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International Antitrust

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I. Developments in Australia

A. Trade Practices Act Amendment Bill

Following the release of the *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review),[1] which was reported in last year's June 2004 review, the Australian government introduced a bill to amend the *Trade Practices Act 1974* (TPA).[2] A majority of the Dawson Review's recommendations were adopted in the Bill. Although the Bill lapsed with the calling of a federal election, the government returned with an enhanced majority—the government will have a majority in both houses of parliament beginning July 1, 2005. The Bill is expected to be reintroduced some time in 2005.

As expected, the Bill introduces a new formal merger clearance system and a formal merger authorization system.[3] These formal systems are designed to operate in parallel with the existing informal merger clearance system. The new systems will provide an alternative forum for the small percentage of mergers, fewer than 5 percent per annum, rejected by the Australian Competition and Consumer Commission (ACCC) under the informal clearance system.

In relation to the formal merger clearance system, if the ACCC has not made a determination within forty business days of the filing of the merger application, or such longer period as the applicant agrees, the ACCC will be considered as having refused clearance.[4]

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1. Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Jan. 2003), *available at* http://tpareview.treasury.gov.au/content/report.asp.

2. Trade Practices Legislation Amendment Bill 2004, 2004 (Austl.), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID = 1641&TABLE = OLDBILLS.

3. *Id.*

4. *Id.*

The ACCC must provide written reasons for its decision. An applicant will then be able to apply to the Australian Competition Tribunal (Tribunal) for a merits review of the ACCC's decision.

Under the authorization system, the Tribunal will be able to authorize a merger if it is satisfied that the public benefits of the proposed merger outweigh any detriment. The Tribunal will have three months to make its authorization decision, or six months in the case of complex matters.[5] The Tribunal will also have to provide written reasons for its decision. A review on the merits is not available.

The Bill introduces a defense to the per se prohibitions on price fixing and exclusionary provisions for joint ventures. The defense will apply where the provision in question is shown to be for the purpose of the joint venture, and does not have the purpose, effect, or likely effect of substantially lessening competition.

The Bill introduces increased penalties for breaches of the TPA's competition provisions. Corporations now face a fine of up to $10 million, three times the value of the benefit of the anti-competitive conduct, or, where this value cannot be determined, 10 percent of the annual turnover of the corporation and its related corporate bodies. The fine imposed is the greater of the three options.

The Bill does not adopt the Dawson Review's recommendation that criminal sanctions be introduced for serious cartel behavior. The Dawson Review recognized the need for a considered approach to the issue. In particular, there would need to be a satisfactory definition of the offense and a workable means of combining it with a clear and certain leniency policy. The government is still considering the manner in which to implement this recommendation.

B. Senate Inquiry

The Economic References Committee of the Australian Senate (Committee) released the results of its *Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (Senate Inquiry) in March 2004.[6] The Senate Inquiry made a number of recommendations dealing with concerns expressed in the small business sector and the wider community about the TPA's operation. The Committee split along political party lines, with the government senators on the Committee releasing a report that rejected many of the Senate Inquiry's key recommendations.

In relation to section 46, which deals with misuse of market power, the government:

- rejected the need for any changes to the [TPA] to clarify what is meant by "substantial market power" or "take advantage";
- rejected the recommendation to specify that the courts may have regard to a corporation's financial power;
- agreed that [section 46] should be amended to ensure that the courts may consider below-cost pricing and whether a corporation has a reasonable prospect of recoupment when determining whether a corporation has misused its market power;

5. *Id.*

6. Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business* (Mar. 2004), *available at* http://www.aph.gov.au/senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf.

- agreed that [section 46] should be amended to proscribe misuse of market power that involves leveraging market power from one market into another; and
- agreed to clarify that a corporation may have a substantial degree of market power as a result of contracts, arrangements or understandings with others.[7]

C. Mergers

1. *ACCC issues revised guidelines for informal merger clearances*

Following the introduction of the Bill, the ACCC introduced a number of changes to the way that it will operate the informal clearance system for complex, non-confidential mergers. Under the revised merger guidelines:

- there will be a public register on the ACCC's website containing information on proposed mergers;
- more detailed timetables will be put in place, noting key assessment milestones and the expected decision date;
- where applicable, the public register will include a Statement of Issues and Competition Assessment. A Statement of Issues will only be published where competition issues have been identified and they require further information and consideration; and
- parties are given a detailed outline of the information required by the ACCC and the procedures for contacting and dealing with the ACCC.[8]

D. Cartels and Leniency Policy

As discussed in last year's review, the ACCC introduced a leniency policy for cartel conduct in mid-2003. In 2004, the ACCC announced a review of its leniency policy and the establishment of a dedicated unit within the ACCC to detect cartel behavior.[9]

E. Application of TPA to Government

1. *NT Gas v. PAWA*

On October 6, 2004, the High Court allowed an appeal that has significant implications for corporations dealing with government entities. In *NT Power Generation Pty Ltd v. Power and Water Authority (PAWA)*, NT Power was refused access to the electricity transmission infrastructure owned by PAWA, a body corporate constituted under the *Power and Water Authority Act 1987* of the Northern Territory.[10] NT Power commenced proceedings in the federal court alleging that the refusal of access was a misuse of market power and breached section 46 of the TPA. In its defense, PAWA relied on section 2B of the TPA, which provides that section 46 does not apply to it except insofar as the Crown carries on a business, either directly or through an authority such as PAWA. In the lower courts, this defense was suc-

7. Louise Benjamin & Belinda Hollway, *Focus: Competition Law: Trade Practices Legislation Amendment Bill 2004* (June 2004), *available at* http://www.aar.com.au/pubs/comp/focljun04.htm.

8. Australian Competition and Consumer Commission, *Guideline for Informal Merger Reviews* (Oct. 2004), *available at* http://www.accc.gov.au/content/index.phtml/itemId/539868/fromItemId/6204.

9. Australian Competition and Consumer Commission, *ACCC further steps up fight against cartels* (Nov. 24 2004), *available at* http://www.accc.gov.au/content/index.phtml/itemId/550606.

10. NT Power Generation Party Ltd. v. Power & Water Auth., (2004) 79 ALJR 1.

cessful on the basis that PAWA had never engaged in the business of providing electricity carriage services. Those courts, however, also held that if section 46 had applied to PAWA's conduct, then PAWA had misused its market power in breach of that provision.

The majority of the High Court found that PAWA was bound by section 46, characterizing PAWA's decision not to permit use of its infrastructure by a competitor because of the negative impact such use would have, in the short term, on its business of selling electricity to consumers, as conduct that advanced that business.[11] Accordingly, the majority was satisfied that PAWA carried on a business. In doing so, the court rejected the notion that PAWA fell outside the TPA because it had never operated in a market for electricity transmission services, pointing out that notions of "competition" and "market" did not form part of the test contained in section 2B of the TPA.

II. Developments In Canada

A. Proposed Amendments to the Competition Act

On November 2, 2004, the Canadian Minister of Industry tabled proposed amendments to the Competition Act (Act) in Canada's House of Commons.[12] If enacted, the amendments would:

- repeal the Act's criminal prohibitions against price discrimination, predatory pricing, and promotional allowances (but not price maintenance);
- introduce administrative monetary penalties (AMPs) as a potential remedy under the Act's abuse of dominance provision, with an initial maximum penalty of $10 million Canadian and $15 million Canadian for any subsequent order;
- increase the maximum level of AMPs for contraventions of the Act's deceptive marketing practices provisions to $750,000 Canadian for individuals with a $1 million Canadian fine for any subsequent order and $10 million Canadian for corporations, which would be subject to a $15 million Canadian fine for any subsequent order;
- authorize the Commissioner of Competition (Commissioner) to seek orders requiring parties found to have made false or misleading representations to provide restitution to victimized consumers, which would include the ability to apply for interim orders to freeze assets; and
- repeal the airline-specific aspects of the Act's abuse of dominance provision that were enacted following Air Canada's acquisition of Canadian Airlines in 1999.[13]

Hearings to consider the amendments were commenced by the House of Commons' Standing Committee on Industry, Natural Resources, Science, and Technology on November 18, 2004. The hearings were suspended on December 2, 2004, until further notice. As of the writing of this article, no further Committee session has been scheduled to consider the amendments.

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11. *Id.*

12. Competition Bureau, *Minister of Industry Tables Amendments to Strengthen the Competition Act* (Nov. 2, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02976e.html (the draft legislation is *available at* http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/C-19/C-19_1/C-19_cover-E.html).

13. *Id.*

B. Enforcement Developments

1. *Mergers*

The Commissioner did not challenge any merger transactions in 2004. She did, however, require divestitures in two instances to resolve potential issues and allow the transactions in question to proceed.[14] In a third transaction, which also was allowed to proceed, the Commissioner accepted detailed behavioral undertakings in lieu of insisting on divestitures.[15] This latter case involved a transaction between Canadian National Railway (CN) and British Columbia Rail. The undertakings were designed to preserve competitive rates and services for the transportation of lumber, grain, and other commodities on certain routes. The undertakings included commitments to publish and maintain certain tariffs, subject to annual adjustments according to a prescribed formula, achieve certain service level targets, such as transit times and switching services, and refrain from discriminating against shippers by imposing unfavorable railway car supply conditions. The CN case is notable because it is still relatively rare for the Commissioner to use behavioral, rather than structural remedies, as part of merger settlements.

In other merger-related developments, the Competition Bureau released revised Merger Enforcement Guidelines (MEGs) on September 21, 2004.[16] This revision represents the first update of the MEGs since they were originally published in 1991. Although the format of the MEGs was revamped and a number of sections were either added, deleted, or changed, the revised MEGs do not depart radically in substantive content from the 1991 version.

The Bureau also initiated a consultation process in 2004 to consider possible amendments to the Act's "efficiencies defense."[17] The "efficiencies defense" provides that the Competition Tribunal may not issue an order against a merger that is likely to substantially prevent or lessen competition where the "efficiencies" generated by that merger outweigh its likely anti-competitive effects. This provision has been the subject of intense litigation in recent years, which has provided the impetus to consider possible amendments.

2. *Criminal Matters*

The Bureau continued to make enforcement of the Act's conspiracy and price maintenance provisions a priority in 2004. For example, guilty pleas resulted in significant fines for companies that participated in international cartels involving carbon cathode blocks, carbon brushes, and rubber chemicals.[18] In one of these cases, the accused company also

14. *See* Competition Bureau, *Bureau Resolves Competition Issues in Forestry Merger* (Apr. 1, 2004), *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02834e.html; Competition Bureau, *Competition Bureau Reaches Agreement to Preserve Competition in Two B.C. Forestry Markets* (Dec. 7, 2004), *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct03016e.html.

15. Competition Bureau, *Competition Bureau Obtains Remedies in BC Rail Merger* (July 2, 2004), *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02865e.html.

16. Competition Bureau, *Competition Bureau Issues Revised Merger Enforcement Guidelines* (Sept. 21, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02948e.html.

17. Competition Bureau, *Consultation on the Treatment of Efficiencies Under the Competition Act, at* http://www.primestrategies.ca/Bureau/index.htm (last visited May 27, 2005) (the "efficiencies defense" is in § 96 of the Act).

18. *See* Competition Bureau, *Crompton Corporation Fined $9 Million for Role in Rubber Chemicals Cartel* (May 28, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02853e.html;CompetitionBu-

pleaded guilty to an additional charge of obstruction of justice for interfering with the Bureau's investigation. The Bureau also announced the settlement of two cases involving price maintenance allegations, one of which represented the first time that a price maintenance investigation has resulted in direct restitution to consumers.[19] Finally, the Commissioner said that she would initiate another round of consultation regarding possible amendments to the Act's conspiracy provisions.[20]

3. *Civil Matters*

In August 2004, the Tribunal concluded hearings in the Canada Pipe case, in which the Commissioner alleged that the use of "loyalty discounts" contravened the Act's abuse of dominance provision.[21] A decision was still pending as of the writing of this article. In another abuse of dominance matter, the Commissioner announced the termination of proceedings against Air Canada, alleging that Air Canada had engaged in predatory pricing—pricing below "avoidable cost." The Commissioner stated that the decline in Air Canada's market share since this application was commenced in 2001 meant that it was no longer in the public interest to continue with the proceeding.[22]

4. *Private Enforcement*

In 2004, private parties made even greater use of the right to seek leave to bring applications to the Competition Tribunal under the Act's refusal to deal provision. Six such leave applications were brought in 2004. But in a sign that the Tribunal may be tightening its standards for granting leave, four of these applications were dismissed.[23]

C. International Cooperation

The Bureau signed information-sharing protocols with the Australian Competition and Consumer Commission and the United Kingdom Office of Fair Trading in order to more effectively fight cross-border consumer fraud and deception.[24] In addition, Canada and the

reau, *Morgan Companies Fined $1 Million for Obstruction and Price-Fixing* (July 16, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html; Competition Bureau, *VAW Carbon Fined $500,000 for Role in International Price-Fixing Conspiracy* (Sept. 22, 2004), *available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02949e.html; Competition Bureau, *Nippon Electrodes Fined $225,000 for Role in Conspiracy* (Nov. 9, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02979e.html.

19. Competition Bureau, *Consumers to be Reimbursed by John Deere Limited* (Oct. 19 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02965e.html; Competition Bureau, *Window Coverings Company Pleads Guilty to Attempting to Influence Competitor's Prices* (Nov. 15, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02987e.html.

20. Competition Bureau, *Cartel Enforcement: International and Canadian Developments* (Oct. 7, 2004), *available at* http://cb/bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02974e.html.

21. Comm'r of Competition v. Canada Pipe Co. (2005), 2002 Comp. Trib. 6 *available at* http://www.ct-tc.gc.ca.

22. Competition Bureau, *Competition Bureau Settles Case with Air Canada* (Oct. 29, 2004), *available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02973e.html.

23. *See generally* Competition Tribunal, *at* http://www.ct-tc.gc.ca/index.asp (last modified Aug. 3, 2004).

24. Competition Bureau, *Competition Bureau Develops Closer International Ties in the Fight Against Cross-Border Fraud and Deception* (Apr. 29, 2004), *available at* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02840e.html.

United States signed a positive comity agreement to enhance cooperation in competition law enforcement between the two jurisdictions.[25]

III. Developments In The European Union

A. Regulation 1/2003 and the Modernization Package

1. *Introduction*

The passage of Regulation 1/2003[26] on May 1, 2004, represents the most significant and far-reaching reform of European Commission (EC) competition rules and procedures in decades. Timed to coincide with European Union (EU) enlargement, Regulation 1/2003 aims to ensure effective enforcement of the EC competition rules in a greatly expanded EU. One central purpose of the reforms is to allow the EC to focus its energies and resources on priority cases and to enhance the role of national courts and competition authorities in the application of EC competition law.

Regulation 1/2003 reforms competition law in two ways. First, it devolves greater authority on national courts and competition authorities to take EC competition law decisions so that more cases can be dealt with at national level. Second, the regulation abolishes the requirement that the EC be notified of restrictive agreements and similar arrangements, as well as the EC's exclusive competence to review and clear such arrangements. This second aspect of the reform, in particular, is intended to free up EC officials to focus more attention on enforcement, particularly against large-scale cartels impacting EU consumers.

In April 2004, the EC also published a number of notices and a regulation that expand on how the new system will operate in practice.[27]

2. *The "Self-Assessment" Principle*

Under the previous regime set forth in Regulation 17/62,[28] parties to an arrangement or agreement that raised competition issues could seek clearance for their arrangement by way of a notification to the EC for an article 81(3) exemption. Getting and approving such notified arrangements tied up significant EC resources. To allow EC officials to focus on more important objectives, principally the investigation and prosecution of illegal cartels, article 1 of Regulation 1/2003 abolishes the notification procedure.[29] This change means

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25. Competition Bureau, *Canada and the U.S. Sign Cooperation Agreement on Competition Law Enforcement* (Oct. 5, 2004), *available at* http://www.cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02958e.html.

26. Council Regulation 1/2003, 2003 O.J. (L 1) 1, 1-25 (amended by Council Regulation 411/2004, 2004 O.J. (L 68) 1, 2).

27. Commission Regulation 773/2004, 2004 O.J. (L 123) 18, 18-24; Commission Notice on cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 43, 43-53; Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004 O.J. (C 101) 54, 54-64; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004 O.J. (C 101) 65, 65-77; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2004 O.J. (C 101) 78, 78-80; Commission Notice—Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81, 81-96; Communication from the Commission—Notice—Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 97-118.

28. Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, 1962 O.J. (P 13) 204, 204-11.

29. *See* Council Regulation 1/2003, *supra* note 26, ¶¶ 3-4.

that companies must carry out their own "self assessment" of private law arrangements which they enter. Neither formal exemption decisions nor their informal replacement—"comfort letters"—are now available.

3. *National Competition Authorities and National Courts*

Article 5 of Regulation 1/2003 empowers national courts and competition authorities to enforce, in their entirety, both article 81, which prohibits anti-competitive arrangements between firms, and article 82, which prohibits the abuse of a dominant position. Under the previous system, only the EC could determine that restrictive arrangements could benefit from an article 81(3) exemption. Under the new system, national courts and competition authorities will be free to apply the article 81(3) exemption directly without the necessity of intervention by the EC.

4. *The European Commission's Enforcement Powers*

Regulation 1/2003 significantly enhances the EC's enforcement powers, particularly its search and seizure powers, as well as its powers of questioning and of interview. For example, the EC may now search private homes and business premises and may seal premises during investigations.[30] Fines for obstructing an investigation have also been significantly increased by the Regulation.[31] The Regulation empowers the EC to impose any structural remedies, such as the divestment of all or parts of a business, compulsory licensing, assignment of intellectual property rights, or behavioral remedies that it considers necessary and proportionate in the case of article 81 or 82 infringements.[32]

5. *The European Competition Network*

As national competition authorities are granted considerable responsibility for the enforcement of EC competition law by Regulation 1/2003, the Regulation establishes a "European Competition Network" of competition authorities, consisting of national competition authorities plus the EC, to ensure a consistent approach in the interpretation and enforcement of EC competition rules.[33] One aim of the Network is to ensure the smooth operation of the new system by establishing case-handling principles and by laying down the competencies of the various competition authorities with respect to cross-border investigations and prosecutions.

B. Abuse of Dominance and Compulsory Licensing of Intellectual Property

1. *Introduction*

In EC competition law, reliance on an intellectual property right by a firm in a dominant position may, in exceptional circumstances, give rise to issues of abuse under article 82 of the EC Treaty.[34] In these circumstances, a refusal to license intellectual property rights by the dominant firm may lead to the imposition of a compulsory licensing remedy. In 2004,

30. *Id.* at arts. 20-21.
31. *Id.* at arts. 23-24.
32. *Id.* at art. 7.
33. *Id.* at art. 11.
34. Case C-241/91, Radio Telefis Eireann v. Comm'n., 1995 O.J. (C 137) 3; Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-07791.

both the EC, in its *Microsoft* decision,[35] and the EC Court of Justice (ECJ), in its *IMS* judgment,[36] sought to clarify which circumstances will qualify as sufficiently exceptional. In doing so, they appear to have adopted differing approaches and, as a result, there remains some uncertainty about when and how compulsory licensing will be imposed.

2. *Microsoft*

Following an investigation initiated after a 1998 complaint from Sun Microsystems, Inc, the EC, on March, 24, 2004, adopted a decision finding that Microsoft had abused its dominant position in the market for client PC operating systems by, inter alia, refusing to supply third parties with the interface information needed to make their work group server operating system products compatible with Microsoft's Windows operating system.

In determining whether exceptional circumstances existed that might justify an abuse finding, the Commission rejected Microsoft's argument that there is an exhaustive checklist of exceptional circumstances that can be taken into account when assessing the compatibility of a refusal to supply under article 82.[37] Instead, the EC interpreted the case law of the European courts to mean that the entirety of the circumstances surrounding a specific instance of refusal to supply must be analyzed and the decision on abuse must be taken on the basis of that comprehensive examination.[38]

The EC found that there were a number of exceptional circumstances in this case, including that Microsoft's refusal to supply the information risked eliminating competition in the relevant market for work group server operating systems, that this risk was due to the fact that the information, to which access was refused, was indispensable to carry on business in that market, and that Microsoft's refusal had a negative impact on technical development to the prejudice of consumers.[39]

The EC then considered whether there was any objective justification that would offset the exceptional circumstances identified. Microsoft argued that its incentives to innovate software features, functions, and technologies would be jeopardized if it were forced to license its intellectual property rights.[40] The EC, however, rejected that argument and concluded that "a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)."[41]

In addition to imposing an exceptionally high fine of €497.196 million, approximately $610 million U.S., the EC ordered Microsoft to license, on reasonable and non-discriminatory terms, the information it had refused to supply to ensure interoperability between its operating system and competitors' work group server operating systems. Microsoft has initiated proceedings in the EC Court of First Instance (CFI) challenging the Commission's decision.[42]

35. Commission Decision COMP/C-3/37.792 (2004), *available at* http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf [hereinafter Case COMP/C-3/37.792].

36. Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG. 2004 E.C.R. 00000.

37. Case COMP/C-3/37.792, *supra* note 35, at ¶ 555.

38. *Id.* ¶ 558.

39. *Id.* ¶ 712.

40. *Id.* ¶ 709.

41. *Id.* ¶ 783.

42. Case T-201/04, Microsoft Corp. v. Comm'n., 2004 O.J. (C 179) 18, 19.

3. *IMS*

The *IMS* judgment, delivered by the ECJ on April 29, 2004, arose in the context of a dispute between IMS and NDC, both of which were engaged in tracking sales of pharmaceutical and healthcare products in Germany.[43] IMS had developed a "brick structure," which was protected by copyright, for the provision of regional sales data on those products. IMS had refused to grant a license for the use of the "brick structure" to NDC and initiated proceedings in a German court to prohibit NDC from using the "brick structure." The German Court sought the assistance of the ECJ in determining whether IMS's refusal to grant a license to NDC was abusive.

The ECJ held that the exercise of an exclusive intellectual property right by an owner that holds a dominant position may, in exceptional circumstances, involve abusive conduct.[44] The court relied on earlier case law, in particular *Volvo*, *Magill*, and *Bronner*,[45] to conclude that those exceptional circumstances, justifying a finding of abuse, will be present when "refusal is preventing the emergence of a new product for which there is a potential consumers demand, that it is unjustified and such as to exclude any competition on a secondary market."[46]

When reviewing the first condition, the court explained that the refusal by a dominant firm to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the firm that requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.[47]

4. *Differences of approach*

The *Microsoft* decision and the *IMS* judgment reveal a difference in approach to determining the exceptional circumstances under which compulsory access to intellectual property may be granted on the basis of article 82 of the EC Treaty. In *Microsoft*, the Commission has taken a broad and open-ended approach, essentially saying that it will decide the issue on a case-by-case basis, taking into account all of the facts. The ECJ, on the other hand, appears to have adopted a more restrictive approach, laying down a checklist of cumulative conditions, all of which must be satisfied before compulsory access will be ordered. The *IMS* judgment, however, does not definitively state that the three cumulative conditions it prescribes are the only conditions under which compulsory access may be granted to intellectual property. Instead, the IMS decision says the conditions are "sufficient" to justify mandatory access.

This discrepancy may provide a basis for the CFI to resolve the apparent differences between the Commission's approach and the ECJ's judgment. An awareness by the CFI of

43. Case C-418/01, *supra* note 36.

44. *Id.*

45. Case 238/87, Volvo v. Veng, 1988 E.C.R. 6211; Case C-241/91, Radio Telefis Eireann v. Comm'n. 1995 E.C.R. I-743; Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-07791.

46. Case C-418/01, *supra* note 36.

47. *Id.*

the emerging differences in approach may be found in its decision of December 22, 2004,[48] dismissing Microsoft's application for interim measures to suspend the remedies imposed by the Commission in its March 2004 Decision. The CFI acknowledged that Microsoft's case "raises the question whether the conditions laid down by the Court in IMS . . . are necessary or merely sufficient." [49]

IV. Developments In Mexico

A. Monopolistic Practices

1. *Alleged monopolistic practices in the market for vouchers, coupons, passwords, tickets, and exchangeable payment orders. Case IO-19-2000. Date of ruling: August 19, 2004*

The Federal Competition Commission (FCC) terminated an investigation into certain practices of the National Association of Retail Stores (NARS), a national trade association of supermarkets. On September 8, 2000, the FCC became aware of potential monopolistic practices through a press release issued by NARS. In this press release, NARS addressed consumers, suppliers, and partners about certain "difficulties" with the coupons and vouchers issued by Prestamex and stated that as a result of such "difficulties," NARS had decided to stop reimbursing Prestamex vouchers.[50] NARS also pressured Prestamex to renegotiate the payment conditions, guarantees, terms, and form of the termination of its contracts.

On September 28, 2000, the FCC began an investigation into potential monopolistic practices of NARS. The FCC alleged that NARS violated articles 8 and 10 of subsection VI of the Federal Law on Economic Competition (FLEC) by publishing the aforementioned press release with the intention of excluding Prestamex from the market for vouchers, coupons, passwords, tickets, and exchangeable payment orders within the national territory for goods and services in retail department stores.[51] The FCC also alleged that NARS granted advantages in favor of other voucher companies. On December 6, 2001, the FCC issued a ruling finding that NARS engaged in monopolistic practices and imposed fines.[52]

Following various appeals, on August 10, 2004, NARS proposed certain undertakings to comply with the FCC's concerns. Specifically, NARS proposed that it would:

- comply with competition rules, particularly those regarding monopolistic practices and mergers, and incorporate competition guidelines in their ethics code;
- refrain from participating, directly or indirectly, in any action to grant exclusive advantages in favor of any voucher issuing companies;
- issue a press release, through newspapers and other media, addressed to consumers, suppliers, and partners, promoting the protection of free market access and the competitive process;
- immediately bring to the attention of the FCC any potential monopolistic practice that may arise within the relevant market; and

48. Case T-201/04R, Microsoft v. Comm'n (Dec. 22, 2004) (Order of the President of the Court of First Instance in Proceedings for Interim Relief), *available at* http://eurpoa.eu.int.

49. *Id.* ¶ 206.

50. *See* Comisión Federal de Competencia, *Annual Report 2004*, at 10-11 (on file with author).

51. *Id.*

52. *Id.*

- refrain from giving any recommendation regarding payments, guarantees, terms, and termination of contracts entered with voucher issuing companies. Moreover, NARS would not engage in any form of retaliation relating to the voucher acceptance service.[53]

2. *Alleged relative monopolistic practices in the market of sale and distribution of helicopters mainly used for public transportation of people and/or cargo. File: DE-12-2003. Date of resolution: February 12, 2004*

The FCC ruled that there was insufficient evidence to prove the existence of monopolistic practices in the market for helicopters mainly used for the public transportation of people and/or cargo.

On April 1, 2003, Transporte Aéreos Pegaso, filed a complaint against Bell Helicopter Textron, Inc, Heliservicios de Campeche, and Servicios Aéreos del Centro (SACSA), for alleged monopolistic practices. Such practices consisted of Bell's alleged refusal to sell helicopters to Pegaso. Based on the information gathered during the investigation, the FCC found that:

- the relevant market is international in scope, since there appeared to be no relevant restrictions to acquiring helicopters from manufacturers outside of Mexico;
- other helicopters are available from other manufacturers that are reasonable substitutes for those sought from Bell and have similar characteristics and prices;
- Bell did not enjoy market power in the relevant market, since the helicopters that are acquired in Mexico are mainly imported and there were other options available from manufacturers outside of Mexico; and
- the current dispute stems from prior commercial litigation between the parties.[54]

Given the difficulties encountered in settling this litigation, which was originally filed by Pegaso against Bell, Bell decided, beginning in 2002, to suspend all business activity with Pegaso.

B. Mergers and Acquisitions

1. *Home Depot México, S de RL de CV/Home Mart México, SA de CV CNT-19-2004. Date of ruling: May 20, 2004*

The FCC cleared the merger between Home Depot México and Home Mart México. Home Depot México is a Mexican company engaged in the sale of products and materials for construction, repair, and home improvement through retail stores. Home Mart México is a Mexican company engaged in the operation and handling of retail stores, as well as buying and selling domestic and imported materials for construction and decoration. Home Depot and Home Mart overlap in the market of home improvement products, which is in an incipient form in Mexico.

The geographical market of their stores is of a local nature because consumers do not usually travel long distances to shop at these types of retail stores. The locations in which the two firms overlap were Monterrey, Mexico City, León, and Guadalajara. The FCC

53. *Id.*
54. *Id.* at 22-23.

concluded that the transaction would not affect competition in the relevant markets because it found no normative or economic barriers to the entry of new competitors.[55]

2. *Corporación Novavisión/Grupo Galaxy Mexicana. Case CNT-85-2004. Date of ruling: November 11, 2004*

The FCC cleared the merger between Corporación Novavisión and Grupo Galaxy Mexicana, with certain conditions. Corporacion Novavision owns a concession of a public network of telecommunications that allows the company to provide satellite direct to home television services under the commercial name of "Sky." Grupo Galaxy Mexicana owns a similar concession to provide the same services under the commercial name of DirecTV.

DirecTV decided to shut down its operations in Mexico because it had been experiencing financial difficulties for several years. The transaction at issue consisted of the acquisition by Novavision of a database that included a list of DirecTV subscribers, containing names, addresses, and other information about the subscribers, including a description of the current promotions, discounts, and other arrangements with each subscriber.

The relevant market was defined as the television and audio direct to home service via satellite within Mexico. The parties explained that the acquisition of the data base would allow DirecTV subscribers to have another option for satellite television services, considering that DirecTV stopped providing the service to these subscribers. DirecTV subscribers were not forced to sign agreements with Sky.

The FCC authorized the transaction, subject to the condition that the parties would agree to give written notification to current DirecTV subscribers that they were not obliged to purchase Sky's services.

V. Developments In New Zealand

A. Merger Activity

The New Zealand Commerce Commission's Mergers and Acquisitions Guidelines[56] came into force on January 1, 2004, and clarified the approach that the Commission will take in applying the "substantial lessening of competition" threshold that replaced the former "dominance" threshold in May 2001. Continuing the trend of prior years, the majority of mergers that were referred to the Commission for voluntary clearance in 2004 were approved. Of the twenty three applications received, twenty were given clearance, and three were declined.[57] While the Commission did not receive any new applications for authorization of mergers in 2004, the Commission took an active role in opposing the appeal to the High Court by Air New Zealand and Qantas against the Commission's 2003 determination rejecting the proposed alliance between the parties. As discussed in last year's edition, the applications were for market behavior and structure authorizations under the Commerce Act. The High Court largely agreed with the Commission's approach to market definition and its assessment of the likely effect of the proposed alliance on competition in

55. *See* Comisión Federal de Competencia Gaceta de Competencia Económica (May-Aug. 2004), at 35-36 (on file with author).

56. Commerce Commission, *Merger and Acquisitions Guidelines* (Dec. 2003), *available at* http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.PDF.

57. Commerce Commission, *Public Registers*, *available at* http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx (last visited July 8, 2005).

those markets. However, after hearing detailed economic evidence from pre-eminent international economists relating to the Commission's use of a model to quantify detriments, the Court held that the Commission had significantly overstated the allocative inefficiencies that were expected to arise from the alliance and the final figures used by the Court in its balancing exercise were materially discounted. The Court also held that the Commission had failed to give adequate weight to unquantifiable benefits. Nevertheless, the Court held that the Commission did not err in concluding that the likely public benefits of the alliance would not outweigh the likely efficiency detriments, and accordingly, the appeal was dismissed. Interestingly, the Australian Competition Tribunal has since upheld a parallel appeal by the airlines against the decision by the Australian Competition and Consumer Commission not to authorize the proposed alliance. The Tribunal found that the only relevant anti-competitive detriment that might occur is in the area of time sensitive travelers wishing to travel between cities in Australia and New Zealand at short notice and within a particular time-frame. The Tribunal concluded that the benefits which flow from the Alliance and accrue to the public and Qantas outweigh any detriment to the time sensitive traveler.

B. Enforcement Action

1. *Telecom—Pricing of access to data tails*

The Commission commenced civil proceedings in the High Court under the Commerce Act against Telecom[58] alleging the company misused its market power and continues to do so to prevent or deter competition in markets involving high speed data transmission. Telecom provided and continues to provide other telecommunications service providers competing with Telecom with two wholesale data service options, including the ability to resell Telecom's retail high speed data transmission services and access to dedicated data tails in Telecom's network to supplement the other telecommunications service providers' own network. The Commission alleges that in providing the second service option, in almost all circumstances, the price charged by Telecom exceeds the following: the price charged for the resale option, the comparable retail price, the price Telecom charges itself, and the sum of Telecom's direct incremental cost and opportunity cost of supplying access to the data tails.[59]

2. *Carter Holt Harvey—Predatory pricing*

The Privy Council overturned a unanimous decision of the Court of Appeal and held that Carter Holt's matching of a competitor's price was not an abuse of market dominance even though its prices were below cost. The Privy Council considered that the case raised a fundamental issue of principle about the extent to which competition law should inhibit competitive conduct through price-cutting by dominant firms. Applying the counterfactual test, the majority held that a dominant firm should not be penalized for lowering prices, even when it will result in below-cost pricing, if a non-dominant firm in a similar situation would have acted the same way. The Court noted the importance of distinguishing between the use of financial power and the use of market power. The Privy Council, relying on the Australian decision of *Boral*,[60] and effectively aligning New Zealand competition law with

58. Telecom Corporation of New Zealand Limited and Telecom New Zealand Limited.
59. Commerce Comm'n v. Telecom Corp. of N.Z. Ltd. [2004] 2 NZLR 421 (High Court, Auckland).
60. Boral Besser Masonry Ltd. v. Australian Competition and Consumer Comm'n (2003) 195 A.L.R. 609.

that of Australia, confirmed the usefulness of "treating recoupment as a fundamental element in determining a claim of predatory pricing."[61] There was no evidence that Carter Holt introduced the "2-for-1" offer with a view to increasing its prices at a later date. Carter Holt's offer was a response to competition in a market, and was not an illegal "use" of its dominant position for an anti-competitive purpose. The Privy Council warned lower courts against finding "use" of dominance based on a finding that there had been an anti-competitive "purpose."

C. Leniency Policy, Co-operation Policy and Cease and Desist Orders

In 2004, the Commission adopted a new Leniency Policy to tackle cartels and recast its previous, more general policy on leniency as a new Cooperation Policy. In addition, the Commission defined its process for dealing with applications for cease and desist orders.

Following its experience in cartel investigations, the Commission recognized the benefits of a clear cut policy that would motivate individuals or businesses to be the first to share cartel information with the Commission. The Leniency Policy[62] provides that the first person involved in a cartel to apply formally to the Commission for leniency may be granted immunity from Commission-initiated proceedings provided they cooperate fully with the Commission throughout any investigation and related proceedings.[63] If the person fails to cooperate with the Commission, the Commission may initiate proceedings against that person. The Leniency Policy applies to arrangements that substantially lessen competition and it does not include conduct that amounts to a company taking advantage of a substantial degree of market power.

The Cooperation Policy[64] compliments the Leniency Policy, although it is broader in scope and applies to the Commission's enforcement work under the Commerce Act and a number of other Acts.[65] If an individual or business has been involved in behavior that may contravene any of the relevant Acts and comes forward to the Commission, the Commission may exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full continuing and complete cooperation. This reduced enforcement action may include a settlement or a submission by the Commission to the Court for a reduction in penalty.

VI. Developments In The United States

A. Procedural Law

In 2004, the U.S. federal courts issued several decisions addressing the question of jurisdiction over anticompetitive conduct with international effects. One of the most important cases is *Hoffmann-LaRoche, Ltd v. Empagran,*[66] which concerned the application of an ex-

61. Carter Holt Harvey Bldg. Prod. Group Ltd. v. Commerce Comm'n [2004] 37 U.K.P.C. 1, ¶ 67.

62. Commerce Commission, *Leniency Policy, available at* http://www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx (last visited May 27, 2005).

63. A person includes a company or an individual.

64. Commerce Commission, *Cooperation Policy, available at* http://www.comcom.govt.nz/TheCommission/Co-operationPolicy/Overview.aspx (last visited May 27, 2005).

65. Credit Contracts and Consumer Finance Act, 2003 (N.Z.); Dairy Industry Restructuring Act, 2001 (N.Z.); Electricity Industry Reform Act, 1998 (N.Z.); Fair Trading Act, 1986 (N.Z.).

66. Hoffman-La Roche, Ltd. v. Empagran, 124 S. Ct. 2359 (2004).

ception in the Foreign Trade Antitrust Improvements Act (FTAIA).[67] In general, if the FTAIA exception applies, plaintiffs can bring a cause of action in U.S. courts for damages caused by the anticompetitive conduct. As noted in last year's edition, the FTAIA has been the subject of conflicting interpretations by U.S. federal courts over the past several years.

The Supreme Court vacated the federal appeals court's decision, and held that, where anticompetitive conduct significantly and adversely affects both customers outside and within the United States, but where the adverse foreign effect is independent of any adverse domestic effect in the United States, the FTAIA exception does not apply to a claim based solely on the foreign effect.[68] The Court noted, however, that appellants may have alternatively argued that the foreign injury suffered by them was not independent from the domestic U.S. effects of the challenged conduct, and that the domestic effects were linked to the foreign harm because the international price-fixing arrangement could not have been maintained without higher prices in the United States. The Court did not address this alternative argument because the appellate court had not done so, but remanded the case to the appellate court for further proceedings.

In light of the Supreme Court's decision in *Empagran*, the U.S. Court of Appeals for the Second Circuit decided that a federal district court lacked subject matter jurisdiction over antitrust claims brought on behalf of a class of U.S. plaintiffs who paid supra-competitive fees in Europe for exchanging currencies.[69] According to the court, the plaintiffs failed to show that the European conspiracy's effects on U.S. commerce gave rise to their claims. For example, plaintiffs did not allege that currency exchange fees in the United States reached supra-competitive levels.

The applicability of the "direct test" in the FTAIA[70] was also considered by the U.S. Court of Appeals for the Ninth Circuit in *United States v. LSL Biotechnologies*[71] In that case, a contract between defendants, U.S. firms, and an Israeli company, in connection with a cooperative venture to develop a genetically-altered tomato seed, included a clause banning the Israeli company from selling long shelf-life tomato seeds in North America. In applying the FTAIA, the appellate court affirmed the district court's decision that it lacked subject matter jurisdiction under the FTAIA.[72] While exclusion of a potential foreign competitor might satisfy the "direct" requirement of the FTAIA, an effect could, according to the court, not be "direct" where it depended on such uncertain intervening developments as those argued by the government.[73] More specifically, the government's argument was that the clause made it less likely that the Israeli company would engage in tomato seed research and product development in the United States.

In 2004, U.S. federal courts also decided a number of cases relating to personal jurisdiction over foreign companies. A French cosmetics manufacturer, for example, was found not

67. 15 U.S.C. § 6a (2005).

68. The federal appeals court concluded that Empagran could pursue its action for damages for injury suffered abroad because of a worldwide conspiracy to fix prices in the courts of the United States, despite the fact that the alleged effects of the conspiracy did not give rise to the plaintiffs' claims. *See* Empagran v. Hoffman-LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003).

69. *See* Sniado v. Bank Aus. Ag., 378 F.3d 210 (2d Cir. 2004).

70. That is whether the foreign conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce. United States v. LSL Biotechnologies, 379 F.3d 672, 678 (9th Cir. 2004).

71. *Id.*

72. *Id.* at 674.

73. *Id.* at 681.

to be within the personal jurisdiction of a federal court in Tennessee for purposes of a hair salon's antitrust suit against the manufacturer.[74] According to the court, the plaintiff had not shown that the manufacturer maintained the continuous and systematic contacts with the United States that were necessary for general personal jurisdiction to exist in the district.[75] The manufacturer did not maintain any offices or facilities in the United States, paid no U.S. taxes, and held no shareholder or board of directors meetings within the country. Also, the company did not own or lease any property in the United States or maintain inventory or a bank account within the United States now or at any time relevant to the suit.[76] In another case, the U.S. Court of Appeals in Philadelphia found that a trial court had personal jurisdiction over two corporations located in Germany that were accused of engaging in unlawful price fixing for automobile refinishing paint, even though the companies did not have contacts with the forum state.[77] The appellate court found that the worldwide service of process authorized under the Clayton Act upon foreign companies was independent of the specific venue provision in the same statutory section, and that the trial court had personal jurisdiction over the companies because such jurisdiction in antitrust litigation was predicated on a foreign company's contacts with the United States as a whole.[78]

Another important procedural development was the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*[79] The Supreme Court was asked in 2003 to review the authority of federal district courts under section 1782 of the Judicial Code[80] to assist in the production of evidence for use in a proceeding before a foreign body, the EC, a question on which lower courts had been divided. In permitting plaintiff to seek the discovery assistance, the Court held that: (1) section 1782 does not contain a requirement that the material at issue be discoverable in the foreign jurisdiction; (2) discovery is available to section 1782 complainants even though they do not have the status of private "litigants" and are not sovereign agents; and (3) although a proceeding before a foreign tribunal has to be within reasonable contemplation, it does not have to be pending or imminent.[81]

In reaching its conclusions, the Court noted that, besides shielding privileged material, nothing in the text of section 1782 limits a district court's authority to material that can be discovered in a foreign jurisdiction.[82] Concerns about parity among adversaries in litigation were also not considered a sound basis for such limitation because relief can be conditioned upon reciprocal exchange of information and because a foreign tribunal can place conditions on its acceptance of the information. With respect to the need for status as a private "litigant," the Court took into account that the text of the statute plainly reaches beyond persons designated "litigant" and that, although the plaintiff may lack formal "party" or "litigant" status in the foreign proceedings, the plaintiff has significant procedural rights.[83] For ex-

74. Cupp v. Alberto-Culver USA, Inc., 308 F. Supp. 2d 873 (W.D. Tenn. 2004).
75. *Id.* at 878.
76. *Id.*
77. In re: Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004).
78. *Id.* at 296-98.
79. Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466 (2004).
80. 28 U.S.C. § 1782 (2000).
81. The Court also rejected defendant's suggestion that a § 1782 applicant must show U.S. law would allow discovery in domestic litigation analogous to the foreign proceeding. Intel Corp., 124 S. Ct. at 2472-73.
82. *Id.* at 2480.
83. *Id.* at 2469-70.

ample, the plaintiff may submit information in support of its claims and may seek judicial review of the foreign decision. The Court concluded that section 1782 authorizes, but does not require, a federal district court to provide assistance to a complainant.

In rehearing the case, the Northern District of California denied in full plaintiff's amended application for discovery.[84] The court took into consideration that the EC could ask the defendant to produce any or all of the documents sought for discovery because the defendant is a participant in the Commission proceedings.[85] The Commission, however, had not done so. Considering this lack of action by the Commission and the Commission's *amicus curiae* briefs to the Supreme Court, the court inferred that the Commission was not receptive to judicial assistance in this case. The court also took into account that the application attempted to circumvent the Commission's decision not to request discovery and that plaintiff's request was unduly intrusive and burdensome because it had not tried to tailor it to the subject matter of the complaint to the Commission.[86]

B. Cartel Enforcement

In 2004, the Department of Justice (DOJ) continued to demonstrate its commitment to prosecute companies that participate in international cartels, which affect U.S. commerce and consumers.

The largest single fine imposed in 2004 was paid by Infineon Technologies AG (Germany), which agreed to pay a $160 million fine for participating in an international conspiracy to fix prices in the market for dynamic random access memory (DRAM) chips.[87] The fine is the third largest Sherman Act fine ever imposed on a corporate defendant, and the largest corporate fine imposed under any statute by the DOJ under the Bush Administration.[88]

The DOJ also took several actions against Bayer AG (Germany), which agreed in July 2004, to plead guilty and pay a $66 million fine for its participation in an international conspiracy to fix prices in the rubber chemicals market from 1995 to 2001.[89] Later in 2004, the company also agreed to plead guilty and to pay a $4.7 million fine for participating in a conspiracy during 2002 to fix prices of synthetic rubber.[90] Bayer's U.S. subsidiary, Bayer Corporation, also agreed to plead guilty and to pay a $33 million fine for participating in a conspiracy from 1998 through 2002 to fix prices of polyester polyols.[91]

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84. Advanced Micro Devices, Inc. v. Intel Corp., No. C 01-7033, 2004 WL 2282320, at *1 (N.D. Cal. Oct. 4, 2004).

85. *Id.* at *2.

86. *Id.* at *3.

87. *See* Press Release, Department of Justice, Infineon Technologies AG Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy (Sept. 15, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205437.htm.

88. *See* Deputy Assistant Attorney General Thomas O. Barnett, Remarks at the Fall Forum of the Section of Antitrust Law (Nov. 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.htm.

89. *See* Press Release, Department of Justice, Bayer AG Agrees to Plead Guilty and Pay $66 Million Fine for Participating in Rubber Chemicals Cartel (July 14, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/204602.htm.

90. *See* Press Release, Department of Justice, Bayer AG Agrees to Plead Guilty and Pay $4.7 Million Criminal Fine for Participating in Synthetic Rubber Price-Fixing Conspiracy (Oct. 13, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205797.htm.

91. *See* Press Release, Department of Justice, Bayer Corporation Agrees to Plead Guilty to Participating in a Chemical Additive Cartel (Sept. 30, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205621.htm.

Other examples include De Beers Centenary AG's (Germany) agreement to submit to U.S. jurisdiction, plead guilty, and to pay a $10 million fine to resolve a ten-year-old indictment for conspiring to fix the price of industrial diamonds[92] and Dutch-based Jo Tankers B.V.'s agreement to plead guilty and pay a $19.5 million fine, over a five-year period, for participating in an international cartel during 1998 and 2002 to allocate customers, rig bids, and fix prices on parcel tanker contracts for shipments of specialty liquids.[93]

The DOJ has also pursued its commitment to prosecute and obtain prison terms for individuals, wherever they reside, for participation in international cartels with an effect in the United States. For example, four executives, three of whom are German citizens, of Infineon Technologies AG and its subsidiary, Infineon Technologies North America Corporation, agreed to plead guilty to participating in the international conspiracy in the DRAM market.[94] Each of the executives has agreed to pay a $250,000 fine and serve prison terms ranging from four to six months. Further, an executive of the chemical company Daicel Chemicals Industries, a resident in Japan, agreed to plead guilty, serve a three-month jail sentence in the United States, and to pay a $20,000 fine for his role in a seventeen-year international conspiracy that suppressed competition in the food preservatives industry.[95] Moreover, the former co-managing director of Jo Tankers B.V. was sentenced to serve three months imprisonment and pay a fine of $75,000 for his role in the parcel tanker contracts cartel.[96]

C. Merger Enforcement

The DOJ and FTC examined several international mergers affecting competition in the United States during 2004. In some of the cases consent decrees were entered to address potential anticompetitive effects.

The DOJ, for example, reached a settlement to resolve its objections to the proposed acquisition of Advanta B.V. (the Netherlands) by Syngenta AG (Switzerland).[97] The DOJ believed that the transaction, which resulted in the merger of the third and fifth largest agricultural seed companies in the world, would lead to higher prices and reduced seed innovation. The settlement required Syngenta to divest the worldwide sugar beet seed business of Advanta B.V.

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92. *See* Barnett, *supra* note 88.

93. *See* Press Release, Department of Justice, Dutch Shipping Company Agrees to Plead Guilty in International Parcel Tanker Shipping Investigation (Apr. 19, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/203321.htm.

94. *See* Press Release, Department of Justice, Four Infineon Technologies Executives Agree to Plead Guilty to International DRAM Price-Fixing Conspiracy (Dec. 2, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/206631.htm.

95. *See* Press Release, Department of Justice, Japanese Executive Agrees to Plead Guilty to Participating in an International Antitrust Conspiracy (Aug. 5, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/204910.htm.

96. *See* Press Release, Department of Justice, Dutch Shipping Company Agrees to Plead Guilty in International Parcel Tanker Shipping Investigation (Apr. 19, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/203321.htm.

97. *See* Press Release, Department of Justice, Justice Department Requires Restructuring of Syngenta's Acquisition of Advanta (Aug. 25, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205195.htm.

The DOJ also reached an agreement with Canadian-based Alcan Inc. and French-based Pechiney S.A. to modify an earlier antitrust settlement that would resolve the government's concerns stemming from Alcan's successful tender offer for Pechiney.[98] The amended settlement gives the parties the opportunity to sell either two of Alcan's aluminum rolling mills in the United States or one of Pechiney's aluminum rolling mills in the United States. The DOJ agreed to amend the settlement because the companies may be able to divest Alcan's brazing sheet business more quickly than Pechiney's brazing sheet business.

The FTC cleared France's Sanofi-Synthélabo's acquisition of Aventis S.A. (France), which resulted in the formation of the third-largest pharmaceutical company in the world, subject to the companies' divestiture of certain assets and royalty rights in the markets for factor Xa inhibitors, cytotoxic drugs for the treatment of colorectal cancer, and prescription drugs used to treat insomnia.[99]

D. International Cooperation

During 2004, representatives of the United States and Canada signed an agreement aimed at enhancing the process under which they will refer cases of anticompetitive activities to each other's authorities for appropriate law enforcement action.[100]

Finally, officials of the DOJ on several occasions emphasized the importance of international cooperation in the antitrust area. For example, at the 31st Fordham Annual Conference on International Antitrust Law & Policy, R. Hewitt Pate, Assistant Attorney General at the DOJ Antitrust Division, stated that strengthened inter-agency cooperation and information sharing is a critical component in a successful international cartel enforcement effort.[101] He also noted with approval that there have been coordinated raids and service of subpoenas during 2004 by the United States, the EU, Canada, and Japan investigating price-fixing and that they should be able to conduct more joint actions in the future.

98. *See* Press Release, Department of Justice, Justice Department, Alcan Inc. and Pechiney S.A. Agree to Modify Antitrust Settlement (May 26, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/203825.htm.

99. *See* Press Release, Federal Trade Commission, Resolving Anticompetitive Concerns, FTC Clears Sanofi-Synthélabo's Acquisition of Aventis (July 28, 2004), *available at* http://www.ftc.gov/opa/ 2004/07/sanofi aventis.htm.

100. *See* Press Release, Department of Justice, U.S. and Canada Sign Agreement to Provide for Enhanced International Antitrust Cooperation (Oct. 5, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205675.htm.

101. *See* Assistant Attorney General R. Hewitt Pate, Address before the Fordham Corporate Law Institute, 31st Annual Conference on International Antitrust Law & Policy (Oct. 7, 2004), *available at* http://www. usdoj.htm.