plea agreement for witness tampering with a U.K.-based company whose U.S. subsidiary was being investigated for an alleged price-fixing conspiracy involving electrical carbon products.[180]

The DOJ continued to prosecute foreign nationals residing abroad who were accused of violating U.S. antitrust laws. In connection with the monochloroacetic acid cartel investigation, two French executives from Elf Atochem S.A. agreed to plead guilty, serve ninety-day jail sentences in the United States, and pay criminal fines of $50,000 each.[181] The DOJ also secured a plea agreement with a British executive for participating in the carbon cathode block conspiracy[182] and indicted a Japanese executive and a German executive for their alleged roles in that conspiracy.[183]

C. Merger Enforcement

In 2002, the DOJ and the Federal Trade Commission (FTC) continued to examine international mergers affecting competition in the United States. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[184] the DOJ and the FTC reviewed numerous international mergers and, in some instances, entered into consent decrees to address potential anticompetitive effects.

The FTC entered into a consent agreement to resolve its objections to the proposed $1.3 billion acquisition by Solvay S.A., a Belgian-based pharmaceutical and chemical manufacturer, of Auismont S.p.A., an Italian company primarily doing business in the fluorinated materials and peroxide industries.[185] The FTC believed that the transaction would have lessened competition in certain markets related to polyvinylidene fluoride (PVDF).[186]

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179. *See* Press Release, Dep't of Justice, Japanese Company, Its American Subsidiary, and Japanese Executive Indicted for Obstruction of Justice (Mar. 19, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/March/02_at_162.htm.

180. *See* Press Release, Dep't of Justice, U.S. Company And U.K. Parent To Plead Guilty To Charges Involving An International Electrical Carbon Products Cartel (Nov. 4, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/November/02_at_642.htm (the company agreed to pay a $ 1 million fine).

181. *See* Press Release, Dep't of Justice, European Executive Agrees to Plead Guilty for Participating in an International Antitrust Conspiracy (Aug. 7, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/August/02_at_462.htm; Press Release, Dep't of Justice, International Chemical Corp. Agrees to Plead Guilty, Pay Fines for Participating in Multiple Criminal Antitrust Conspiracies (Mar. 14, 2002), *available at* http://www.usdoj.gov/atr/public/press_releases/2002/10835.htm.

182. *See* Press Release, Dep't of Justice, British Executives to Plead Guilty for their Role in an International Price-fixing Conspiracy (Sept. 27, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/September/02_at_559.htm (two British nationals pled guilty, with the individual who did not reside in the U.S. agreeing to pay a $28,000 fine).

183. *See* Press Release, Dep't of Justice, Japanese and German Executives Indicted for Their Roles in an International Price-fixing Conspiracy (May 21, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/May/02_at_304.htm.

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

185. Press Release, Federal Trade Comm'n, FTC Settlement Would Preserve Competition in U.S. Market for Fluoropolymer Resins (May 2, 2002), *available at* http://www.ftc.gov/opa/2002/05/solvayausimont.htm (Ausimont was a subsidiary of Italenergia S.p.A).

186. *Id.* The FTC believed that competition would be lessened because (i) the relevant markets were highly concentrated and had significant barriers to entry, (ii) the transaction would unduly increase concentration, and (iii) the transaction could make coordinated interaction more likely among the only two significant PVDF producers that would remain post-transaction. *Id.* The FTC found coordination to be likely because reliable

The consent agreement required Solvay to divest its U.S. PVDF operations (including its Alabama plant), and to provide to the acquirer of the divested business (1) a royalty-free license to Solvay's intellectual property, including the right to manufacture or sell PVDF anywhere in the world, and (2) detailed information about Solvay's production of PVDF at Solvay's plants in Alabama and France.[187] The FTC also reported that it had cooperated with the European Commission in the analysis of the transaction.[188]

After a review that lasted nearly ten months, the FTC declined to challenge two proposed transactions in the cruise line industry: the proposed merger of Royal Caribbean Cruises, Ltd. and P&O Princess Cruises plc, and the competing hostile tender offer by Carnival Corporation for Princess.[189] The FTC took the unusual step of releasing a lengthy statement (Statement) regarding its decision not to challenge the transactions.[190] In its Statement, the FTC emphasized that it did not believe that either transaction would result in a merger to duopoly because (1) at least one other major competitor existed (in addition to the three parties), (2) a significant group of "fringe" competitors remained, and (3) there was "considerable competitive interaction between the cruise industry and alternative vacation options."[191] The FTC also reported that the EU and U.K. antitrust enforcement agencies had also investigated the proposed transactions, and not challenged them.[192]

The DOJ in 2002 also began to implement its own Merger Review Process Initiative, which involves methods to make the initial waiting period more productive, streamline Second Requests, and expedite the DOJ's assembling and analysis of information.[193]

D. International Cooperation

The DOJ and FTC (Agencies) continued to engage in substantial cooperation with foreign antitrust enforcement authorities. Representatives from the Agencies attended the first annual International Competition Network (ICN) conference, where they worked with antitrust agencies from numerous foreign jurisdictions to facilitate reforms in multijurisdictional merger review.[194] The Agencies have also attempted to more fully articulate

pricing information is available from customers, and the large number of customers in the industry would make cheating on any coordination easy to detect.

187. *Id.*

188. *Id.*

189. Press Release, Federal Trade Comm'n, FTC Closes Cruise Line Merger Investigations (Oct. 4, 2002) (HHI increase from 2800 to 3700), *available at* www.ftc.gov/opa/2002/10/cruiselines.htm.

190. Statement of Federal Trade Comm'n Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041, *available at* http://www.ftc.gov/os/2002/10/cruisestatement.htm.

191. The Statement also recognized that the objections by competitors to the proposed transactions must be received "with healthy dose of skepticism" given that "[o]pposition to a merger from a competitor often indicates that the transaction will increase—rather than decrease—competition." *Id.*

192. *Id.*

193. *See* Charles A. James, Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, Rediscovering Coordinated Effects, Address Presented at the American Bar Association Annual Meeting, Section of Antitrust Law (Aug. 13, 2002), *at* www.usdoj.gov/atr/public/speeches/200124.htm; Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, Antitrust Going Global in the 21st Century, Remarks before Federal Bar Association Corporate and Association Counsels Division and American Corporation Counsel Association Northeast Ohio Chapter (Oct. 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200418.htm [hereinafter Mojoras].

194. *See* William J. Kolasky, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, Global Competition Convergence and Cooperation: Looking Back and Looking Ahead, Address Presented at the

the fundamental principles that should guide competition law in an increasingly global economy.[195]

The Agencies continue to participate in the U.S.-EU Merger Working Group, and in October 2002, the Agencies and the EU released "best practices" for coordinating merger reviews of transactions subject to both U.S. and EU review.[196] The "best practices" are intended to minimize the risk of divergent outcomes in each jurisdiction, facilitate the coherence and compatibility of remedies, enhance the investigative efficiency of the reviews, and reduce the burden on the transacting parties.[197]

American Bar Association Fall Forum (Nov. 7, 2002), *at* www.usdoj.gov/atr/public/speeches/200442.htm [hereinafter Kolasky]; Majoras, *supra* note 193.

195. *See, e.g.*, Kolasky, *supra* note 194; William J. Kolasky, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, Global Competition: Prospects for Convergence and Cooperation, Remarks before the American Bar Association Fall Forum (Nov. 7, 2002), *at* www.usdoj.gov/atr/public/speeches/200446.htm.

196. *See* Press Release, U.S. Dep't of Justice, Antitrust Div., United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Merger Reviews (Oct. 30, 2002), *available at* www.usdoj.gov/atr/public/press_releases/2002/200407.htm; Press Release, Federal Trade Comm'n, United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Merger Reviews (Oct. 30, 2002), *available at* www.ftc.gov/opa/2002/10/euguidelines.htm.

197. *See* Majoras, *supra* note 193.