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International Antitrust Law

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I. Developments in Australia

A. The Federal Government's Review of Competition Regulations

On April 16, 2003, the Australian Government released the report of an independent public inquiry's review of the antitrust provisions of the Trade Practices Act (TPA) (Dawson Report).[1] The Dawson Report was hailed by most members of the business sector as a balanced response to the competing interests of large and small businesses and consumer groups.

The recommendations in the Report were aimed at facilitating greater transparency and certainty in the Australian Competition and Consumer Commission's (ACCC) administrative dealings, modernizing the TPA, and amending the laws to redress any imbalances in the rights of consumers as against business.

The report made recommendations in the following categories: mergers, civil penalties, and search and seizure of documents. The recommendations were accepted by the Federal Government and are expected to be translated into legislation by the end of 2004.

1. *Mergers*

Parties are currently permitted to approach the ACCC informally to seek the organization's assurance that it will not take any action to prevent a merger from taking place.

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1. Trade Practices Act Review, *available at* http://tpareview.treasury.gov.au/content/home.asp (last visited May 27, 2004).

(A formal authorization process also exists, by which mergers which would otherwise contravene the TPA can be approved, non-confidentially, on the basis of public benefit.)

The Report identified a lack of effective review mechanisms and the absence of reasons for the ACCC's decisions in the informal clearance process. It recommended that the ACCC provide, on an applicant's request, adequate reasons for its decisions (subject to confidentiality) if they are requested by the parties. For example, the ACCC may be asked to explain why it rejects a merger or accepts undertakings.

Further, the Report recommended that new voluntary formal clearance procedures be introduced (which parallel the existing informal clearance process) under which parties would receive binding clearance and immunity from third-party action with limited right of appeal to a tribunal.

2. *Civil Penalties*

The Report also recommended strengthening penalties for contravention of the TPA. Recommendations included: (1) a financial penalty that is the greater of $10 million, three times the gain from each contravention or, where the gain cannot be calculated, a penalty calculated by reference to turnover; (2) giving the courts the option of excluding individuals from company directorships or management; and (3) preventing corporations from indemnifying officers, employees or agents either directly or indirectly from any liability for a penalty. The Federal Government has accepted each of these recommendations.

3. *Search and Seizure of Documents*

The ACCC currently has extensive powers under section 155 of the TPA to obtain documents and information from companies and individuals. The ACCC may raid a company's premises, without prior notice, for the purposes of a search and seizure. The Report recommended that, in order to undertake such a search, the ACCC should first be required to obtain a warrant from a judge or magistrate.

B. Mergers: Australian Gas Light Company—Acquisition of Stake in Loy Yang A Power Station[2]

For the first time since the commencement of the TPA in 1974, the Federal Court of Australia has considered and ruled on the merger prohibition under section 50 of the TPA.

A dispute broke out between major electricity/gas retailer the Australian Gas Light Company (AGL) and the ACCC in late 2003, over AGL's proposed acquisition of a stake in the Loy Yang A power station as part of a consortium in which it held a thirty-five percent stake. The ACCC publicly opposed the acquisition on grounds that it would increase barriers to entry to the wholesale and retail market for the supply of electricity. As the ACCC could prosecute the merger parties for breaching section 50 of the TPA if they proceeded with the transaction, AGL took the pre-emptive step of seeking a declaration from the Federal Court of Australia that its acquisition did not breach the merger prohibition under section 50 of the TPA. The Federal Court granted the declaration on the basis of undertakings given by AGL about the role it would play in the management and control of the power station. The judgment contains an extensive and systematic consideration of the elements of the merger prohibition.

2. Australian Gas Light Co. v. Australian Competition & Consumer Comm'n [No 3] 2003 FCA 1525 (Austl.).

This decision has important implications for the antitrust review of international mergers involving Australia. The decision establishes a detailed legal precedent which will inform future ACCC deliberations. It also shows that merger parties need not always accept, and can seek judicial review of, an ACCC determination.

C. Cartels and the ACCC's Leniency Policy

On June 27, 2003, the ACCC released a leniency policy for cartel conduct.[3] This policy is said to encourage the voluntary disclosure of cartel conduct, such as price fixing, market sharing (including bid rigging or customer sharing), and production or sales quotas, by providing whistleblowers with conditional immunity. Under this policy, a whistleblower (company or individual) would be able to approach the ACCC on a hypothetical basis to determine whether they will be afforded immunity before making the decision to disclose information.

The policy only applies to the first applicant for leniency. Subsequent applicants can apply under the ACCC's Cooperation Policy for Enforcement Matters. If the ACCC is unaware of the cartel, the first company or individual to come forward will receive an offer of conditional immunity from ACCC-instituted court proceedings. If the ACCC is aware of a cartel but has insufficient evidence to institute court proceedings, the first company or individual to come forward will receive an offer of conditional immunity from civil pecuniary penalties.

D. Misuse of Market Power

1. *Australian Competition & Consumer Commission v. Boral Ltd.*[4]

As reported in last year's review, the ACCC claimed that Boral engaged in predatory pricing in the concrete masonry products market, in breach of section 46 of the TPA.[5] The ACCC alleged that Boral tried to eliminate one of its competitors during a price war among manufacturers of concrete masonry products in Melbourne.

The Federal Court found that Boral had market power due to its financial resources and its consequent ability to engage in long-term pricing below avoidable cost. This finding came as a surprise to many, given that none of the traditional signs of market power were present: there were no substantial barriers to entry; Boral was neither able to impose sustainable price increases, nor was it in a position to refuse to deal.

The High Court reversed the Federal Court's decision on appeal on the grounds that Boral did not possess *substantial* market power, as required by section 46 of the TPA.[6] The High Court found that substantial market power required more than the existence of a financially well-resourced company in a concentrated market. The High Court also took into account the fact that Boral's price-cutting took place in the context of a highly competitive price war and its ability to recoup its losses at a later stage.

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3. Australian Competition and Consumer Commission, leniency policy for cartel conduct, *available at* http://www.accc.gov.au/content/index.phtml/itemId/454181 (June 30, 2003).

4. Boral Besser Masonry Ltd. (now Boral Masonry Ltd.) v. Australian Competition and Consumer Comm'n (2003) 195 A.L.R. 609 (Austl.) [hereinafter Boral 2].

5. *See* (2001) 106 F.C.R. 328 (Austl.).

6. Boral 2, *supra* note 4.

E. International Jurisdiction—Cartels

1. *Bray v. F. Hoffmann-La Roche*[7]

This case concerned a class action brought in the Federal Court involving an international vitamin price-fixing and market-sharing cartel that operated worldwide during the 1990s and resulted in a number of prosecutions in the United States, Canada, and Europe. Bray and other applicants who had purchased vitamins or products containing vitamins, such as animal feeds, during the period in which the cartel operated, claimed damages and other relief under the TPA from several companies, including foreign companies against whom Bray invoked the Federal Court's long-arm jurisdiction.

Much of the cartel conduct in dispute occurred outside Australia, giving rise to an important jurisdictional question: did the TPA apply? The TPA is limited to conduct that either occurs in Australia or is engaged in outside of Australia by a corporation (including a foreign corporation) "carrying on business within Australia."[8] Many of the respondents had Australian subsidiaries, but the trial judge held that those subsidiaries were not carrying on the business of the parent companies in Australia. Instead, they were held to be carrying on their own business, rather than functioning as a mere extension of the parent company. The trial judge held, and this conclusion was not questioned on appeal, that something more than the indirect commercial ability of a parent company to direct and control its subsidiaries was needed in order to lift the corporate veil.

Despite this conclusion, the trial judge found (on a preliminary basis) that there was enough evidence to support inferences that the foreign respondents engaged in conduct *in Australia*. The trial judge held that, in giving effect to the cartel arrangements entered into by the parent companies, the subsidiaries were acting as the agents of their foreign parents. As a result foreign parent companies were found to have engaged in conduct in Australia through their subsidiaries, who were acting as agents. The Full Court of the Federal Court upheld the trial judge's decision.

F. International Cooperation

The ACCC announced during 2003 that it had entered into a cooperation agreement with agencies in the United Kingdom and New Zealand concerning consumer protection and exchange of information, including confidential information.[9] The ACCC is also conducting discussions with the Japan Fair Trade Commission about entering into a formal cooperation agreement.

II. Developments in Canada

A. New Commissioner Appointed

On November 10, 2003, the Canadian Minister of Industry announced the appointment of Ms. Sheridan Scott as the new Commissioner of Competition (Commissioner) effective

7. Bray v. F. Hoffmann-La Roche Ltd. (2003) 200 A.L.R. 607 (Austl.).
8. *See* Trade Practices Act, 1974, §5(1) (Austl.).
9. Press Release, Australian Competition and Consumer Comm'n, ACCC enters into cooperation arrangement with agencies in United Kingdom, New Zealand (Oct. 17, 2003), *available at* http://www.accc.gov.au/content/index.phtml/itemId/387740.

January 12, 2004.[10] The former Commissioner, Konrad von Finckenstein, was appointed to the Federal Court, Trial Division, on August 14, 2003. Ms. Scott has previously served as Staff Attorney at the Canadian Radio-Television and Telecommunications Commission, Vice-President of Regulatory Affairs at the Canadian Broadcasting Corporation and, most recently, Chief Regulatory Officer for Bell Canada.

B. New Round of Amendments Proposed

On June 23, 2003, the Government of Canada released a discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (Discussion Paper).[11] The Discussion Paper details the latest series of proposed amendments to the Competition Act (Act),[12] a number of which would significantly alter competition law enforcement in Canada if enacted.[13] A major theme of the Discussion Paper is the alleged need to expand the types of penalties available under the Act in order to enhance deterrence. For example, one proposal would authorize the Competition Tribunal (Tribunal) to impose "administrative monetary penalties" (or fines) for contravening the Act's non-merger civil provisions, including abuse of dominance, tied selling, exclusive dealing, and refusal to deal. Such conduct is currently only subject to injunctive relief under the Act. Another proposal would authorize the Tribunal to order respondents to pay injured consumers restitution in certain misleading advertising cases[14] and remove the current cap on administrative fines for these practices. The Discussion Paper also proposes allowing private parties to bring civil actions in the courts for damages arising from conduct found by the Tribunal to be contrary to the Act's non-merger civil provisions. The current private right of action available under the Act is limited to parties who have suffered damage from contraventions of the Act's criminal provisions or for breaches of Tribunal orders in civil matters.

The Public Policy Forum (PPF), an independent body designed to foster public policy dialogue, is conducting a national consultation process to solicit comments on the Discussion Paper.[15] The PPF will prepare a report for the Commissioner in 2004, which will set out principles for the Canadian Government to consider if it proceeds in drafting legislation along the lines set out in the Discussion Paper.[16]

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10. News Release, Competition Bureau, Allan Rock Announces Appointment of Sheridan Scott as New Commissioner of Competition (Nov. 10, 2003), *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02768e.html.

11. Discussion Paper, *Options for Amending the Competition Act: Fostering a Competitive Marketplace, available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02584e.html (June 2003).

12. R.S.C. 1985, c. C-34.

13. The Discussion Paper includes draft provisions relating to most of the proposed amendments.

14. The Tribunal would also be authorized to issue "accessory orders" to prevent a party from depleting its assets in order to avoid the restitution obligation.

15. Comments submitted to the PPF as part of the consultation process can be accessed via the website, *at* http://www.ppforum.com/competitionact/index.html (last visited May 27, 2004).

16. Canada (Comm. of Competition) v. Superior Propane, Inc., 2000 Comp. Trib. 15 (Aug. 30, 2000), *available at* http://www.ct-tc.gc.ca/english/cases/propane/propane.html. The entire Tribunal panel agreed that the merger would prevent or lessen competition substantially in many local propane markets in Canada, as well as in the market for national account coordination services associated with the delivery of propane. However, a majority of the panel concluded that the efficiency gains likely to be generated by the merger ($29.2 million per year for ten years) were greater than, and offset, the likely anticompetitive effects of the merger (a maximum of $6 million per year for ten years).

C. MERGERS

Merger news in 2003 was dominated by the conclusion of the *Superior Propane* case,the first to consider the proper application of the Act's "efficiencies" provision.[17] The Tribunal had initially allowed Superior's acquisition of ICG Propane to proceed on the grounds that the efficiencies generated would outweigh the substantial lessening of competition caused by the merger.[18] That decision was later overturned by the Federal Court of Appeal (FCA). The matter was remitted to the Tribunal for re-determination with the instruction that the resulting merger-generated efficiencies be weighed against: (1) the deadweight loss to the economy; (2) the qualitative reduction in non-price competition; and (3) the quantifiable socially-adverse redistributive effects flowing from the merger.[19] Employing these criteria, the Tribunal held again in its re-determination decision that the merger's efficiencies were greater than, and offset, the effects of the resulting lessening or prevention of competition.[20]

The Commissioner then appealed the Tribunal's re-determination to the FCA on the basis that the Tribunal had failed to properly follow the FCA's instructions. On January 31, 2003, the FCA upheld the Tribunal's decision by a two to one majority, holding that the Tribunal's methodology was in "accord with both the direction and latitude given to it by the [FCA]" in the Court's first judgment.[21] The FCA also rejected the Commissioner's argument that the Act's efficiencies provision should not be applied to permit a "merger to monopoly." The majority concluded that the creation of a monopoly should not in and of itself be reason to prohibit a merger from proceeding where it otherwise generates sufficient efficiencies to meet the statutory test.

In other merger-related developments, the thresholds and fees under Canada's pre-merger notification regime were amended effective April 1, 2003.[22] As a result, the current "size-of-transaction" threshold for pre-merger notification has increased from C$35 million to C$50 million (the $400 million "size of the parties" threshold remains the same). In addition, the fees for filing pre-merger notifications and applying for Advance Ruling Certificates were increased from C$25,000 to C$50,000. The Bureau has also begun projects to update its 1991 *Merger Enforcement Guidelines*[23] and 1998 *Merger Enforcement Guidelines*

17. Section 96 of the Act provides that the "Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made." R.S.C. 1985, c. C-34, *supra* note 12, § 96.

18. Canada (Comm. of Competition) v. Superior Propane, Inc., 2000 Comp. Trib. 15 (Aug. 30, 2000), *available at* http://www.ct-tc.gc.ca/english/cases/propane/propane.html. The entire Tribunal panel agreed that the merger would prevent or lessen competition substantially in many local propane markets in Canada, as well as in the market for national account coordination services associated with the delivery of propane. However, a majority of the panel concluded that the efficiency gains likely to be generated by the merger ($29.2 million per year for ten years) were greater than, and offset, the likely anti-competitive effects of the merger (a maximum of $6 million per year for ten years).

19. Canada (Comm. of Competition) v. Superior Propane, Inc., 2001 FCA 104.

20. Canada (Comm. of Competition) v. Superior Propane, Inc., 2000 Comp. Trib. 16, *available at* http://www.ct-tc.gc.ca/english/cases/propane/propane.html (last visited May 27, 2004).

21. Canada (Comm. of Competition) v. Superior Propane, Inc., 2003 FCA 53.

22. *See* News Release, Competition Bureau, Threshold and Fees for Merger Notification to Increase and Written Opinions to Become Binding on Commissioner of Competition on April 1, 2003, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02536e.html (March 24, 2003).

23. Competition Bureau, *Merger Enforcement Guidelines, available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01026e.html (March 1991). Among other topics, the review will examine issues

as Applied to a Bank Merger (BMEG).[24] Drafts containing proposed changes are expected to be released for comment in 2004. Finally, the Canadian Government introduced draft legislation to amend the review process for mergers in the transportation sector.[25]

D. Criminal Enforcement

The Bureau continued to emphasize enforcement of the Act's conspiracy and price maintenance provisions in 2003, with guilty pleas resulting in fines imposed on both corporations and individuals.[26] As in past years, a large number of these guilty pleas involved international cartels, including with respect to methylglucamine, choline chloride, polyester staple fibre, graphite electrodes, and isostatic graphite.

In another sign of the importance of international cooperation in this area, the Bureau signed a cooperation arrangement with the U.K. competition authorities.[27] A similar agreement with Mexico came into force in 2003.[28]

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such as: the Act's definition of "merger"; how a merger may "prevent" (rather than lessen) competition; unilateral effects versus interdependence (coordinated effects); market definition; non-price effects of a merger; innovation; failing firms; buying power; and vertical mergers.

24. Competition Bureau, *The Merger Enforcement Guidelines as Applied to a Bank Merger*, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02484e.html (last visited May 27, 2004). In June 2003, the Minister of Finance issued a moratorium on certain bank mergers until at least September 2004. The Bureau's review of the BMEGs is designed to take place during this moratorium and in anticipation of Canada's largest banks being able to apply for approval to merge after the moratorium is lifted.

25. Bill C-26, *An Act to Amend the Canada Transportation Act and the Railway Safety Act, to Enact the VIA Rail Canada Act and to Make Consequential Amendments to Other Acts* (2nd Sess., 37th Parl., 51-52 Eliz. II, 2002–2003) (Mar. 20, 2003), *available at* http://www.parl.gc.ca. Background materials on Bill C-26 *available at* http://www.tc.gc.ca (last visited May 27, 2004).

26. *See* News Releases, Competition Bureau, Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02499e.html (Feb. 17, 2003); Rhône-Poulenc Biochimie S.A. Sentenced To $500,000 Fine Following Competition Bureau Price Fixing Investigation, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02507e.html (Feb. 27, 2003); Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02539e.html (Mar. 28, 2003); Competition Bureau Investigation Results in Guilty Plea for Price Maintenance of Isostatic Graphite, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02559e.html (Apr. 15, 2003); Competition Bureau Investigation Nets $600,000 Fine from Bioproducts Incorporated, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02712e.html (Aug. 19, 2003); Competition Bureau Probe Nets $2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02711e.html (Aug. 19, 2003); Competition Bureau Nets $1.5 Million Fine in Polyester Staple Fibre Price Fixing Conspiracy, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02715e.html (Aug. 29, 2003); Former UCAR Executive Robert Krass Pleads Guilty to Price-Fixing, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02723e.html (Sept.18, 2003).

27. *See* News Release, Competition Bureau, Cracking Down on Cross-Border Scams: Competition Bureau Signs Cooperation Arrangement with U.K. Counterparts, available at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02730e.html (Oct. 14, 2003).

28. *See* News Release, Competition Bureau, Canada-Mexico Cooperation Agreement on Competition Law Enforcement Comes into Force, *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02510e.html (Apr. 11, 2003).

III. Developments in China

A. Introduction

The People's Republic of China moved closer to developing an emerging competition law system in 2003, even though China's Law Against Unfair Competition (LAUC) has been in force for a decade. In addition, there has been a draft Anti-Monopoly Law for which public comments have been solicited.[29] The new pricing rules and foreigners-only merger review rules already implement some provisions from the draft Anti-Monopoly Law.

B. New Pricing Rules

One of the most important competition law developments in China during 2003 was the adoption of the Provisional Rules Prohibiting Monopolistic Pricing (Pricing Rules) by the State Development and Reform Commission (SDRC), which went into effect on November 1, 2003. These rules were adopted under the authority of the Pricing Law. The SDRC is empowered to interpret the Pricing Rules, while the competent price regulators under article 40 of the Pricing Law will have authority to determine the legality of challenged conduct and impose penalties.[30] The Pricing Rules are similar to provisions in the draft Anti-Monopoly Law.

Monopolistic pricing conduct under the Pricing Rules is defined as collusion among "operators" or abuse of dominant market position by operators to manipulate market prices and disrupt normal, orderly production and management, damaging the lawful interest of other operators or consumers or the "social and public interest."[31] "Dominant market position" will be determined mainly by factors such as market share in the relevant market, substitutability of the products concerned, and entry barriers.[32]

The Pricing Rules prohibit illegal cartels. Operators may not enter into agreements, resolutions, or coordinated arrangements to jointly engage in the following conduct:

- fixing, maintaining, or changing prices;
- restricting output or supply and manipulating prices;
- price manipulation in bids or auctions; or
- other price manipulation conduct.[33]

C. Foreigner-Acquisition Rules

On March 13, 2003, the Ministry for Foreign Trade and Economic Co-operation (MOFTEC) adopted the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Foreigner-Acquisition Rules), which could constitute a

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29. *See* Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice Sections on the Proposed Anti-monopoly Law of the People's Republic of China, *at* http://www.abanet.org/antitrust/comments/jointsubmission.pdf (last visited Mar. 25, 2004) [hereinafter ABA Comments on China's Proposed Anti-Monopoly Law].

30. Provisional Rules Prohibiting Monopolistic Pricing, arts. 10, 15 (2003) [hereinafter Pricing Rules].

31. *Id.* art. 2. As is common practice and similar to the draft Anti-monopoly Law, there is no definition for "operators" or "social and public interest" in the Pricing Rules.

32. *Id.* art. 3. This rule differs from similar rules in the draft Anti-monopoly Law, which follow a more structural, market-share determined test.

33. *Id.* art. 4. Trade associations are also barred from engaging in the prohibited conduct; *see also Id.* art. 14.

discriminatory form of merger review applicable only to acquisitions by foreigners.[34] The Foreigner-Acquisition Rules also contemplate a number of policy objectives unrelated to competition law which could complicate the review of mergers by Chinese authorities.[35]

The Foreigner-Acquisition Rules require a pre-merger filing with MOFTEC and the State Administration for Industry and Commerce (SAIC) if certain market power, evidenced by alternative tests, is demonstrated.[36] However, where necessary, filing will be required even if any of the alternative market power tests are not met.[37] If MOFTEC and SAIC believe there is a risk of over-concentration, inhibition of fair competition, or harm to consumers' interest, they should hold hearings and approve or disapprove the reported transaction within ninety days from the filing of complete documents.[38]

When an acquisition abroad that has the potential to adversely impact the market in China, the Foreigner-Acquisition Rules also require a filing.[39] This rule is intended to prevent round-tripping and round-about acquisitions that would gain effective control over operations and assets in China.

The Foreigner-Acquisition Rules provide exemptions from review by MOFTEC and SAIC. The grounds for exemptions are not necessarily related to competition law considerations.[40]

IV. Developments in the European Union

A. European Community Competition Law

1. *Anti-competitive National Legislation: Powers and Obligations of National Competition Authorities*

On September 9, 2003, the European Court of Justice (EC Court) delivered its judgment in *Consorzio Industrie Fiammiferi*.[41] The judgment provides important guidance on the obligations of national competition authorities when confronted with anti-competitive national legislation.

34. *See* ABA Comments on China's Proposed Anti-Monopoly Law, *supra* note 29, at 31–32.

35. *See* Pricing Rules, *supra* note 30, arts. 1 & 3.

36. *Id.* art. 19. The alternative tests are: (1) annual turnover of RMB¥1.5 or more in China by either party; (2) ten or more annual cumulative acquisitions in the relevant industry; (3) twenty percent market share or more by either party in China before the transaction; or (4) acquiring party enjoying a twenty-five percent market share or more in China after consummating the transaction.

37. *Id.* art. 19. Therefore, entities like competitors, trade associations, MOFTEC and SAIC may demand a filing if it is believed the transaction involves too much market share or will give rise to other serious concerns to market competition, "national livelihood" or "national economic security."

38. *Id.* art. 20.

39. *Id.* art. 21. The alternative tests are: (1) assets in China held by either party reaching RMB 3 billion; (2) annual turnover of RMB 1.5 billion or more in China by either party; (3) twenty percent market share or more by either party in China before the transaction; (4) acquiring party enjoying a twenty-five percent market share or more in China after consummating the transaction; or (5) as a result of the acquisition abroad, the acquiring party will own directly or indirectly fifteen companies in the relevant industry.

40. *Id.* art. 22. The grounds for exemption are that the proposed acquisition involves: (1) improvement of fair competition; (2) re-organization of insolvent enterprises and protecting employment; (3) introducing advanced technologies, management talents, and enhancing international competitiveness; or (4) improving environment protection.

41. Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, C-198/01 [hereinafter CIF].

The case concerned a decision of the Autorità Garante della Concorrenza e del Mercato, the Italian national competition authority (Italian Authority), which declared that legislation (dating back to 1923) establishing and governing the Consorzio Industrie Fiammiferi (CIF), an Italian consortium of domestic match manufacturers, was contrary to articles 10 and 81 of the EC Treaty. The Italian Authority also found that the CIF and its members had infringed article 81 through the allocation of production quotas and ordered them to terminate the infringements.

The CIF appealed the Italian Authority's decision and the Italian court hearing the appeal sought the opinion of the EC Court[42] on issues of EC competition law. The Italian Court asked the EC Court the following question:

> Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, does Article 81 EC require or permit the national competition authority to disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future, and if so, with what legal consequences?[43]

The Court's reply supported the approach adopted by the Italian Authority. It said:

> Where undertakings engage in conduct contrary to Article 81(1)EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed:
>
> - has a duty to disapply the national legislation;
> - may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;
> - may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;
> - may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.[44]

In relation to firms that are required by national law to engage in anti-competitive conduct, the EC Court confirmed that those firms should not be penalized. It said that the duty of national competition authorities to disapply an anti-competitive national law cannot expose the firms concerned to any penalties, either criminal or administrative, with respect to past conduct that was required by the law concerned. However, once the national competition authority's decision finding an infringement of article 81 and disapplying the anti-competitive national law becomes definitive, the decision becomes binding on the firms concerned. From that time on, the firms can no longer claim that they are obliged to act in breach of the EC competition rules. Anti-competitive conduct on their part after the decision may place them at risk of penalty. The EC Court also confirmed that where a national law merely encourages, or makes it easier for, firms to engage in autonomous anti-

42. Pursuant to art. 234 of the EC Treaty.
43. CIF, *supra* note 41.
44. *Id.*

competitive conduct, those firms remain subject to articles 81 and 82 and may incur penalties.

B. EC Merger Control Regulation

1. *EC Merger Control Regulation: Adoption of New Text*

a. Introduction

Following a review and consultation process initiated by the European Commission in 2001,[45] the Council of Ministers meeting in Brussels on November 27, 2003[46] unanimously agreed to replace the current EC Merger Control Regulation,[47] which was adopted in 1989,[48] with the text of a new EC Merger Control Regulation.[49] The new regulation applies from May 1, 2004. This date is significant for two reasons: first, it is the date for the enlargement of the European Union with the accession of ten new Member States,[50] and second, it is the date on which the new procedural regulation for EC competition law[51] enters into force.[52]

The new EC Merger Control Regulation introduces important changes in the substantive criterion for the appraisal of transactions, in the jurisdictional arrangements between the European Commission and the Member States, and finally in the procedure for the notification and review of transactions.

b. Substantive Criterion for Appraisal

In relation to the substantive criterion by which mergers are appraised, a new formulation is introduced in article 2 of the new regulation. The 1989 regulation identified "the creation or strengthening of a dominant position" as the criterion for the substantive review of notified transactions.[53] The new regulation provides that a merger should be prohibited if it "would significantly impede effective competition, in the common market or in a substantial part of it, as a result of the creation or strengthening of a dominant position."[54]

By retaining a reference to dominance, it is intended that the new formulation of the substantive test should preserve the value of the case law on dominance that the Commission had developed in the context of merger control under the 1989 regulation. However, the principal purpose of the new formulation is to clarify and facilitate the application of the EC merger control rules to unilateral effects in oligopoly situations.

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45. *See generally* Oliver Borgers et.al., *International Antitrust Law*, 37 Int'l Law 305, 316 (2003) [hereinafter Borgers].

46. *See* Press Release, European Commission, Commission welcomes agreement on New Merger Regulation, *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1621 101RAPID (Nov. 27, 2003).

47. Council Regulation 4064/89, 1989 O.J. (L 395) 1, *amended by* Council Regulation 1310/97, 1997 O.J. (L 180) 1, 1998 O.J. (L 40) 17 [hereinafter 1989 Regulation].

48. The 1989 Merger Control Regulation was amended in 1997 by Council Regulation 1310/97, 1997 O.J. (L 180) 1.

49. Council Regulation 139/2004, 2004 O.J. (L 24) 1 [hereinafter new Regulation].

50. Poland, Hungry, Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Cyprus, and Malta.

51. Council Regulation 1/2003, 2003 O.J. 37.

52. *See* Borgers, *supra* note 45, at 313.

53. 1989 Regulation, *supra* note 47, art. 2.

54. New Regulation, *supra* note 49, art. 2(3).

c. Jurisdictional Rules

With respect to jurisdictional issues, the new regulation retains the approach of the 1989 regulation in relation to the identification of the type and size of transactions which will fall within the Commission's exclusive merger control jurisdiction. The new regulation's definition of the term "concentration,"[55] which it uses to cover mergers, takeovers, acquisitions, and certain joint ventures, is substantially unchanged from the 1989 regulation. The new Regulation also carries over the turnover thresholds, introduced into the 1989 regulation by the 1997 amending regulation, and leaves them unchanged.[56]

However, the new regulation introduces a number of significant changes in the allocation of cases between the European Commission and the national competition authorities (NCA) of the Member States. Almost all Member States have their own national systems of merger control, and the 1989 regulation included mechanisms for the allocation of jurisdiction in individual cases between the European Commission and the NCAs. Under article 9 of the 1989 regulation, the European Commission could refer a notified transaction to a NCA for review. Article 22 provided for a procedure by which a NCA or a number of NCAs jointly could refer a case notified at national level to the European Commission for review. The parties to a transaction, however, could not initiate a request for referral, and requests for referral could only be made after notification.

d. Procedural Reform

The new regulation also introduces a number of procedural reforms, in particular:

- Notifications may now be filed prior to the conclusion of a binding agreement when the parties demonstrate to the European Commission a good faith intention to conclude an agreement.[57] The new regulation abolishes the requirement that transactions must be notified within a week of the conclusion of an agreement.
- The new regulation also introduces changes in the time frame for conducting merger investigations. The time limits imposed on the Commission are now expressed in working days rather than calendar months. Phase I investigations should take twenty-five working days[58] and Phase II investigations should be completed within ninety working days[59] of the initiation of the Phase II proceedings. In cases where the parties offer remedies, Phase I investigations may be extended to thirty-five working days.[60] In a Phase II investigation, an additional fifteen working days may 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. In addition, with the agreement of the merging parties, up to twenty working days may be added to the timetable in Phase II proceedings.[61]

The European Commission's powers of investigation in merger cases are strengthened by the new regulation.[62] The powers are now essentially identical to the powers granted to the European Commission under Regulation 1/2003 for the enforcement of competition

55. *Id.* art. 3.
56. *Id.* art. 1 (2) & (3).
57. *Id.* art. 4(1).
58. *Id.* art. 10(1).
59. *Id.* art. 10(3).
60. *Id.* art. 10(1).
61. *Id.* art. 10(3).
62. *Id.* art. 11, 12 & 13.

law. The power of the Commission to impose fines is also strengthened where a firm fails to supply information requested or where it supplies incorrect or misleading information.

V. Developments in Mexico

A. Monopolistic Practices

1. *Alleged Monopolistic Practices Relating to Wholesale Acquisition, Distribution and Trading of Goods in Retail Stores*

In May 2002, the Federal Competition Commission (FCC) opened an investigation into alleged monopolistic practices in retail stores, specifically involving actions allegedly designed to block competitors' access to products and to establish exclusive advantages. The main retail store chains operating in Mexico were requested to provide information and documents. The FCC also requested information from thirteen suppliers to investigate, among other issues, whether retail stores had exerted pressure so that the sales prices of their products should be lower than those offered to other clients.

As to charges made against Walmex, the FCC investigated whether Walmex tried to exert pressure upon suppliers to charge high prices to Walmex's competitors, under threat of having their products delisted. Despite the high profile press coverage of this case, the FCC did not receive any formal complaints against Walmex during the investigation. The FCC voted in March 2003 to close the investigation, concluding that the allegations had not been proven.

2. *Alleged Monopolistic Practices in the Market for Distribution of Tickets for Air Transportation*

The FCC closed an investigation commenced in 2002 due to a lack of evidence to support allegations of monopolistic practices involving ticket distribution in the air transportation service market. The proceeding began in September 2002, when the National Association of Travel Agencies filed a complaint for monopolistic practices against the International Air Transport Association (IATA), several airlines, and various travel agencies. The complaint alleged monopolistic practices in the distribution and trading of tickets for air transportation service. On October 23, 2002, the complaint was admitted and the investigation regarding alleged monopolistic practice started.

The following IATA aspects were the focus of the complaint: (1) IATA's acceptance of security deposits from only certain financial agencies; (2) IATA's application of charges as a result of ticket cancellation; (3) IATA's performance of audits at any moment, for which the charge would be roughly US$500; and (4) the IATA's charge to customer's for access to website pages through which certain operations were conducted.

Based on the information provided by IATA, the FCC decided to dismiss the alleged charges. IATA showed that:

- Travel agencies are able to enter into agreements with several financial companies;
- IATA charges for cancelled tickets only those travel agencies that exceed the margin of reasonable mistakes in the distribution of tickets;
- Audits begin when there is reason to believe that an agent does not conform with the goals established and, in the case of failure, this would cause the termination of the travel agencies' contracts with IATA; and
- The web site has been available since January 2001 with the goal of achieving an efficient invoicing and payment system and reducing costs of stationary and courier services. It was

considered that in its implementation, travel agencies were given enough time to adapt to the new system.

B. Mergers and Acquisitions

1. *Acquisition of Wella by Procter & Gamble*

This transaction involved product overlaps in Mexico in the relevant markets of production and distribution of shampoos, conditioners, styling products, dying hair products, cosmetics, and fragrances. The geographic market was national because the relevant products: (1) were distributed on a national basis; (2) were acquired by Mexican retailers of this activity; or (3) were imported, distributed and positioned within national markets.

The applicable merger indexes in the relevant markets and in each price segment were within the thresholds established by the FCC, with the exception of the low price hair dyers segment. As to the hair dryer segment, the FCC concluded that other competitors, such as L'Oréal and Revlon, were able to enter easily. Thus, no adverse effects on the competition process were foreseen, and the transaction was cleared without conditions.

2. *José Cuervo and Don Julio*

This transaction involved the acquisition on behalf of José Cuervo of shares of stock from Don Julio, a subsidiary of Diageo. As a consequence, José Cuervo sought to acquire shares in Don Julio subsidiaries.

There was a competitive overlap in the generic tequila market, which is a national market. The tequila market involves two issues: production and sale of tequila, and the production of an "Agave Tequiliana Weber Blue" variety, the plant from which the raw Tequila liquid is extracted.

The results of the merger indexes were within the established frame applied by the FCC, and other important competitors in the market were identified. Therefore, adverse effects to the competition process were unlikely to be caused by the transaction.

VI. Developments in New Zealand

A. Regulatory Control

1. *Telecommunications*

With a year's familiarization with new Telecommunications legislation,[63] telecommunications service providers in 2003 took full advantage of provisions that enable recourse to the Commerce Commission for resolving access disputes.[64] Most of those applications were by competitors of the incumbent (formerly state-owned) Telecom, seeking access to its network.[65] The Commission has general powers to determine "price" and "non-price" terms of interconnection.

63. Telecommunications Act, 2001 (N.Z.).

64. The Telecommunications Commissioner is a specialist member of the Commission designated for this purpose.

65. *See, e.g.*, Commerce Commission, *Decision 497—Determination on the TelstraClear Application for Determination for "Wholesale" Designated Access Services, available at* http://www.comcom.govt.nz/telecommunications/accdet/tclwd12may2003.pdf (May 12, 2003).

In 2003, the Commission also took advantage of a more specific power to investigate whether competitors of Telecom ought to be entitled access to the unbundled elements of Telecom's local loop network and fixed Public Data Network. This would allow competitors to use parts of Telecom's network on a wholesale basis in order to compete in providing retail services. The Commission's draft determination, released in September,[66] suggested substantial net benefits from unbundling. However, in its final determination, released in late 2003, the Commission recommended unbundling only for the fixed Public Data Network.[67] Its change of heart was based on a market-led solution proposed by Telecom, which the Commission intends to monitor and revisit in mid 2004.

2. *Dairy*

In 2003, the Commission issued two determinations under the 2001 Dairy Industry Restructuring Act (DIRA). That legislation authorized the creation of the dairy co-operative Fonterra (New Zealand's largest company) and, as a quid pro quo, provided for a regulatory regime designed to promote competition in dairy markets in New Zealand. The first determination related to a dispute between Fonterra and a small processor to whom Fonterra was required, under regulations made under the DIRA,[68] to supply raw milk.[69] In the absence of an agreement between Fonterra and a processor, the regulations provided for a default price for the supply of raw milk. The decision raises an interesting issue concerning whether Fonterra is entitled to cut off supply to a processor that is not creditworthy. The Commission found that Fonterra was entitled to cut off supply. However, in such circumstances, if Fonterra chose to supply, it must be at the default price provided under the regulations. The other determination made by the Commission in 2003 relates to setting a discount rate for calculating Fonterra's annualized share value.[70] Ordinarily, Fonterra is entitled to set this rate, except where it fails to use a cost of capital rate in calculating its co-operative share price. The Commission and Fonterra disagreed about the appropriate methodology for calculating the discount rate.

B. MERGER ACTIVITY

Although the level of merger and acquisition activity in the market continued to decline in 2003, mergers that were referred to the Commission (as part of New Zealand's voluntary clearance regime) were almost invariably approved. This trend has continued since 2002

66. *Telecommunications Act 2001: Section 64 Review and Schedule 3 Investigation into Unbundling the Local Loop Network and the Fixed Public Data Network, Amended Draft Report, available at* http://www.comcom.govt.nz/telecommunications/llu/Draft10Oct2003.pdf (October 2003).

67. In particular, to enable improved competition for broadband Internet services in the residential and SME markets. *See* Commerce Commission, *Local Loop and Fixed Public Data, at* http://www.comcom.govt.nz/telecommunications/localloop.cfm (Dec. 22, 2003).

68. Dairy Industry Restructuring (Raw Milk) Regulations, 2001 (N.Z.).

69. Commerce Commission, *Decision 503—Determination in the Matter of an Application for Determination of a Dispute Under the Dairy Industry Restructuring Act 2001, Involving Independent Dairy Producers Limited and Fonterra Co-operative Group Limited* (June 30, 2003), *available at* http://www.comcom.govt.nz/dairy/docs/Final%20Determination_%20IDP_Fonterra%20-%2027%20June%202003.pdf.

70. Commerce Commission, *Decision 501- Determination in the Matter of an Application for Determination of a Dispute Under the Dairy Industry Restructuring Act 2001 and Dairy Industry Restructuring Raw Milk Regulations 2001* (June 12, 2003), *available at* http://www.comcom.govt.nz/dairy/docs/discountratefinaldetermination13June2003.pdf.

despite persistent concerns of businesses that the "substantial lessening of competition test" introduced in 2001 will make it more difficult for mergers to be approved than under the former "dominance" test.

As forecasted in last year's edition, the Commission was indeed busy dealing with joint applications filed by Air New Zealand and Qantas in December 2002.[71] The applications were 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 was subject to the approval of both the New Zealand Commerce Commission and its Australian equivalent, the ACCC, and was declined by both regulators in October.

The Commission considered that the proposed alliance would result in a substantial lessening of competition in a number of markets, which could not be justified on the basis that economic benefits to New Zealand outweighed the detriment resulting from a predicted loss of competition. In its final determination, the Commission quantified a total net loss to the public at NZ$154.5 million in the third year if the proposed alliance were to proceed. The parties have appealed the decision to the High Court and a hearing has been set for July 2004.

C. Enforcement Action

1. *British American Tobacco Merger*

In 2003, the Commission's court action involving the global merger of Rothmans International and British American Tobacco was settled. The Commission alleged that the merger resulted in New Zealand tobacco subsidiaries acquiring a dominant position in the New Zealand markets for tobacco products and pre-rolled cigarettes. The settlement, which did not involve an acceptance of liability by the defendants, required divestment by the defendants of certain cigarette brands and various other conditions. The proceeding has prompted the Commission to recommend a review of the Commerce Act, in order to better address jurisdictional and enforcement issues raised in the context of global mergers.

2. *Vitamin Companies—Cartel Behavior*

The civil proceedings commenced in 2002 by the Commission against the New Zealand subsidiaries of three multi-national vitamin companies[72] for cartel behavior were struck out this year on the grounds that they were time barred. This result ensued despite a separate High Court decision in proceedings brought by customers of the three companies that suggested the limitation period under the Commerce Act would not begin running until the unlawful behavior was "reasonably discoverable" by the plaintiff. Although faced with two inconsistent decisions in relation to the same factual scenario, the Commission elected not to appeal against the decision to strike out its proceedings.

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71. Air New Zealand Ltd and Qantas Airways Ltd, Notice Seeking Authorisation of Restricted Trade Practice under sect. 58, Commerce Act 1986 (Dec. 9, 2002), *available at* http://www.comcom.govt.nz/adjudication/quantasairnz.cfm; Air New Zealand Ltd and Qantas Airways Ltd, Notice Seeking Authorisation of Business Acquisition under sect. 67, Commerce Act 1986 (Dec. 9, 2002), *available at* http://www.comcom.govt.nz/adjudication/qantasairnz.cfm.

72. Roche Products (New Zealand) Ltd., Rhodia New Zealand Ltd., and BASF New Zealand Ltd.

VII. Developments in The United States

A. Procedural Law

In 2003, U.S. federal courts issued a number of important decisions relating to the interplay between U.S. antitrust law and international commerce. Several decisions concern the application of the Foreign Trade Antitrust Improvements Act (FTAIA),[73] which over the past several years has been the subject of conflicting interpretations. Some interpretations would allow foreign claimants to recover damages in U.S. courts for injuries suffered abroad that are caused by entirely foreign conduct if those claims arise out of unlawful conduct with a direct, substantial, and reasonably foreseeable effect on U.S. commerce.[74]

In *Empagran SA v. F. Hoffmann-La Roche Ltd.*,[75] a federal appeals court ruled that a foreign plaintiff may recover for injuries resulting solely from effects of foreign commerce attributable to prohibited anticompetitive conduct, so long as the anticompetitive conduct challenged also had a direct, substantial, and reasonably foreseeable effect on United States commerce. In *Empagran*, non-U.S. corporations that purchased vitamins abroad for delivery abroad sued the non-U.S. manufacturers and distributors of those vitamins under federal antitrust laws, alleging that the manufacturers and distributors and their co-conspirators engaged in a long-running conspiracy to fix vitamin prices, allocate market share, and commit other unlawful, anticompetitive practices that resulted in inflated vitamin prices. The federal appeals court analyzed the FTAIA and the decisions of the other federal appeals courts interpreting it and concluded that plaintiffs could pursue their action in the courts of the United States, including actions seeking treble damages as allowed under federal law, as long as they could establish that the challenged anticompetitive conduct had a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce sufficient to give rise to a claim under the federal antitrust laws. The plaintiffs were permitted to proceed with their claim despite the fact that the alleged U.S. effects of the conspiracy did not give rise to the plaintiffs' claims.

Defendants in the *Empagran* case appealed to the Supreme Court, who agreed to review the appeals court's conclusions in December. A decision from the Supreme Court is expected later in 2004 and will likely resolve the recent differences among the various federal appeals courts concerning the meaning of the FTAIA.[76]

Another procedural development of note concerns the ability of competitors to obtain discovery in the United States in connection with foreign proceedings. At the urging of the

73. 15 U.S.C. 6a (2000).

74. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399–400 (2d Cir. 2002) (holding that the FTAIA permited plaintiffs who alleged that they had paid inflated commissions in auctions held outside of the U.S. to proceed with their claim despite the fact that the alleged U.S. effects of the conspiracy did not give rise to the plaintiffs' claim). *Compare* Den Norske Stats Oljeselskap AS v. HeereMac Vof, 241 F.3d 420, 431 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1059 (2002) (dismissing action by a Norwegian oil company because the U.S. effects of the alleged conspiracy involving the global market for heavy-lift barge services did not "give rise" to the plaintiff's claims); General Electric Co. v. Latin American Imports S.A, 2002 WL 1603093 (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").

75. 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, U.S., No. 03-724 (Dec. 15, 2003).

76. In particular, *Empagran*, *Kruman*, and *Den Norske*.

U.S. Department of Justice (DOJ), the Supreme Court has agreed to review a controversial decision that found a broad right to obtain such discovery. In 2002, the federal appeals court in *Advanced Micro Devices, Inc. v. Intel Corp.*,[77] ruled that an investigation by the Directorate General for Competition (Directorate), a "sub-unit" of the European Commission, qualifies as a proceeding before a "foreign tribunal" for the purposes of a federal court's authority to order discovery from a person within its jurisdiction for use in a foreign proceeding, pursuant to section 1782 of the Judicial Code.[78] Following a friend-of-the-court brief by the DOJ, the Supreme Court agreed to review whether: (1) a federal district court is authorized to provide a private person with discovery that a foreign jurisdiction itself does not authorize; (2) civil discovery by a private person is allowed when no proceeding before a foreign tribunal is pending or imminent, and (3) discovery rights in the United States are extended to private non-litigants. A decision is expected by July 2004.

B. Cartel Enforcement

In 2003, the 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 U.S. antitrust laws. Odfjell Seachem AS, a company based in Norway, was fined US$42.5 million after pleading guilty to participation in a conspiracy to allocate customers, rig bids, and fix prices on parcel tanker affreightment contracts for the shipment of specialty liquids to and from the United States and elsewhere.[79] Hoechst Aktiengesellschaft, an international chemical conglomerate based in Germany, was fined US$12 million after pleading guilty to participating in a conspiracy to suppress competition in world markets for an industrial chemical used in the production of commercial and consumer products, including pharmaceuticals, herbicides, and plastic additives.[80] Other examples of the DOJ's international reach include an agreement by the Japanese manufacturer Ishihara Sangyo Kaisha Ltd. to plead guilty and pay fines totaling US$5 million for its role in a conspiracy to fix prices and allocate customers for the sale of video magnetic iron oxide particles,[81] and the plea agreement of Rhône-Poulenc Biochimie S.A., whose principal place of business is in Elbeuf, France, pursuant to which it agreed to pay a US$5 million fine for participating in a conspiracy to fix prices and allocate customers for a chemical used in a medical process.[82]

C. Merger Enforcement

In 2002, the DOJ and Federal Trade Commision (FTC) continued to examine international mergers affecting competition in the United States. Pursuant to the Hart-Scott-

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77. 292 F.3d 664, 666–68 (9th Cir. 2002).

78. *See* 28 U.S.C. 1782 (2000).

79. *See* Press Release, Dep't of Justice, Norwegian Shipping Co. and Two Executives Agree to Plead Guilty of in International Parcel Tanker Shipping Investigation, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201301.htm (Sept. 29, 2003).

80. *See* Press Release, Dep't of Justice, German Chemical to Plead Guilty to Criminal Antitrust Conspiracy, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/200738.htm (Feb. 6, 2003).

81. *See* Press Release, Dep't of Justice, Japanese Manufacturer Pleads Guilty for Its Role in Price-Fixing Conspiracy, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/200711.htm (Jan. 30, 2003).

82. *See* Press Release, Dep't of Justice, Rhône-Poulenc Biochimie, Subsidiary of Aventis, Agrees to Plead Guilty to Fixing Prices of a Medical Product Ingredient, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201284.htm (Sept. 18, 2003).

Rodino Antitrust Improvements Act of 1976,[83] the DOJ and FTC reviewed numerous international mergers and, in some instances, entered into consent decrees to address potential anticompetitive effects.

The DOJ reached a settlement to resolve its objections to the proposed US$4.6 billion acquisition by Alcan Inc., a Canadian-based, fully integrated aluminum producer, of Pechiney S.A., a French company also engaged in the production of aluminum.[84] The DOJ believed that the transaction, if completed, would have lessened competition in certain markets related to brazing sheet, an aluminum alloy used in fabricating various motor vehicle parts.[85] The settlement required Alcan to divest Pechiney's aluminum rolling mill in Ravenswood, West Virginia, if Alcan's tender offer for Pechiney was successful. The DOJ also reported that it had cooperated with the European Commission in the analysis of the transaction.

The FTC entered into a consent decree to resolve its objections to the proposed $1.89 billion acquisition by DSM N.V. of Roche Holding AG's Vitamins and Fine Chemicals division.[86] The FTC believed that the transaction, if completed, would result in a near monopoly in the market for phytase, an enzyme added to poultry and swine feed to promote digestibility of phosphorus and other nutrients. The consent decree required DSM to divest its phytase business to BASF AG within ten days of the consummation of the transaction. The FTC reported that it had closely cooperated with the European Commission, which also reviewed the transaction and took enforcement action in that connection.[87]

D. International Cooperation

The DOJ and FTC continued to engage in substantial cooperation with foreign antitrust enforcement authorities. Representatives from the agencies attended the second annual International Competition Network (ICN) conference in Merida, Mexico, where they worked with antitrust agencies from approximately fifty foreign jurisdictions to advance reforms in multijurisdictional merger review.[88] In addition, the DOJ has emphasized its heightened level of cooperation with other antitrust enforcers in connection with combating cartel activities on an international basis.[89]

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83. *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.

84. *See* Press Release, Dep't of Justice, Department of Justice Will Require a Divestiture if Alcan Inc. Completes Its Pending Tender Offer for Pechiney S.A., *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201302.htm (Sept. 29, 2003).

85. *Id.* The DOJ alleged in its complaint that Alcan was a recent entrant into the North American brazing sheet market, and that its entry had sparked an intense competitive rivalry that resulted in lower prices and higher quality. According to the complaint, the acquisition would reduce the number of major North American brazing sheet manufacturers from four to three and increase the likelihood of future cooperative price increases.

86. *See* Press Release, Fed. Trade Comm'n, *FTC Alleges DSM N.V.'s Purchase of Roche Holding's Vitamins and Fine Chemicals Division Would Violate Clayton Act*, *available at* www.ftc.gov/opa/2003/09/dsm.htm (Sept. 23, 2003).

87. *Id.*

88. *See* Press Release, Dep't of Justice, Assistant Attorney General R. Hewitt Pate Promotes Merger Process Reform at International Competition Network Conference in Merida, Mexico, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201115.htm (June 26, 2003); Press Release, Fed. Trade Comm'n, FTC Officials Promote Merger Process Reform at International Competition Network Conference in Merida, Mexico, *available at* http://www.ftc.gov/opa/2003/06/icnpost.htm (June 26, 2003).

89. *See* R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission, Before the British Institute of International and Comparative Law Third Annual Conference on International and Comparative Competition Law*, *available at* http://www.usdoj.gov/atr/public/speeches/201199.htm (May 16, 2003).