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401 Report from the Front Lines: Current Antitrust and Competition Policy Issues

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Faculty Biographies

Theodore L. Banks

Theodore L. Banks (Ted) is chief counsel and senior director of global compliance policy at Kraft Foods in Northfield, Illinois. His responsibilities include, among other things, risk assessment, policy development, training, and communications for Kraft's compliance program, as well as the global records management program.

Over his legal career, Mr. Banks has been responsible for antitrust, environmental, and corporate legal matters, in addition to his current compliance responsibilities. He coordinated numerous major transactions, including the IPO of Kraft Foods.

He is the author of several legal treatises, including Distribution Law: Antitrust Principles and Practice, published by Aspen, now in its second edition, and was one of the pioneers in developing ways that in-house attorneys can use computers in their practices. Mr. Banks has written numerous articles on compliance, antitrust, and legal management topics, and co-edited the Corporate Legal Compliance Handbook, also published by Aspen. He is also a frequent speaker at continuing legal education programs, where he strives not to bore the attendees too much.

Mr. Banks received a BA from Beloit College and is a graduate of the University of Denver College of Law.

Nadia Calviño

Nadia Calviño is deputy director general in the Directorate General for Competition of the European Commission with special responsibility for mergers and antitrust. She joined the commission as deputy director general for mergers and her area of responsibility was enlarged then to cover antitrust enforcement, including cartels.

A career civil servant in Spain (Técnico Comercial y Economista del Estado), before joining the European Commission she worked in the Ministry for Economy occupying different positions in the areas of foreign trade, macroeconomic forecasting, economic policy, and competition. She worked in this area for more than nine years; as senior antitrust case handler, deputy director general for legal affairs, deputy director general for mergers and finally, director general for competition.

An economist and a lawyer by training, she has worked as a teacher of economic policy in the Spanish University (Universidad Complutense de Madrid).

W. Stephen Cannon

Steve Cannon is chairman of Constantine Cannon LLP with offices in New York and Washington, DC. Constantine Cannon is a mid-sized firm of 40 lawyers specializing in antitrust and complex commercial litigation, government relations, and regulatory policy.

Prior to joining Constantine Cannon, Mr. Cannon served as senior vice president, general counsel, and secretary of Circuit City Stores, Inc. Before joining Circuit City, Mr. Cannon was a partner in the Washington, DC firm of Wunder, Diefenderfer, Ryan, Cannon & Thelen, where he concentrated his practice in antitrust, trade regulation, and administrative law. Prior to joining Wunder, Diefenderfer, Mr. Cannon spent 10 years in government service. After a clerkship with the South Carolina Supreme Court, Mr. Cannon received an appointment under the US Justice Department's Honors Law Graduate Program. Mr. Cannon was appointed chief antitrust counsel to the US Senate Judiciary Committee and later, Mr. Cannon returned to the antitrust division of the Justice Department as deputy assistant attorney general.

In 2004, Mr. Cannon was appointed to serve on the Antitrust Modernization Commission. The Commission was charged with examining the broad scope of the nation's antitrust laws. Later, Mr. Cannon was appointed to an ABA special task force to examine the status of attorney-client privilege in American jurisprudence. In addition, Mr. Cannon serves on the board of directors of the US Chamber of Commerce National Litigation Center and as counsel to ACC on a range of issues.

Mr. Cannon received both his undergraduate and law degree from the University of South Carolina.

Vinod Kumar Dhall

Vinod Kumar Dhall was the first member and acting chairman of the Competition Commission of India. He set up the Commission and laid the foundation of a professional competition authority incorporating global best practices. Under his direct supervision, the Commission undertook preparation of draft implementing regulations, guidelines, merger notification procedures, and inquiry and investigation manuals. It also undertook extensive competition advocacy and public awareness, and instituted training programs for staff and other stakeholders. It commissioned many competition assessment studies in different sectors of the economy.

Previously, Mr. Dhall was (permanent) secretary to the Government of India and adviser/consultant to United Nations organizations.

In 2007, Mr. Dhall brought out a book, *Competition Law Today* published by Oxford University Press, which has met with critical praise within and outside India. He has been chair/member of several high level working groups on competition law/policy set up by Government of India or other organizations within and outside India. He lectures extensively and is honorary visiting professor at law/management institutes.

Adam Fanaki

Adam Fanaki is the special counsel to the commissioner of competition, the head of Canada's Competition Bureau. As special counsel to the commissioner, Mr. Fanaki sits on the bureau's senior management committee and provides advice on key competition bureau matters. During the first year of his appointment, Mr. Fanaki represented the commissioner in significant proceedings before the competition tribunal and courts, led strategic policy and legislative amendment initiatives, and acted as counsel in respect of numerous significant mergers, criminal cases, and other matters.

Mr. Fanaki is seconded to the competition law division of the Department of Justice from the law firm of Borden Ladner Gervais LLP. He has litigated competition matters before the competition tribunal and in civil courts. Mr. Fanaki has also advised the commissioner of competition regarding proposed legislative amendments to the Competition Act.

He is a past chair of the legislation and competition policy committee and vice-chair of the reviewable matters committee of the Canadian Bar Association - Competition Law Section. Mr. Fanaki has been an adjunct faculty member at Osgoode Hall Law School, York University, and a lecturer at the University of Western Ontario. He has authored numerous papers on the subject of competition law and Mr. Fanaki has consistently been recognized as one of Canada's leading competition lawyers in various publications.

He obtained an LLB, with distinction, from the University of Western Ontario and a Masters from King's College - University of London.

Pamela Jones Harbour

Pamela Jones Harbour was sworn in as a commissioner of the Federal Trade Commission on August 4, 2003. Her term expires in September 2009.

Ms. Harbour joined the FTC from Kaye Scholer LLP where she served as a partner in the litigation department handling antitrust matters. She counseled clients on Internet privacy, e-commerce, consumer protection, and a variety of competition-related matters. Prior to joining Kaye Scholer, Ms. Harbour was New York State deputy attorney general and chief of the office's 150-attorney Public Advocacy Division. During her term in the attorney general's office, she argued before the United States Supreme Court on behalf of 35 states in State Oil v. Khan, a landmark price-fixing case. She also successfully represented numerous states in New York v. Reebok, States v. Keds, and States v. Mitsubishi, each resulting in multimillion-dollar national consumer settlements. Among her most notable antitrust cases were New York v. May Department Stores, a successful anti-merger challenge, and States v. Primestar Partners, a consent judgment culminating a four-year multistate investigation of the cable television industry.

Ms. Harbour received her law degree from Indiana University School of Law, and a BM from Indiana University School of Music.

Brad Smith

Brad Smith is Microsoft's senior vice president, general counsel, and corporate secretary. He leads the company's department of legal and corporate affairs, which is responsible for all legal work and for government, industry, and community affairs activities. Mr. Smith has played a leading role at Microsoft on intellectual property, competition law, and other Internet legal and public policy issues. He is also the company's chief compliance officer and is responsible for Microsoft's intellectual property work. Since becoming general counsel, he has overseen numerous negotiations with governments and other companies. He is also responsible for the expansion of Microsoft's citizenship and philanthropic activities.

Mr. Smith previously worked as deputy general counsel for worldwide sales, and before that, he managed the company's European law and corporate affairs group, based in Paris. Before joining Microsoft, he was a partner at Covington & Burling, having worked in the firm's Washington, DC and London offices and represented a number of companies in the computing industry.

He has written numerous articles regarding international intellectual property and electronic commerce issues, and has served as a lecturer at The Hague Academy of International Law.

Mr. Smith graduated summa cum laude from Princeton University, where he received the Harold Willis Dodds Achievement Award, the highest award given to a graduating senior at commencement. He was a Harlan Fiske Stone Scholar at the Columbia University School of Law. He also studied international law and economics at the Graduate Institute of International Studies in Geneva, Switzerland.

Coordination Among National Antitrust Agencies

Kris Dekeyser, Mario Siragusa, Douglas Rosenthal & David Golden

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THE TENTH ANNUAL SEDONA CONFERENCE ON ANTITRUST LAW & LITIGATION: THE GLOBALIZATION OF ANTITRUST ENFORCEMENT

Coordination Among National Antitrust Agencies

Kris Dekeyser,[1] Mario Siragusa,[2] Douglas Rosenthal[3] and David Golden[4]

This paper examines the manner in which national antitrust agencies within the EU and within the U.S. coordinate antitrust enforcement in their respective territories, and also how they interact with other antitrust organizations around the world. In looking at these issues, the hope is to add a new perspective to the ever important question of convergence of substantive antitrust laws in a global economy. An examination of how national antitrust agencies coordinate among themselves provides some insight into whether convergence should always be the goal, and whether it can realistically be achieved.

Part I focuses on coordination among national antitrust agencies within the EU. Part II focuses on coordination among the U.S. enforcement agencies. Part III focuses on cooperation among the EU, the U.S. and other non-EU countries and organizations. The paper concludes with some policy considerations for purposes of examining these issues.

Part I: Coordination Among National Antitrust Agencies In The EU

A. Introduction - Antitrust Enforcement In The Pre-Modernisation Era

Council Regulation (EC) No. 1/2003[5] ("Regulation 1/2003") entered into force on 1 May 2004, establishing a new antitrust enforcement regime in the European Union. Until that date, the enforcement of competition rules in the European Union lacked coordination and was not based on the same set of rules and principles. The main objective of EC Council Regulation 1/2003 ("Regulation 1/2003") is to strengthen the enforcement of EC competition rules at a national level, through increased involvement of National Competition Authorities ("NCAs") and national judges. Indeed, before May 1, 2004 there was scarce application of EC competition rules by NCA's and hardly any

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[5] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1 of 4 January 2003, p. 1.

application of these rules by national judges. While it is probably possible, for the early decades of the development of EC competition policy, to attribute such an effect to a deficit of spread consensus in support of an incisive antitrust policy, such consensus was building up as from the 1980ies in particular, with Member States gradually setting up national competition authorities and introducing national competition laws that were often largely modelled on EC law. Nonetheless, the European Union did not have, at the time, normative instruments suitable to ensuring coordination of antitrust policy and enforcement at national level.[6]

Indeed, in the pre-modernisation scenario, the European Commission was *de facto* to a large extent alone in applying Articles 81 and 82 of the EC Treaty for prosecuting antitrust infringements capable of affecting trade between Member States. National competition authorities ("NCAs") retained competence to apply national antitrust provisions to infringements in their national territory including infringements capable of affecting trade between Member States and thus falling within the scope of application of Articles 81 and 82 EC. As it is clear now, this system was intrinsically flawed. Indeed, the "monopoly" in the application of Articles 81 and 82, together with the fact that agreements affecting trade could be notified and approved in Brussels, led to a sub-optimal enforcement situation, given the Commission's limited enforcement resources, the under-development of the NCAs' involvement in the application of EC competition law as well as inefficiencies flowing from their potentially overlapping action based on different sets of rules.[7]

Regulation 1/2003 impacted on this pre-existing situation by enhancing the Commission's enforcement prerogatives and investigative powers. It also determined, on the one hand, a rationalisation of the available resources and, on the other hand, established a mechanism where the coherent application of antitrust principles was actively pursued.

Indeed, for the first time, the national competition authorities of the Member States and the national courts obtained the power to apply the competition provisions in the Treaty in full within their respective jurisdiction/sphere of competence.[8] In addition, when applying national competition law to agreements or conduct in breach of those rules, NCAs and national courts are obliged to apply Articles 81 and 82 of the EC Treaty (provided, of course, that the conduct is capable of affecting trade between Member States).[9]

B. The European Competition Network And Its Functioning

[6] It must be observed, as an example, that Regulation 17/62 contained little provision for exchange of information between the Commission and the NCAs and none at all for exchange of information between the NCAs.
[7] *See* Recital 3 of Regulation 1/2003: "*The centralised scheme set up by Regulation No 17 [...] hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.*"
[8] *See* Articles 5 and 6 of Regulation 1/2003.
[9] *See* Art. 3 of Regulation 1/2003.

The fact that Regulation 1/2003 empowered national competition authorities and national courts to apply Articles 81 and 82 triggered the concern that Community competition law might be applied in vastly diverging ways by different authorities and/or courts. In this respect, the establishment of the European Competition Network ("ECN") was the most appropriate solution to ensure, at the same time, cross-border cooperation between antitrust authorities, capillary enforcement and coherent application of EU competition rules.

The ECN is not an autonomous body or organization in the EU institutional landscape. It is, rather, a forum for cooperation between the European Commission and the national competition authorities. The role of the ECN is to facilitate the exchange of information between competition authorities and the mutual assistance in antitrust investigations, with a view to shaping a common competition culture and enhancing the efficiency of the antitrust enforcement action across Europe.[10]

In the above respect, it is important to point out that the function of the ECN is not limited to the "institutional" activities provided for in Regulation 1/2003. Out of the scope of such provisions, cooperation has grown and developed. Within the ECN, informal exchanges as well as periodic meetings in a range of different fora have their place. While the *plenary meetings* and *working groups* address issues concerning horizontal cooperation between the Authorities, ECN *subgroups* bring together experts for specific sectors. Any topic of sufficient weight and mutual interest can moreover be taken up at the periodic Meetings of Directors general.

1. An Integrated And Flexible Enforcement System

Regulation 1/2003 sets forth the provisions regulating the cooperation within the ECN. The resulting system is based on parallel competences of the Commission and the NCAs in the application of EU competition rules and on flexible case allocation. Additional orientations on the functioning of the ECN are included in the Commission Notice on cooperation within the Network of Competition Authorities (the "Network Notice").[11]

As a consequence of the establishment of the ECN, additional resources (in terms of investigative tools and case-specific information) became available to European competition authorities, enhancing their ability to be effective enforcers including in cases that have certain cross-border implications. NCAs are able to draw on information exchanges and assistance from other authorities in the network under the mechanisms foreseen in the Regulation.

Moreover, work sharing in the network contributes to making effective and efficient use of the limited resources available for antitrust enforcement

[10] *See* K. Dekeyser and M. Jaspers, *A New Era of ECN Cooperation*, World Competition, 2007, pp. 3-24.
[11] OJ C 101 of 27 April 2004, p. 43.

The parallel competence and the flexible case allocation principles, included in the Network Notice, allow any well-placed competition authority to take action on a case.[12] Cases can be handled by authorities that are well placed in terms of being close to (and consequently possess enhanced knowledge of) the markets affected. In addition, work sharing in the network can contribute to alleviating the persisting resource constraints for antitrust enforcement. At the same time, the Commission is enabled to play a leading role in the enforcement and is not prevented from handling cases raising important policy issues independent of their geographical scope.[13]

2. Exchange Of Information

A key, value-adding element of the ECN is the possibility to exchange case-specific information. Such information can be relevant for case allocation purposes and/or for investigating and/or proving a case. Exchanged information can be used in evidence, if the conditions in the Regulation are fulfilled. There are specific safeguards for leniency-related information.

Article 12 of Regulation 1/2003 regulates the exchange of information within the ECN. It provides that, for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to (i) provide one another with and (ii) use in evidence any matter of fact or of law, including confidential information.

With respect to the use in evidence of exchanged information, Art. 12(2) of Regulation 1/2003 clarifies that

> Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

Only in two specific cases the information exchanged can be used in evidence to impose sanctions on natural persons namely when (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or (ii) the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

[12] On work sharing in the network and the concept of *well-placed* authority, see the Network Notice, paras 5ss.
[13] *See* ECJ judgment in case C-344/98, *Masterfoods*, [2000] ECR I-11369.

In this respect, it is worth adding that, although, Art. 12 empowers NCAs to exchange information, it does not compel them to do so, when requested by another NCA.[14] Adhering to a request for information falls within the discretion of each NCA. It has been considered whether such discretion is outweighed by a general duty to cooperate imposed on the NCAs by Art. 10 of the EC Treaty.[15] Some argue that the rationale of Art. 10 (*i.e.* the need that the Community institutions and the national authorities assist each other in the implementation of the Treaty) suggests that a duty to provide information indeed exists. However, there are opinions to the contrary.[16] What can be emphasised at this point is that, even if the *option* set forth by Article 12 is indeed construed as an *obligation*, such obligation should not be considered unlimited. Leniency information, for instance, is of pre-eminent importance for antitrust enforcement and, as such, must be handled with caution.

The reflections above lead us to the conclusion that the principles regulating the exchange and use in evidence of information gathered within the Network are a cornerstone of the functioning of the ECN system. This is because access to information obtained anywhere in the Network countries allows enforcers within the Network to build more solid cases at a faster pace, at the same time avoiding any duplication of investigative efforts. There is one cavaet, however, namely that leniency information is an invaluable enforcement resource for the authority that gathers it: it shall therefore be subject to a special regime.

3. Cooperation In The EU And Leniency: The ECN Model Leniency Program

The described system of parallel competences with flexible case allocation rules has strong consequences for the handling of leniency cases within the EU, given the increasing trend among Member States to adopt leniency programs and the fact that each ECN member deals with its leniency program independently from the others.

In order to provide a greater degree of predictability for potential applicants and prevent them from being faced with contradictory demands when more than one ECN leniency program is applicable, ECN members launched the ECN Model Leniency Program. It is an important tool for the harmonization of all European leniency programs.

Indeed, the principal aim of this Program is to provide details on how the one-stop-shop options for the handling of leniency within the ECN should work, thus setting out the principal substantive rules that ECN members believe should be common to all the programs they operate.

[14] It must be considered that NCAs are already subject to an obligation to comply with the Commission's request for information pursuant to Art. 18(6) of Regulation 1/2003.

[15] *See* J. Faull & A. Nikpay, *The EC Law of Competition*, 2nd ed., 2007, p. 141-142.

[16] It is argued, in particular that the provision of Art. 12 of Reg. 1/2003 is a specific provision and, as such, it would prevail over Art. 10 EC Treaty. The latter is a rule of general character, which is only applicable to the extent that Community legislation does not specifically provide on the matter. *See* J. Faull & A. Nikpay, *cit.*, p. 141-142.

4. Work Sharing

With the sole exception of Article 11(6), the system of Regulation 1/2003 is a system of parallel competences. The Network Notice envisages that work sharing should be flexible and a matter of dialogue between the enforcers in the ECN. This approach initially raised concerns and was also contested in court.

In legal terms, it is noteworthy that the CFI has for the first time taken position on questions of work sharing between the Commission and national competition authorities in the ECN in its judgments of 8 March 2007[17] in the France Télécom cases. In a nutshell, the applicants in the case had argued that – by carrying out an inspection in a case that had previously been dealt with by the French NCA and consensually been pursued further by the Commission – the Commission had violated an alleged 'division of competences' that, according to the applicant, could be derived from Regulation 1/2003, the Network Notice and/or general principles.

In its judgement in Case T-339/04, the CFI rejected the arguments of the applicant(s) in respect of work sharing in the ECN in their entirety. It held in particular that Regulation 1/2003 has, in conformity with the principle of subsidiarity, provided for a wider association of the national competition authorities with the application of the EC competition rules. However, the Regulation has not changed the general competence of the Commission recognised by the case law of the ECJ (*Masterfoods*). Moreover, the Regulation has not established a division of competences that could preclude the Commission from carrying out an inspection where a national competition authority is already dealing with the same case. Neither the Network Notice – as evidenced by its contents and wording – nor the Joint Statement establish binding criteria that could lead to the conclusion that – in the case at hand - solely the French competition authority could deal with the case and that the Commission was prevented from doing so. Furthermore, the principle of subsidiarity does not put into question the competences conferred on the Commission by the EC Treaty, which include the enforcement of the EC competition rules.

From a practical perspective, work sharing is not a major issue of concern and discussion within the network. Based on the Network Notice, cases are in the vast majority of instances followed up and concluded by the authority that started them.[18] When initiating an investigation, authorities naturally take into account that they have a close relationship with the market in which the infringement takes effect, access to the evidence (if necessary with assistance by one or more other authorities) and enforcement powers to address the case. At present, there is no indication that any cases at all have been initiated by an authority that could not be considered well placed within the meaning of the Network Notice. In addition, any issues arising in connection with a possible re-allocation have been addressed and solved through bilateral discussions

[17] Judgements of the CFI of 8 March 2007 in Cases T-339/04 and 340/04, France Telecom v. Commission.

[18] *See* K. Dekeyser and D. Dalheimer, *Cooperation within the European Competition Network – Taking Stock After 10 Months of Case Practice*, in P. Lowe & M. Reynolds (eds), *Antitrust Reform in Europe: a Year in Practice*, London, International Bar Association, 2005, pp. 105-123.

taking place within the network and at the earliest possible stage. In sum, the practice of the ECN shows that very few cases have been transferred from one competition authority to another or have given rise to work sharing discussions between authorities in the network.

5. Coherent Application Of Antitrust Rules

Regulation 1/2003 pursues as one major objective the coherent application of the EC competition rules by all enforcers. It recognises the fact that inconsistencies in the application of Articles 81/82 EC can be detrimental to companies doing business in the internal market. Against this background, it calls for a high level of coherence which in turn, entails a degree of coordination in the ECN.

In the above respect, Regulation 1/2003 sets forth three main mechanisms in order to ensure the coherent application of the antitrust rules: (i) obligation on NCAs to apply Community law whenever there is an effect on trade between Member States, in a manner that ensures convergence between national and Community law (Art. 3); (ii) obligation on the NCAs to inform the Commission at the latest 30 calendar days before the adoption of an envisaged decision (Art. 11(4)); and (iii) possibility for the Commission to intervene if there is a serious risk of incoherence by relieving the NCA of its competence to act (Art. 11(6)).

Art. 3 of Regulation 1/2003 has so far ensured the desired convergence in the application of antitrust rules, with the result that, from this perspective, there is now a level playing field for undertakings doing business in the European Union.[19]

In addition, the information mechanism foreseen in Art. 11(4) of Regulation 1/2003 allows the Commission to review all the envisaged decisions from NCAs so as to exercise its task and particular responsibility towards ensuring a coherent application of the antitrust provisions. The possibility to submit observations on a case[20] has proven, in this respect, to be a pragmatic and balanced tool to foster the required convergence. The aim of such observations is to draw the national authority's attention to certain issues or to raise certain points which might merit further reflection. They are usually undertaken in a very informal manner in phone contacts between the national case-team and the responsible unit within DG Competition. In certain cases, the oral dialogues are followed-up by a letter but the fact that the views are expressed in writing does not change the informal nature of the exercise.

It is useful to underline that coherent application should not be confounded with absolute uniformity in outcome. Ensuring an overall level playing field for European business is achieved when the same type of legal and economic considerations govern enforcement action by ECN members. Market or case-specific elements may result in a different outcome for cases that would initially appear to be the same. Different ECN members may also opt for different instruments – such as prohibition or commitment decisions – to address the identified concern.

[19] *See* K. Dekeyser and M. Jaspers, *cit*.
[20] *See* Network Notice, para. 46.

At this stage of the ECN activities, the Commission has never used the possibility granted by Art. 11(6) to take action on a case and relieve an NCA of its competence to act, with a view to ensure coherent application. Informal contacts and comments have proven to be very effective in drawing the national authority's attention on the most relevant aspects of a case and the willingness of the national authorities to engage in these dialogues and to take due account of the suggestions made has turned this more voluntarily cooperation instrument into a useful complementary tool to the formal powers given to the Commission. In this respect, the powers granted by Art. 11(6) remain as an *extrema ratio* in the array of Commission's enforcement tools.

6. Achievements Of The ECN Network

At present, the allocation of cases, work sharing and exchange of information in the ECN have resulted in an enhanced and coherent application of EC competition rules. The ECN has had policy reflections beyond what is expressly required by the Modernization Package, the growing convergence of national procedural rules and the work in the leniency field being good examples.[21] However, not all discrepancies in the centralized and decentralized application of the competition rules have been removed, as the different policies for fines of each NCAs demonstrate.

The ECN network has brought about substantial improvements in antitrust enforcement in the EU. While the Commission maintains a leading and propulsive role within the network, it must be noted that, since the adoption of Regulation 1/2003, the NCAs have also been very active in prosecuting cartels as well as in pursuing other antitrust infringements of all types. Between May 2004 and mid-November 2007, the ECN members have adopted some fifty decisions applying Art. 81 to cartels. Three out of five of these decisions were adopted by the NCAs.[22]

Numerous NCAs are pro-active enforcers in the liberalising markets and have in recent years exercised a strict control vis-à-vis foreclosing strategies by – still dominant – incumbent operators. NCAs are active in sectors that involve highly complex economic questions (e.g. financial services) and address areas that had for a long time not been the object of competition law scrutiny (e.g. liberal professions). Also the role of the sectoral ECN subgroups has to be highlighted in this regard. These groups bring together experts from the authorities in a given area and serve as a forum for mutual information and joint learning. They also provide opportunities for coordination of enforcement action that is reflected in clusters of cases being moved forward by various enforcers.

Thus, the improvements to be credited to the ECN go far beyond dry numbers and remarkably consist of continuous efforts in exchanging intelligence information and actively cooperating in case work.

C. Conclusion

[21] *See* K. Dekeyser and M. Jaspers, "A New Era of ECN Cooperation," in *World Competition*, 30(1), 2007, p. 22.
[22] *See* presentation by W. Wils at the conference "Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe," IESE, Barcelona, November 19-20, 2007.

We have offered a cursory, but hopefully comprehensive, view on the impact of ECN on the antitrust enforcement system in the EU. Moving from the pre-existing situation, where the European Commission held a factual near-monopoly in the application of Art. 81 and 82 of the EC Treaty, the ECN has significantly improved the situation by decentralizing enforcement powers and responsibilities.

The ECN is not a decision-making body, but rather a forum for discussion, cooperation and information exchange. Far from invading and eroding the competences and the prerogatives of single NCAs, the ECN is an efficiency-enhancing structure (in terms of both resources and information available) facilitating an incisive antitrust enforcement. In this scenario, the European Commission maintains a crucial and leading role, in particular by ensuring a coherent application of antitrust principles and policy in all Member States. The Commission may also, thanks to the ECN, focus its attention on the most urgent priorities, such as pan-European infringements.

The positive effects of the ECN are further enhanced by the sharing, within the network, of a common leniency policy and culture. In this respect, it is a great achievement that NCAs throughout Europe have within a remarkably short time frame decided to endorse the Model Leniency Programme and align their leniency policies (already existing or forthcoming) to the MLP. The result is a consolidation of a system characterised by greater efficiency and legal certainty, where it is easier, on the one hand, to unveil cartels and, on the other hand, to prosecute them at a faster pace and with greater effectiveness.

Part II: Antitrust Cooperation Among U.S. Antitrust Authorities

A. Introduction

Antitrust enforcement in the United States can best be described as a patchwork of concurrent, and to some extent overlapping, authorities at both the federal and state levels. Foremost at the federal level, the Antitrust Division at the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") oversee investigation, litigation, and transactional review of a broad range of antitrust-related matters. At the state level, attorneys general may bring suit on behalf of the state and in their *parens patriae* role under both state and federal law, and state and territorial antitrust agencies also engage in transactional reviews. Moreover, private plaintiffs may sue on behalf of individuals, groups, or a large class of millions of "clients" under both federal and state law. The role of private plaintiffs and their interaction with U.S. antitrust authorities is important but outside the scope of this paper.

Cooperation between the federal agencies and between federal and state governments occurs frequently on both formal and informal bases. The two prominent federal agencies, DOJ and FTC, share enforcement authority under the Clayton Act and accordingly coordinate with each other, at times in a dysfunctional fashion, to allocate investigative resources. Also, with the adoption of the Protocol for Coordination of Merger Investigations and the Protocol for Increased State Prosecution of Criminal Antitrust Offenses, federal and state antitrust authorities have increased their formal coordination in the investigation and prosecution of anticompetitive conduct. Moreover,

federal caselaw heavily influences state court litigation and decision-making, thereby creating one body of law shared by both.

The United States and other countries cooperate through formal mechanisms, including bilateral agreements, mutual legal assistance treaties, and other diplomatic instruments, and informal mechanisms, and informal relationships. In addition, consultation occurs through various multinational organizations.

Congress enacted the Sherman Act into law in 1890 and passed the Clayton Act in 1914.[23] While the DOJ had already been prosecuting anticompetitive conduct for more than 30 years, President Franklin D. Roosevelt formally created the Antitrust Division of the DOJ in 1933 with the appointment and confirmation of Harold M. Stevens, the first Assistant Attorney General for Antitrust.[24] Congress's passage of the Federal Trade Commission Act – in the same year as the Clayton Act – established the FTC, in part to supplement the DOJ's enforcement of the antitrust laws[25] and to create an administrative agency for the administrative rulemaking and adjudication of antitrust matters.[26]

B. Cooperation Between Federal Antitrust Authorities

1. Background

The DOJ and the FTC share government enforcement of the federal antitrust laws. While the DOJ holds exclusive federal power to prosecute criminal and civil claims under the Sherman Act[27] and the FTC routinely investigates violations of the Robinson-Patman Act, both agencies can bring civil enforcement actions under the Clayton Act.[28] In its Antitrust Division Manual, the DOJ describes the enforcement relationship with the FTC:

> The Antitrust Division and the FTC have concurrent statutory authority to enforce Sections 2, 3, 7, and 8 of the Clayton Act. Judicial interpretation of Section 5 of the FTC Act permits the FTC to challenge conduct that also may constitute a Sherman Act violation, and thus, there is an overlap with the Division in this area as well. This overlapping antitrust

[23] *See* Department of Justice, Timeline of Antitrust Enforcement Highlights at the Department of Justice, *available at* http://www.usdoj.gov/atr/timeline.pdf (last visited June 17, 2008).
[24] *See* Lauren Kearney Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 Vand. L. Rev. 1307, 1311-12 n.15 (2007).
[25] *See* D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319–20 (2003).
[26] *See* David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1113–14, 1117-18 (2005).
[27] While it holds no power pursuant to the Sherman Act, the FTC can bring suit under 15 U.S.C. § 45, i.e., FTC Act § 5, for conduct that might violate the Sherman Act. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 691 n.454 (6th ed. 2007) (hereinafter "Antitrust Law Developments") (citing *FTC v. Cement Inst.*, 333 U.S. 683, 690 (1948)).
[28] Antitrust Law Developments at 691. Other federal agencies possess limited jurisdiction under the Clayton Act, including the Surface Transportation Board, Federal Communications Commission, Department of Transportation, and the Federal Reserve Board. *Id.* at n. 455.

> enforcement authority necessitates coordination between the two agencies to ensure both efficient use of limited resources and fairness to subjects of antitrust investigations.[29]

When both agencies hold concurrent jurisdiction and to ensure efficient use of resources, the "clearance procedure" is used to designate one agency to proceed with the investigation.[30] Usually, one agency will grant the other agency clearance quickly.[31] Adopted in 1995 by the two agencies, the Hart-Scott-Rodino Premerger Program Improvements agreement provides internal procedures to decide which agency will investigate a specific merger.[32] Not withstanding these procedures, conflicts do arise between the DOJ and FTC, especially in merger review under § 7 of the Clayton Act.[33]

In addition to consultation and referral for both merger and non-merger matters, the DOJ and FTC regularly share information and evidence with one another to the extent permitted by law.[34] The two agencies also cooperate in studying and designing antitrust policy, such as their participation in joint hearings and joint drafting of reports on a variety of topics,[35] issuance of various guidelines,[36] and joint filing of amicus briefs.[37] Further, the DOJ and FTC create task forces to study particular areas of the law and present reports, including the State Action Task Force and the Noerr-Pennington Task Force.[38]

[29] Antitrust Div., U.S. Dep't of Justice, Antitrust Division Manual ch. VII (3d ed. 1998), available at http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm (hereinafter "Antitrust Division Manual").
[30] Antitrust Law Developments at 693. The latest revision of the Clearance Procedures of Investigations was adopted in 1993. *Id.* at n.462.
[31] *Id.* at 694.
[32] *Id.*
[33] *Id.* at 693-94.
[34] Antitrust Division Manual, Chapter VII.
[35] Antitrust Law Developments at 694. Those topics include intellectual property, health-care, and single-firm conduct. See, e.g., Federal Trade Comm'n & U.S. Dep't of Justice, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (Feb. 6–Nov. 6, 2002), *available at* http://www.ftc.gov/opp/intellect/index.htm; News Release, FTC, FTC Issues Report on How to Promote Innovation Through Balancing Competition with Patent Law and Policy (Oct. 28, 2003), *available at* http://www.ftc.gov/opa/2003/10/cpreport.htm; FTC/DOJ Report and Hearings on Health Care and Competition Law and Policy (Feb. 2003–Sept. 2003), *available at* http://www.ftc.gov/ogc/healthcarehearings/index.htm; Department of Justice and FTC Issue Merger Challenges Data, Announce Upcoming Merger Enforcement Workshop (Dec. 18, 2003), *available at* http://www.usdoj.gov/atr/public/pressreleases/2003/201899.htm.
[36] *See, e.g.,* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *available at* http://www.ftc.gov/bc/docs/horizmer.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Licensing of Intellectual Property (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm; U.S. Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.
[37] Andrew Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 Antitrust 21, 22-23 nn.48, 49 (Fall 2007) (citing numerous joint briefs for the United States as amicus).

2. Jurisdictional Conflicts Between The DOJ And The FTC

Section 7 of the Clayton Act tasks both the DOJ and FTC to prevent the formation of monopolies.[39] In 1976, Congress's passage of the Hart-Scott-Rodino Antitrust Improvements Act ("H-S-R Act") established a premerger notification process and a statutorily-defined waiting period.[40] However, the H-S-R Act did not provide any procedures for the DOJ and the FTC to define which agency would investigate a merger.[4142] At the same time, because it required the review of all mergers of a specific size and set a time limit for review, the H-S-R Act, in effect, demanded that the DOJ and FTC work efficiently to decide which agency would review each merger.[43]

To alleviate the rising tide of clearance disputes, the DOJ and FTC entered into two agreements, one in 1993 and the second in 1995, under which the agency with the most expertise in the industrial sector of the proposed merger would investigate.[44] Nevertheless, clearance disputes between the DOJ and FTC consumed much of the 30-day waiting period, leaving the "cleared" agency with little time to review the merger.[45]

In 2002, the DOJ and FTC announced the creation of a Memorandum of Agreement ("Clearance Agreement") that delineated the industry sectors that were to fall under each agency's purview, and the divisions would be permanent.[46] Approximately

[38] Report of the State Action Task Force: Recommendations to Clarify and Reaffirm the Original Purposes of the State Action Doctrine to Help Ensure Robust Competition Continues to Protect Consumers (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf; Noerr-Pennington Task Force, *described at* http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm.
[39] Antitrust Law Developments at 333.
[40] *Id.* at 334.
[41] *See The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 Vand. L. Rev. at 1314-15.
[42] Even though notification must be made to both the DOJ and FTC at the beginning, parties would pick which agency they preferred to deal with by contacting the one or the other immediately after filing. The agencies now discourage this practice.
[43] *See id.*
[44] *See id.* at 1315-16; *see also supra* n.12.
[45] *Id.* at 1316 (citing Federal Trade Commission, Clearance Delays, http://www.ftc.gov/opa/2002/02/clearance/cleardailystats.htm). The DOJ and FTC commissioned a study to evaluate the problem and found that 24 percent of all matters for which clearance was requested delayed the review process, on average, by three weeks each. *Id.* at 1317-18; News Release, FTC, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance.shtm.
[46] *Id.* at 1318. (citing Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), available at http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf). The DOJ was to have jurisdiction over agricultural and associated biotechnology; avionics, aeronautics, and defense electronics; beer; computer software; cosmetic and hair care; financial services/insurance/stock and option, bond, and commodity markets; flat glass; health insurance and healthcare products and services; industrial equipment; media and entertainment; metals; mining and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber;

two months before the announcement, Senator Ernest Hollings, Ranking Member of the Commerce, Justice and State Appropriations Subcommittee of the U.S. Senate that has the power to approve or disapprove the DOJ's budget, vociferously objected to the Clearance Agreement on the grounds that it would shift antitrust oversight from the FTC, which does not sit directly in the Executive Branch, to political appointees in the DOJ.[47] Political support for the Clearance Agreement never recovered, and despite the March 2002 joint announcement, the DOJ and FTC abandoned the effort in May 2002.[48]

3. Findings In The Antitrust Modernization Commission Report

The same year that the Memorandum of Agreement was nullified, the Congress enacted the Antitrust Modernization Commission Act, which created a committee to study the current state of all antitrust laws and enforcement and make recommendations for improvement.[49] In 2007, the Commission delivered its final report within which it recommended

> The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing a new agreement.[50]

The Commission found that the clearance disputes occurred infrequently,[51] but when they do, the conflicts, among other things, "create tension in the normally cooperative relationship between the two agencies and undermine public confidence in the U.S. antitrust enforcement regime."[52] The Commission highlighted two components of the 2002 Clearance Agreement that it found especially important. First, the allocation of areas of primary responsibility should be retained in whatever new agreement might be

telecommunications services and equipment; travel and transportation; and waste. The FTC was to have jurisdiction over airframes; autos and trucks; building materials; chemicals; computer hardware; energy; healthcare; industrial gases; munitions; operation of grocery stores and grocery manufacturing; operation of retail stores; pharmaceuticals and biotechnology; professional services; satellite manufacturing and launch and launch vehicles; and textiles.

[47] *Id.* at 1334 (citing Philip Shenon, *Plan to Split Up Antitrust Oversight Stalls*, N.Y. Times, Jan. 18, 2002, at C2.

[48] *Id.* at 1335 (citing Charles A. James, Statement Regarding DOJ/FTC Clearance Agreement (May 20, 2002), available at http://www.usdoj.gov/opa/pr/2002/May/02_ag_302.htm).

[49] Antitrust Modernization Commission Act of 2002. The Commission was composed of twelve commissions with four each appointed by the President, Senate, and House of Representatives. Pursuant to its enabling statute, the Commission terminated 30 days after issuing its report.

[50] Antitrust Modernization Commission, Report and Recommendations at 134 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (hereinafter "Antitrust Modernization Commission Report").

[51] *Id.*

[52] *Id.*

created.[53] Second, any new agreement should include the 2002 Clearance Agreement's "tie-breaker" process where an independent arbitrator would assign a merger to one agency within 10 days of the initial clearance request.[54]

C. Cooperation Between Federal And State Antitrust Authorities

All 50 states, plus the District of Columbia, Puerto Rico, and the Virgin Islands, have passed antitrust laws that largely track the Sherman Act and the Clayton Act.[55] In fact, the 1890 enactment of the Sherman Act occurred after 26 states had already put in place some form of antitrust prohibition, and the principal author of the Sherman Act himself stated that the federal statute was to "supplement the enforcement" of state law.[56] During the Reagan administration, many states perceived federal antitrust efforts as lacking and accordingly became more active in enforcing both federal and state law.[57] Today, state antitrust authorities coordinate more closely with federal authorities in the investigation and prosecution of anticompetitive conduct.

1. Background

A majority of states have laws similar, many almost identical, to §§ 1 and 2 of the Sherman Act, and less frequently, laws similar to §§ 3 and 7 of the Clayton Act and the Robinson-Patman Act.[58] Many states' competition laws specifically require deference of varying degree to federal precedent, *i.e.*, "harmonization statutes."[59] In states where no harmonization statute exists, state courts generally follow federal caselaw.[60] While some state courts have extended their jurisdiction's competition laws to interstate commerce,[61] some states have used comity to curtail the extraterritorial reach of state law.[62] The United States Supreme Court has held that state antitrust laws are not preempted by either the Commerce Clause or the Supremacy Clause of the U.S. Constitution.[63]

In addition to state laws, states can bring suit under federal antitrust statutes. The H-S-R Act included provisions that ordered the DOJ to provide investigative information to state attorneys general and allowed state attorneys general to sue under the Sherman

[53] *Id.* at 136.

[54] *Id.*

[55] Antitrust Law Developments at 623 (citing ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (3d ed. 2004)). To read a comprehensive list of state antitrust laws, *see State Laws*, 6 Trade. Reg. Rep. (CCH) ¶ 30,000. *Id.*

[56] Antitrust Law Developments at 623 (citing 21 Cong. Rec. 2457 (1890).

[57] *See* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 Antitrust L.J. 413, 421 (2002).

[58] Antitrust Law Developments at 623-24.

[59] *Id.* (collecting statutes).

[60] *Id.* (collecting cases).

[61] *Id.* at 625 (citing *Coca-Cola, Co. v. Harmar Bottling Co.*, 2006-2 Trade Cas. (CCH) ¶ 75,464, at 106,234 (Tex. 2006) ("mere involvement of interstate commerce does not permit a defendant to escape suit")).

[62] *Id.*

[63] Antitrust Modernization Report at 185 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130 (1978); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (holding state antitrust laws to be within "an area traditionally regulated by the States" for which there is a "presumption against finding pre-emption")).

Act with *parens patria* actions in the name of state residents for treble damages.[64] In addition, a state may bring suit as an injured purchaser on its own behalf under § 4 of the Clayton Act,[65] and a state can seek injunctive relief under § 16 of the Clayton Act for harms to the state's economy.[66]

In 1983, the National Association of Attorneys General ("NAAG") created the Multistate Antitrust Task Force.[67] In 1989, NAAG formed the Executive Working Group on Antitrust to coordinate federal and state enforcement efforts.[68] A majority of states have joined the Voluntary Pre-Merger Disclosure Compact, which "encourages merging firms to submit pre-merger filings to the member states in return for an agreement by the states to forgo the issuance of individual state subpoenas and to obtain documents through the same process used by the relevant federal antitrust agency."[69]

Consultation, coordination, and cooperation between federal and state antitrust authorities can take on a variety of forms. For example, in criminal investigations, the DOJ and state antitrust authorities agreed to a cross-deputization program in which state attorneys generals could be appointed to assist in the prosecution of federal criminal antitrust cases.[70] As another example, the NAAG Executive Working Group holds monthly teleconferences with federal authorities.[71] In the past, the DOJ held Common Ground Conferences with state attorneys general to discuss coordination of state and federal antitrust enforcement.[72]

2. Coordination Protocols

[64] 15 U.S.C. §§ 15c, 15f (2000); *see* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 376-91 (1999).
[65] Antitrust Law Developments at 725 (stating that "the states allege pricing fixing and seek overcharged amounts as their damages").
[66] *Id.* at 726 (citing *In re K-Dur Antitrust Litig.*, 338 F.Supp.2d 517, 550 (D.N.J. 2004) (denying defendants' motion to dismiss states' claims for alleged conspiracy to delay entry of generic drugs)).
[67] Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 679 (2003).
[68] Antitrust Modernization Report at 188 (citing Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* Competition Laws In Conflict 269 (Richard A. Epstein & Michael S. Greve eds., 2004)).
[69] Antitrust Modernization Report at 188-89 (citing National Association of Attorneys General, Voluntary Pre-Merger Disclosure Compact (1987, revised 1994), *available at* http://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premergerdisclosure-compact.pdf).
[70] Antitrust Law Developments at 798-99 (citing Antitrust Division Manual, ch. VII). The California Attorney General's Office participated in a grand jury investigation of alleged anticompetitive conduct involving electrical signals with the Antitrust Division. *See, e.g., United States v. Rosendin Elec.*, 1989-2 Trade Cas. (CCH) ¶ 68,809, at 62,242-45 (N.D.Cal. 1987); FTC, News Release, State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams (June 20, 2002), *available at* http://www.ftc.gov/opa/2002/06/bizopswe.shtm.
[71] American Bar Ass'n, Section on Antitrust Law, The State of Federal Antitrust Enforcement at 48 (2004), *available at* http://www.abanet.org/antitrust/at-comments/2005/02-05/federal_at_enforcement.html.
[72] U.S. Dep't of Justice, Cooperative Antitrust Enforcement (1995), *available at* http://www.usdoj.gov/atr/public/speeches/0142.htm.

In 1998, the DOJ, FTC, and NAAG adopted the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General ("Merger Protocol").[73] In 1996, the DOJ and NAAG adopted the Protocol for Increased State Prosecution of Criminal Antitrust Offenses ("State Prosecution Protocol").[74] Together, the Merger Protocol and the State Prosecution Protocol represent the two most important examples of the formal coordination between federal and state antitrust enforcement authorities.

The Merger Protocol helps define the areas ripe for coordination in the merger review process. For example, to avoid subpoenas from multiple state enforcement agencies, the Merger Protocol specifies that the federal agency investigating the proposed merger will share H-S-R filing documents with the state authorities with the consent of the merging parties.[75] Further, the Merger Protocol encourages the reviewing authorities to hold a teleconference early in the process to coordinate the collection of evidence and the hiring of experts.[76] The Merger Protocol also urges federal and state authorities to work closely with each other during settlement negotiations, and if possible, hold joint settlement talks.[77]

The State Prosecution Protocol provides a mechanism for the DOJ to hand off criminal investigations to a state attorney general when the alleged anticompetitive conduct, usually bid-rigging or price fixing, only affects local concerns.[78] The State Prosecution Protocol imposes two criteria: first, the state attorney general must have the legal and personnel resources to undertake the criminal prosecution, and second, the state attorney general is willing to undertake the criminal prosecution.[79] If the attorney general satisfies those requirements, the DOJ will transfer all evidence related to the investigation.[80]

3. Conflicts Between Federal And State Laws And Jurisprudence

In *Illinois Brick Co. v. Illinois*, the Supreme Court closed the door on the recovery of damages for indirect purchasers harmed by § 1 of the Sherman Act.[81] Before and after the Court's 1977 decision in *Illinois Brick*, more than 25 states enacted laws, sometimes called "*Illinois Brick* repealers," that specifically permit recovery for indirect purchasers

[73] U.S. Dep't of Justice, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (1998), *available at* http://www.usdoj.gov/atr/public/guidelines/1773.htm (hereinafter "Merger Protocol").
[74] U.S. Dep't of Justice, Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996), *available at* http://www.usdoj.gov/atr/public/guidelines/0618.htm (hereinafter "State Prosecution Protocol").
[75] Robert L. Hubbard & Sondra Roberto, *State Merger Enforcement*, 6 Sedona Conf. J. at 3 (2005).
[76] *Id.*
[77] *Id.* at 4.
[78] *See* Protocol for Increased State Prosecution of Criminal Antitrust Offenses.
[79] *Id.*
[80] *Id.*
[81] 431 U.S. 720 (1977).

for violations of state antitrust laws.[82] The Supreme Court ruled that these laws were not preempted by federal law in its seminal decision in *California v. ARC America Corp*.[83] In that case, the state attorneys general of Alabama, Arizona, California, and Minnesota brought suit against ARC America under § 4 of the Clayton Act as indirect purchasers who fell victim to a price fixing conspiracy in violation of § 1 of the Sherman Act.[84] The states also alleged violations of their state antitrust laws.[85] In approving a settlement agreement, the District Court denied relief of the states' indirect purchaser statutes because it found that those laws were preempted by federal law, and the Ninth Circuit affirmed.[86] The Supreme Court, however, found that the state indirect purchaser statutes are not preempted:

> [T]he Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted. There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery. [. . .] Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.[87]

Moreover, the Court found that state indirect purchaser laws do not obstruct the "purposes and objectives of Congress," stating that "[s]tate laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[88]

Ninety-seven years ago, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the Supreme Court held that minimum vertical price fixing, also referred to as minimum resale price maintenance, was *per se* illegal.[89] In 2007, the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, overruled the *per se* rule of *Dr. Miles* and replaced it with a rule of reason analysis.[90] Currently, 13 states forbid resale price maintenance,[91] and the adherence of another eight states to federal precedent remains an open question.[92] Moreover, 37 states filed an amicus curiae brief with the Supreme Court

[82] Antitrust Law Developments at 639 n. 118 (collecting statutes). Those states (and District) include Alabama, Arkansas, California, Colorado, the District of Columbia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.
[83] 490 U.S. 93 (1989).
[84] *Id.* at 97-98.
[85] *Id.*
[86] *Id.* at 99.
[87] *Id.* at 101-02 (citing 21 Cong.Rec. 2457 (1890) (remarks of Sen. Sherman)) (footnote and other citations omitted).
[88] *Id.* at 102 (citing *Illinois Brick*, 431 U.S. at 746; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977)).
[89] 220 U.S. 373 (1911).
[90] 127 S.Ct. 2705 (2007).
[91] Richard A. Duncan and Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 Franchise L.J. 173, 174 (Winter 2008). Those states include California, Connecticut, Kansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia. Note that New York and New Jersey hold contractual provisions that implement resale price maintenance unenforceable.
[92] *Id.* at 177. Those states include Arkansas, Georgia, Maine, North Dakota, Vermont, and Wyoming.

to implore the court not to overturn the *per se* rule of *Dr. Miles*.[93] The Vertical Restraints Guidelines issued by NAAG, last revised in 1995, currently describe resale price maintenance as *per se* illegal.[94]

Two years prior to the Supreme Court's decision, NAAG adopted a resolution that included numerous principles of state enforcement that takes a somewhat strident position of the states' independence from federal antitrust enforcement.[95] The principles proclaim that "the federal antitrust laws were enacted by Congress with the intent that those laws complement rather than supplant state antitrust laws."[96] Also, the principles state that NAAG "[o]pposes federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such preemption or limitation would impair enforcement of the antitrust laws, harm consumers, and harm free competition."[97]

4. Findings In The U.S. Antitrust Modernization Commission Report

In its evaluation of state enforcement of antitrust laws, the U.S. Antitrust Modernization Commission analyzed state enforcement using the NAAG State Antitrust Litigation Database.[98] The Commission found that of the 343 antitrust actions recorded during 1990 to 2006, 59 percent of the actions were undertaken with federal antitrust authorities.[99] The Commission also found that 80 percent of the enforcement actions dealt with "local or regional conduct."[100] Forty-seven percent of the cases recorded involved price fixing, bid rigging, or market allocation, and 34 percent involved merger review.[101] The remaining 19 percent consist of various forms of anticompetitive conduct, such as boycotts, tying, and resale price maintenance.[102]

The Commission concluded that, overall, "[t]he available evidence suggests that . . . state and federal non-merger antitrust enforcement over the past seventeen years has

[93] *See* Briefs for the States of New York, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming as Amici Curiae Supporting Respondents, *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), *available at* http://www.antitrustreview.com/files/2007/02/leegin.pdf.
[94] *Id.* (citing Nat'l Ass'n of Attorneys General, Vertical Restraints Guidelines (2d ed. 1995)).
[95] Nat'l Ass'n of Attorneys General, Resolution, Principles of State Antitrust Enforcement (2005), *available at* http://www.abanet.org/antitrust/at-committees/at-state/pdf/modernization/naag-sp2005-res.pdf.
[96] *Id.* at 1.
[97] *Id.* at 2-3.
[98] Antitrust Modernization Report at 190.
[99] *Id.* at 191. The Commission noted that the NAAG State Antitrust Litigation Database defines "federal participation" as "there was a federal case related to the state case." *Id.* Further, the Commission stated that the "database does not explain whether federal participation was 'joint, parallel, or independent.'" *Id.*
[100] *Id.*
[101] *Id.* Figure 1 indicates that 29% of the merger review cases recorded involved federal participation and five percent without federal participation.
[102] *Id.* at 195. Table A shows that six cases involving resale price maintenance occurred from 1999 to 2006.

been broadly consistent and not in conflict."[103] The Commission recommended that no statutory change was necessary for state non-merger enforcement.[104] In addition, the Commission recommended no statutory change to the states' role in reviewing mergers.[105] Additional recommendations for merger review included the encouragement of federal and state authorities to coordinate their merger review activities, to harmonize the application of substantive antitrust law, and to make investigative information requests consistent across federal and state authorities.[106]

Part III: Cooperation Among The EU, The U.S. And Other Non-EU Countries

Given the globalization of the economy and the cross-border nature of infringements, international cooperation – both at the bilateral and multilateral level – has become essential for the effective enforcement of competition rules. For example, in 2003, the DOJ, the European Commission ("EC") Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission conducted simultaneous searches and interviews regarding suspected interrelated global cartel activity.[107] With the rise of multinational corporations and the global scope of commerce, multinational antitrust investigations and prosecutions are increasingly becoming the norm.[108]

On the one hand, this cooperation can take place informally at a bilateral or multilateral level, for example through the implementation of the 1995 OECD Recommendation on international cooperation that provides a legal basis for the cooperation between the European Commission and the competition authorities of other OECD member countries. Activities carried out under the framework of the WTO, the OECD, and the International Competition Network ("ICN") brought about substantial progress in the development of common standards to address specific issues.

On the other hand, the expansion of international economic relations increasingly requires that the EU and other countries conclude international agreements with other states and regions.

In 1967 the OECD recommended that the issues regarding the international enforcement of national competition laws be addressed during the negotiation of bilateral agreements. At the time, discussions amongst OECD member states resulted in a body of

[103] *Id.* at 194.
[104] *Id.* at 192-98. The Commission also recommended that state "non-merger enforcement should focus primarily on matters involving localized conduct and competitive effects." *Id.* at 196-97.
[105] *Id.* at 198-200.
[106] *Id.* at 200-03.
[107] Scott D. Hammond, U.S. Dep't of Justice, Antitrust Div., An Update of the Antitrust Division's Criminal Enforcement Program, Address Before the A.B.A. Section of Antitrust Law Cartel Enforcement Roundtable 1 (Nov. 16, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm (last visited July 18, 2008).
[108] *Id.* (stating 90 percent of nearly $3 billion in criminal fines collected from FY1997 to FY2005 came from international cartel activity and approximately 50 percent of corporate defendants were foreign based).

recommendations which would later form the basis for many bilateral agreements, including the timely notifications of cases of interest to the other country, the sharing of information, the coordination of parallel investigations and mutual assistance in collecting evidence, as well as positive comity principles.

A. Cooperation Among The EU And Non-EU Countries

Today the EU engages in bilateral relations with a large number of countries and particular importance is placed on the bilateral cooperation agreements between the EU and USA, Canada and Japan, which – particularly the U.S. agreement – have been developing satisfactorily. Under these agreements, competition authorities on both sides exchange information and coordinate their enforcement activities. Each side may ask the other to take on enforcement actions (positive comity), and each side must take account of the other's interests when enforcing competition rules (traditional or negative comity).

1. Administrative Agreements On Cooperation In Competition Law Matters: The Bilateral Agreements

a. United States Of America

On September 1991, the Commission entered into the first independent agreement with the U.S. on the issue of cooperation between competition authorities in the application of their competition laws ("EC/U.S. Agreement"). The 1991 agreement was the first bilateral agreement to include the concept of positive comity. Furthermore, in 1998 the parties supplemented the agreement with another agreement regarding the application of "positive comity principles" in order to enhance the enforcement of their competition laws. The EC/U.S. Agreement was intended to avoid or settle possible conflicts and has developed into an intensive cooperation between the European Commission and the two American competition authorities.

The EC/U.S. Agreement covers the Commission's proceedings regarding competition law arising under Articles 81, 82, 85 and 86 EC as well as under ECMR and, within the US, competition proceedings carried out by the Antitrust Division of the Department of Justice and the Federal Trade Commission under the Sherman Act, the Clayton Act, the Wilson Tariff Act and the FTC Act.

The scope of the EC/U.S. Agreement is limited to cooperation between the competition authorities at a federal level in the U.S. and at the EC level in the EU. It excludes certain regulated sectors within the U.S., and does not establish a right for private parties. Moreover, this agreement must be interpreted in a manner consistent with the parties' existing domestic regulation. The main obligations of the EC/U.S. Agreement are: (i) the obligation to notify the other party whenever the competition authorities become aware that their enforcement activities may affect the other party's important interests; (ii) a general obligation to provide the other party with the requested information unless the information falls under one of the exceptions and (iii) an obligation to assist to the other party's competition authorities in their enforcement activities and coordinate enforcement activities.

Thanks to efforts made on both sides to find a convergent policy, in most cases the authorities of both sides of the Atlantic have reached compatible results, in particular due to the so-called negative and positive comity rules.

The negative comity principles require that an authority restrain itself in the application of its laws and regulations where the advantage gained from their application would be smaller than the negative effect they would have on the interests of another country's authorities.

In practice, the American authorities seem to have only once formally called upon the Commission, in *Boeing/McDonnell Douglas,*[109] to consider the interests of the American defense industry in the investigation of the aforementioned concentration. Ultimately, the Commission was able to respect that request in its final Decision, authorizing the concentration.[110]

The positive comity principles, on the other hand, provide the parties with a framework for the common prosecution of certain practices, when anti-competitive practices in the territory of one party are also capable of affecting another party's significant interests. Thus, if one party believes that antitrust infringements taking place on the other party's territory are adversely affecting its important interests, it can inform the other party and request that appropriate enforcement activities be carried out by the competent authorities. The notified party has the discretion to decide whether or not to undertake enforcement activities and the notifying party is not prevented from undertaking its own enforcement actions.

In particular, the purpose of the 1998 Positive Comity Agreement has been to improve the rules governing the division of cases between parties in the investigation of anticompetitive activities which adversely affect the interests of another party and which are impermissible under the domestic competition laws of the State in which they are taking place (Article I(1) of the Positive Comity Agreement). In this respect, the Court of First Instance has assumed that the main purpose of the agreement was to give one party the opportunity to benefit from the effects of a procedure initiated by the other party.[111]

In any case, in addition to these measures used to enhance efficiency, the desire to avoid jurisdictional conflicts must also be emphasized.

The application of the 1998 Comity Agreement is subject to two important limitations: (i) the information provided by one party to the competition authorities of the other party to implement the agreement shall be used exclusively for that purpose unless the authority providing the information, as well as its source, consent to another use; and (ii) the applicable rule takes precedence over the Comity Agreement.

109 OJ L 336/16, 1997.
110 Conversely, the Commission was recommended to exercise restraint in applying the ECMR after the *Oracle/Peoplesoft* merger was authorised in the U.S.
111 CFI Judgement of June 15, 2005, *Speciality graphites*, Case T-71/03, § 116.

To date the positive comity mechanism has only been formally used in *Sabre/Amadeus*[112] where U.S. agencies asked the Commission to investigate anti-competitive conduct by several European airlines for their failure to provide Sabre, a US-based computer reservation system, with the same comprehensive and timely flight information they provided the European based Amadeus system. The Commission initiated proceedings against one airline following a request by the Department of Justice.

However other cases have been dealt with the positive comity principle on an informal basis: in *Nielsen* a competitor complained in both Europe and the U.S. about an alleged abuse of dominant position by a research company. Since the complaint concerned practices employed mostly in Europe, the U.S. authorities entrusted the Commission to carry out the proceedings as soon as they were ensured that the Commission would take action. Nevertheless, the Commission got the U.S. authorities involved in the investigation, and they were able to close their proceedings shortly after the Commission did. [113]

Similarly, the Commission was able to better assess the proposed *Halliburton/Dressler* merger because it had already been the subject of negotiations between the parties and the U.S. competition authorities.[114]

Moreover, in March 1999 the EC and the U.S. agreed upon allowing reciprocal attendance at determined procedural stages in individual cases. Even if attendances had informal precedents, since U.S. officials were informally present at the Commission hearings in the *Boeing/MDD* merger investigation, the chance provided for in the administrative arrangements was first used in December 1999, when officials of the Federal Trade Commission attended the Commission's oral hearing in the *BOC/Air Liquide* merger case.

While EC and U.S. competition authorities have learned to cooperate closely to their mutual advantage, there are still concerns that U.S. rules on discovery may undermine EU procedures, especially in the context of leniency applications.

This issue arose in the *Vitamins* cartel case when U.S. plaintiffs sought to obtain full copies of leniency applications that were filed with the Commission to be used as evidence in their action for damages.

The Commission filed an *amicus curiae* brief in the matter of *In Re Vitamin Antitrust Litigation* where it did not dispute the possibility of suing leniency applicants for damages, but argued that the EC leniency program "*should not be available as a shortcut for plaintiffs*" because the application of discovery rules to EU leniency applications might "*undermine the effectiveness of the EC leniency program at a very critical stage of*

112 IP/00/835.
113 EC Com. Report on Competition Policy 26, 1996, 347.
114 EC Com. Report on Competition Policy 28, 1998, 351.

investigation."[115] However, according to the plaintiffs, the defendants should take into account the fact that providing written statements to any governmental body "*waives any privilege or protection that otherwise may have shielded those materials from discovery*."

The issue is not settled and shows the difficult balance of interests between protecting leniency applicants, whom authorities depend on to disclose the existence of cartels, and the plaintiffs' right to access information in order to bring an action, especially since private actions are now strongly encouraged by the Commission. The Commission has since than decided to follow the practice of U.S. competition authorities and allow companies to apply for leniency orally.[116]

Notwithstanding this intensive cooperation, the Commission and the U.S. antitrust authorities have reached different conclusions in several important cases.

With respect to mergers, the *GE/Honeywell* proposed merger, among others, was treated differently by the U.S. Department for Justice, which cleared the merger and the Commission, which blocked it, showing that besides the challenge to aligning their procedures, the substantive tests carried out by the antitrust authorities do not converge entirely.[117]

The divergence in the approach to antitrust enforcement taken by the EC and U.S. antitrust authorities was reinforced by the *Microsoft* case, which highlighted that unilateral behaviour is one of the most controversial issues in this area.

In this regard, it has to be recalled that some months after the EC decision on Microsoft, Mr. R. Hewitt Pate, then assistant Attorney-General for the Antitrust Division of the U.S. Department of Justice stated: "*...Unilateral conduct remains the area of greatest separation between the general approaches of the US and the EU. At the broadest level, we in the United States might be said-in words suggested by Judge Posner at a recent Antitrust Division event to have a more Darwinian view of the competitive process. Over here, as a DG Comp economist has put it during the same program, there is a great emphasis on requiring that dominant firms limit themselves to 'gentlemanly` competition*."

And EC Commissioner Mario Monti replied: "*...I think we are aiming at safeguarding conditions of Darwinian competition just as our American friends, provided it is Darwinian competition on the merit. If competition is Darwinian but through means other than the merit, then I believe that the competition authorities should be draconian*."

In *Microsoft*, although both the Commission and the U.S. Department of Justice kept each other informed throughout the duration of their respective proceedings against the corporation, in the U.S. the case was resolved via a settlement, reached in 2002, which imposed largely behavioural remedies on Microsoft, while the Commission's proceeding in 2004 concluded by requiring Microsoft to disclose certain source code information, supply a version of Windows which does not include the Media Player, as well as the levy of a massive fine.

b. Competition Law Agreement EC/Canada

In 1999 the EC concluded a cooperation agreement with Canada that, for the most part, follows the agreements between EC and U.S.

The most relevant difference between the two agreements is the scope, given that the EC/Canada Agreement does not cover Article 86 EC proceedings. Another difference is that the catalogue of situations requiring a notification contains an additional circumstance requiring notification, *i.e.,* "enforcement activities that involve one of the parties seeking information located in the territory of the other party."

Under this agreement, each party's competition authority must, when carrying out coordinated enforcement activity, try to ensure that the other party's enforcement objective is also reached. Mechanisms of negative and positive comity are provided.

c. EC/Japan Competition Law Agreement

In 2003 the EC entered into an agreement with Japan on cooperation on competition law activities. The agreement was entered into exclusively by the EU Council. All relevant sections of the agreement follow the parallel agreements with the United States and Canada. It should be noted that the purpose of the EC/Japan Competition Law Agreement is not only to facilitate the cooperation and coordination between competition authorities but that such cooperation should contribute to the effective enforcement of each party's domestic competition laws. The first occasion was the *Heat Stabilisers and Impact Modifiers* case.[118]

d. Bilateral Relations With Korea And China

The Commission signed a Memorandum of Understanding with the Korea Fair Trade Commission in October 2004. It establishes a bilateral competition "dialogue," through which these authorities may exchange opinions on issues of competition policy and work together in case-related applications of their competition laws when it is admissible under their existing domestic laws.

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115 *See* A. Burnside, H. Crossley: "Co-operation in competition: a new era?", in *E.L.Rev*, Sweet and Maxwell, April 2005, p. 252.

116 *Ibid.*

117 In speeches on this case, Charles James, who at the time was Assistant Attorney General for Antitrust at U.S. Department for Justice, pointed out that "*the DoJ had considered the merger to be procompetitive and beneficial to consumers*" that U.S. laws "*protect competition, not competitors" and that the European approach "reflects a significant point of divergence.*" The EU's reply was that it is mostly concerned with consumer welfare and that, in the long term, consumer welfare relies on effective competition, consequently the long-term risk of seeing competitors exit from the market is seen as more harmful than any advantage gained from the short-term improvements to competition. *See* A. Burnside: "GE, Honey; I sunk the Merger," in *ECLR* , 2002, p.109.

118 EC Commission Report on Competition Policy 33, 2003, § 697.

Furthermore, the Chinese Department of Commerce and the Commission agreed in May 2004 to establish a "structured dialogue." This provides a forum for consultations on issues of competition policy and for assistance in the introduction of a competition regime.

2. Multilateral Cooperation

Since the end of World War II, attempts have been made to solve the legal and practical concerns raised by the parallel application of national competition laws, subject to the principle of territoriality, in the framework of a globalizing economy.

The draft of the *Havana Charter* (1948), the *UNCTAD Model Law* (1980) and the *Draft International Antitrust Code* (1993) were different attempts to find effective structures for governance at a multilateral level and thus respond to globalization.

In this respect, it has been affirmed that any form of "global solution" raises serious concerns about the economic and institutional differences between States. Moreover, according to this point of view, there is a serious objection that harmonization of the principles of competition law at a global level, would not be flexible enough to adapt quickly to new problems: "top down" solutions would even lead to insufficient enforcement.[119]

Therefore, as harmonisation of competition law at the international level seems neither realistic nor desirable, international organizations seek to reach a consensus on a minimum set of standards at the international level.

While the draft of the *Havana Charter* contained a chapter on competition policy, this chapter was cast aside after the rejection of the Charter by the American Congress and forgotten during the *Uruguay Round,* which led to the creation of the WTO (1994), demonstrating the minor importance of competition law.

However, many provisions of WTO law refer to competition law concepts. The precise content of those general indications has yet to be developed because the WTO system is generally directed at States and thus does not have direct effects on business practices.

For example in *Kodak/Fuji* the U.S. tried to argue that an exclusive agreement between Japanese wholesale distributors and a national manufacturer was an infringement of WTO law because it restricted trade. The dispute settlement panel of the WTO concluded that the toleration of anti-competitive practice of private persons does not constitute a *state* restriction of trade.[120]

[119] *See* G. Roebling in G. Hirsch, F. Montag, F. Jurgen Sacker, "Competition Law: European Community Practice and Procedures," Thomson Sweet & Maxwell, 2008, p 121 and 127.
[120] WTO, WT/DS44/R-"Kodak/Fuji."

The WTO members made an attempt to include issues of competition law in the WTO system during the Ministerial Conference of Singapore in 1996, and the so-called "Singapore Issues" were put on the agenda of the Ministerial Conference of Doha of 2001 where a working group was appointed to concentrate on the principles of transparency, non-discrimination and the protection of procedural fairness.

However, during the Ministerial Conference of Cancun in 2003, the majority of the WTO members opposed the initiation of formal deliberation on a possible WTO competition agreement that was strongly supported by the EU.

Thus the EU, in order to improve multilateral coordination efforts which have yet to become a common competition framework, participates in informal international bodies. This fosters dialogue between authorities and experts, creating movement towards a convergence in competition laws and procedures, and towards the development of a new competition regime.

The idea is to achieve a convergence of national cartel law through voluntary adoption and gradual evolution. The biggest advantage of this "bottom-up" approach is that it respects the principle of subsidiarity and takes account of the States' sovereignty over antitrust enforcement.

On the other hand, this approach causes delays and imbalances in the implementation of the proposed recommendations. In conclusion, convergence is less harsh, but much slower to achieve.

a. The OECD

One of the more important bodies for multilateral cooperation is the OECD. It was established in 1961 and brings together 35 countries to provide statistics on economic and social data so it can analyse and forecast economic developments and social changes and thus help countries find solutions to common problems related to market economy.

In particular the OECD's Competition Committee is a source of policy analysis and provides governments with advice on important competition policy issues and market-oriented reform by actively encouraging and assisting government decision-makers in tackling anti-competitive practices and regulations. Members of the Committee include senior representatives from the competition authorities in OECD countries, plus observers from a number of non-OECD countries. A larger number of countries participate through the Global Forum on Competition. Business and consumer representatives also participate in some Committee and Global Forum activities.

The OECD Committee works out *Best Practice Roundtables* and *Studies*, which provide statements on fundamental and sector specific topics of competition policy. Moreover, the Competition Committee proposes recommendations to the OECD Council of Ministers. They do not create binding law, but they often influence the development of the law in the OECD Member States. Among these recommendations, there are the

OECD Recommendation 1995 on International Cooperation; the OECD Recommendation 1998 on Effective action against hard core cartels; the OECD Recommendation 2001 on Structural separation in regulated industries; the OECD Recommendation 2005 on the merger review, whose content is similar to the ICN recommendation on the same topic.

b. The International Competition Network

The ICN was created in 2001, as a global antitrust network that was launched to "*provide competition authorities with a specialised yet informal venue for maintaining regular contacts and addressing practical competition concerns*." It should be noted that the ICN does not have any binding power, but seeks to propose and adopt recommendations and guidelines to address relevant issues in the area of antitrust enforcement: it is an informal network of competition authorities which discusses topics of competition law and policy with the aim of providing recommendations for a convergence of procedural and substantial law.

Nowadays a large majority of the existing competition authorities joined the ICN (89, coming from 79 jurisdictions), including competition authorities from developing countries, as well as non-governmental bodies such as international organizations (*e.g.*, OECD and WTO), industry and consumer associations, associations and practitioners of antitrust law and economics and members of academia. ICN appoints project-related working groups that compare the individual jurisdiction's different approaches in reports and conferences. When there are sufficient common features, at the annual conferences ICN presents Guiding Principles or Recommended Practices that have been endorsed by all competition authorities.

At present, ICN practice is mainly focused on a multi-jurisdictional merger review as the number of multiple notifications of large proposed concentrations has strongly increased. The ICN recommendations seek to reconcile the tension between the national control over mergers on one hand, and the desired coherent and efficient global regulatory framework on the other hand. If the recommendations are implemented they foster the convergence and a greater compatibility of the different proceedings thus making cross-border cooperation between the authorities of the ICN more effective. Furthermore, the increased predictability of parallel proceedings reduces the regulatory barriers for the merging undertakings.

This is an example on how the "bottom-up" approach can, in the long term, bring to a gradual convergence of national antitrust rules and a development of a global competition culture, possibly leading to the codification at international level.

c. Legal Relationships With Candidate Countries

Nowadays, the European Union has accession relationships with Croatia, Turkey Macedonia and Albania. The agreements contain several provisions on the development of competition policy and state aid rules in those countries. Moreover, the Association

Agreement between the EC and Turkey differs from the competition rules of other agreements of the EC, by allowing for the possibility of sanctions for private persons (Articles 32-33 Decision of the Association Council No. 1/95).

d. Regional Association Processes

The European Union has association agreements with the Southern Mediterranean Region ("EuroMed") and with the neighbouring CIS States. These agreements contain an obligation of the partner countries to introduce competition and state aid discipline.

Moreover, the European Union has intensified its political and economic dialogue with the African, Caribbean and Pacific countries ("ACP countries") with the Cotonou Agreement, entered into force on April 1, 2003 and replacing the so-called Lomé Agreements. It provides for the implementation of rules and policies on restrictive agreements or practices as well as assistance and co-operation in drafting an appropriate legal framework.

e. Free Trade Agreements

Legal relations between the EC and Switzerland are based on the bilateral Free Trade Agreement of 1972 and seven other bilateral agreements, which entered into force on June 1, 2002. The substantive rules on competition declare that restrictive agreements, abuses of a dominant position and any state aid are incompatible with the proper functioning of the agreements in so far as they may affect trade between the EC and Switzerland.

The EC and its Member States entered into other free trade agreements, containing competition rules, with Mexico (entered into force on October 1, 2000), Chile (signed in 2002) and South Africa (entered into force on May 1, 2004).

B. Cooperation Among The U.S. And Other Countries' Antitrust Authorities

1. U.S. Diplomatic Instruments Enabling Cooperation Between Nations

The United States and eight nations have put in place executive, bilateral agreements through which they coordinate antitrust enforcement and investigations.[121] In general, these agreements provide notification of investigations, sharing of non-confidential information, coordination of investigations, and consultation to resolve problems and disputes.[122] The International Competition Policy Advisory Committee, as appointed by former President Bill Clinton and former Attorney General Janet Reno, described the bilateral agreements as:

[121] Antitrust Law Developments at 1261. Those countries include Germany, Australia, the European Communities, Canada, Israel, Japan, Brazil, and Mexico. Because these instruments are executive agreements, they do not affect existing law, such as prohibitions on the disclosure of confidential information without consent.
[122] *Id.* at 1262.

> Each of these agreements reflects two themes: enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. According to the U.S. Department of Justice, the extent to which one or the other of these themes has predominated in a particular agreement has depended on the specific bilateral concerns and history from which the agreement emerged. In addition, the most recent bilateral agreement includes a third theme, that of technical cooperation.[123]

Enacted in 1994, the International Antitrust Enforcement Assistance Act enables executive agreements, if negotiated with certain conditions, to include provisions for the exchange of confidential information between antitrust authorities but does not allow the disclosure of confidential information for multinational merger review.[124] However, so far, the United States has entered into only one such agreement.[125] Nonetheless, the degree of cooperation is still quite considerable.

The United States Executive Branch has also negotiated and the United States Senate has approved Mutual Legal Assistance Treaties ("MLATs") with more than 30 countries.[126] These treaties facilitate cooperation between nations in criminal antitrust matters, including the compulsion of evidence and the obtainment of confidential investigation information.[127] The DOJ's Office of International Affairs serves as a point of contact for MLAT-related matters.[128]

2. Findings In The United States' Antitrust Modernization Commission Report

The United States' Antitrust Modernization Commission analyzed cooperation between the U.S. antitrust authorities and the rest of the world and decided that, for the most part, the DOJ and FTC worked closely and efficiently with other nations on antitrust-related issues.[129] At the same time, the Commission made a number of recommendations and findings. First, the Commission notes that 70 jurisdictions require notification of a proposed merger, and the filing requirements for each nation remain

[123] *See* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, U.S. Dep't of Justice, Final Report, Annex C-1, v (Feb. 28 2000), *available at* http:// www.usdoj.gov/atr/icpac/finalreport.htm (last visited July 18, 2008) (hereinafter "ICPAC Report").
[124] *Id.*, Annex C-1, at vii.
[125] Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (1999), *available at* http://www.usdoj.gov/atr/public/international/docs/usaus7.htm (last visited July 18, 2008).
[126] *Id.* at 181 n.7.
[127] Antitrust Law Developments at 1262; U.S. Dept. of State, Mutual Legal Assistance (MLAT) and Other Agreements, http://travel.state.gov/law/info/judicial/judicial_690.html (last visited July 18, 2008) (showing MLATs currently in force or pending Senate approval).
[128] U.S. Dept. of State, Mutual Legal Assistance (MLAT) and Other Agreements (directing prosecutors to contact Office of International Affairs).
[129] Antitrust Modernization Report at 213-14, 216.

heterogeneous, and in aggregate, quite expensive.[130] The Commission recommended that the DOJ and FTC conduct a feasibility study, in coordination with other nations, of "some kind of common premerger notification system across countries that would reduce the burden associated with multiple filings."[131]

Second, the Commission recommended that principles of both negative and positive comity be inserted into most bilateral and multilateral agreements because it provides "a useful mechanism to avoid duplicative enforcement and to reduce instances of potentially conflicting decisions."[132] The Commission recommended that comity should promote the goals of deferral, harmonization, coordination mechanisms, and benchmarking reviews.[133] Regarding deferral, a country, if the transaction or conduct does not impact its jurisdiction to as great of an extent as another country, would not seek an enforcement action or to impose remedies and defer to the other jurisdiction.[134] The harmonization of remedies principle simply means that, rather than limiting other nations from imposing different remedies, nations would have confidence that the first country to act would be "competent and free from political influence."[135] The coordination mechanism and benchmarking review principles allow for entities subject to conflicting remedies will have an avenue to request the nations to consult with one another, and the benchmarking review principle would encourage nations that impose disparate remedies to conduct a "retrospective evaluation as to why the usual cooperation mechanisms failed."[136]

* * * *

Conclusion

There has been a lot of effort to improve coordination and cooperation among national antitrust enforcement agencies in the EU and the U.S. Is the level of coordination and cooperation sufficient? The answer to that question is debatable. There are still differences in approach and there is still lack of coordination in certain areas. For example, in certain circumstances, confidentiality requirements limit cooperation on parallel case development in different jurisdictions. There are also substantive law differences among different national competition authorities, especially in the U.S. For example, in the U.S., there are differences in the law enforcement approach at the DOJ and at the FTC in monopolization cases, especially as those matters relate to intellectual

[130] *Id.* at 217 (citing PricewaterhouseCoopers survey that found mergers typically required eight complete filings and cost $3.8 million to $11.5 million). It remains doubtful that there more than a handful of mergers which have been reported to much more than a dozen jurisdictions that require notification. This is based on an informal survey of several experienced practitioners.
[131] *Id.* (noting that Germany, France, and Britain attempted a joint filing system but its use was infrequent).
[132] *Id.* at 221.
[133] *Id.* at 223.
[134] *Id.* at 223-24. The Commission divided deferral between complete deferral, where a "direct, substantial, and reasonably foreseeable" standard would apply, and presumptive deferral in which choice-of-law principles would determine the nation to which deference would paid.
[135] *Id.* at 224.
[136] *Id.* at 224-25.

property and competition law interfaces.[137] Some also argue that there are differences in merger enforcement views and aggressiveness between the DOJ and the FTC.[138] Finally, there are arguably ambiguities surrounding several recent U.S. Supreme Court antitrust opinions, as to which some controversy has been generated.[139]

What insight, if any, does this provide to the inevitable questions surrounding "convergence" of the substantive antitrust laws in a global economy? The authors do not express any opinion, but rather offer two different viewpoints for consideration. One view is that to the extent there are differences in substantive antitrust enforcement among the authorities within the U.S., over time competition between the authorities will result in a superior substantive approach, and the same should apply for competition among substantive antitrust laws around the globe.[140] Furthermore, convergence of antitrust laws on a global basis may be too difficult and an unrealistic goal due to the unique political, social, legal and economic background of every country.[141] While comity and cooperation are a good thing, acceptance of some difference in substantive law may be necessary when cooperation inevitably breaks down. This is especially the case given the uncertainty of the state of economics and its important role in antitrust law. Arguably further efforts to achieve better coordination and cooperation, both within the U.S. and the EU and among each other, are of greater importance then achievement of complete convergence.

On the other hand, in an integrated global economy a single set of rules would certainly be more predictable, efficient and result in decreased legal fees, which in turn can spur economic growth and create efficiencies (factors of tremendous importance). Although there may be some benefits to competition among antitrust agencies, it could argued that the inconveniences and inefficiencies the competitive process imposes on businesses make the result in the end not worth it. Moreover, some could question whether superior substantive approaches result from the competitive process.

[137] *See* Willard K. Tom, "The DOJ/FTC Report on Antitrust Enforcement and Intellectual Property Rights," Antitrust, Summer 2007, Vol. 21, number 3, at 36-37.
[138] *See, e.g.,* Jonathan B. Baker and Carl Shapiro, "Reinvigorating Horizontal Merger Enforcement," October, 2007, Prepared for the Kirkpatrick Conference on Conservative Economic Influence on U.S. Antitrust Policy, Georgetown University Law School, April 2007, organized by Robert Pitofsky, *available at:* <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>.
[139] *See* Commissioner J. Thomas Rosch, "A Modest Proposal For Modest Antitrust Decisions at the Supreme Court," presented at the Antitrust Section Spring Meeting of the American Bar Association, March 27, 2008, *available at*: http://www.ftc.gov/speeches/rosch/080327modest.pdf.
[140] *See* William E. Kovacic, Chairman, U.S. Federal Trade Commission, "Competition Policy in the European Union and the United States: Convergence or Divergence?," Bates White Fifth Annual Antitrust Conference, Washington, D.C., June 2, 2008, *available at:* http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf.
[141] J. Thomas Rosch, Commissioner, U.S. Federal Trade Commission, "Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence," Bates White Fourth Annual Antitrust Conference, June 25, 2007, *available at:* http://www.ftc.gov/speeches/rosch/070625pendulum.pdf.

Microsoft

Microsoft Standards of Business Conduct

Great People with Great Values

Published: May 15, 2003 | Updated: June 1, 2006

This online version of Microsoft's Standards of Business Conduct has been modified from the original version distributed to our employees. The references to some internal resources and electronic links have been changed to facilitate communications from the public at large.

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Letter from Steven A. Ballmer, Chief Executive Officer

Dear Fellow Employee:

Microsoft aspires to be a great company, and our success depends on you. It depends on people who innovate and are committed to growing our business responsibly. People who dedicate themselves to really satisfying customers, helping partners, and improving the communities in which we do business. People who are accountable for achieving big, bold goals with unwavering integrity. People who are leaders, who appreciate that to be truly great, we must continually strive to do better ourselves *and* help others improve.

We must expect the best from ourselves because who we are as a company and as individuals is as important as our ability to deliver the best products and services. How we manage our business internally—and how we think about and work with customers, partners, governments, vendors and communities—impacts our productivity and success. It's not enough to just do the right things; we have to do them in the right way.

The Standards of Business Conduct are an extension of Microsoft's values and the foundation for our business tenets. They reflect our collective commitment to ethical business practices and regulatory compliance, and they provide information about Microsoft's Business Conduct and Compliance Program. At a high level, they summarize, and are supported by, the principles and policies that govern our global businesses in several important areas:

legal and regulatory compliance; trust and respect of consumers, partners, and shareholders; asset protection and stewardship; creation of a cooperative and productive work environment; and commitment to the global community.

These Standards of Business Conduct provide information, education, and resources to help you make good, informed business decisions and to act on them with integrity. In addition, managers should use this resource to foster, manage, and reward a culture of accountability and integrity within their groups. Working together, we can continuously enhance our culture in ways that benefit customers and partners, and that strengthen our interactions with one another. Then we can truly achieve our mission of enabling people and businesses throughout the world to realize their full potential.

All Microsoft employees are responsible for understanding and complying with the Standards of Business Conduct, applicable government regulations, and Microsoft's policies. As Microsoft employees, you also have a responsibility to raise compliance and ethics concerns through our established channels. This is the way to ensure that Microsoft is and continues to be a great company of great people.

Steven A. Ballmer
Chief Executive Officer

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Microsoft Values

- Integrity and honesty.
- Passion for customers, partners, and technology.
- Open and respectful with others and dedicated to making them better.
- Willingness to take on big challenges and see them through.
- Self-critical, questioning, and committed to personal excellence and self-improvement.
- Accountable for commitments, results, and quality to customers, shareholders, partners, and employees.

Why Microsoft Has Standards of Business Conduct

As responsible business leaders, it is not enough to intend to do things right, we must also do them in the right way. That means making business decisions and taking appropriate actions that are ethical and in compliance with applicable legal requirements. As we make these decisions, Microsoft's values must shine through in all our interactions. The Standards of Business Conduct are an extension of Microsoft's values and reflect our continued commitment to ethical business practices and regulatory compliance.

By following the guidance provided in this publication, we are acknowledging our individual and collective responsibilities to manage our business activities with integrity as we pursue our mission of enabling people and businesses throughout the world to realize their full potential.

How to Use the Standards of Business Conduct

Microsoft's Standards of Business Conduct summarize the regulatory requirements and business practices that guide our decision making and business activities. The Standards contain basic information about our policies as well as information about how to obtain guidance regarding a particular business practice or compliance concern. It is essential that you thoroughly review this publication and make a commitment to uphold its requirements.

The Standards of Business Conduct are not intended to cover every issue or situation you may face as a Microsoft employee. Nor does it replace other more detailed policies. You should use the Standards as a reference guide in addition to Microsoft's policies, including the Employee Handbook, required for your specific job. For example, the Chief Executive Officer (CEO), Chief Financial Officer (CFO), Corporate Controller, and other employees of the finance organization must also comply with the Microsoft Finance Code of Professional Conduct. Microsoft reserves the right in its sole discretion to modify or eliminate any of the Standards' contents without prior notice. Individual business units may also adopt standards of professional conduct for their areas. It is your responsibility to be fully aware of these Standards and follow them.

If you need details on a specific policy, you may contact the compliance team at buscond@microsoft.com. If you need guidance regarding a business practice or compliance issue or wish to report a possible violation, talk to your immediate supervisor, manager, another member of management, your Human Resources Generalist, or your Law and Corporate Affairs contact.

You may also call the Business Conduct Line at (877) 320-MSFT (6738). If you are calling from outside the United States, you may make a collect call to the Business Conduct Line by accessing an international operator and asking to place a collect call to (704) 540-0139. The Business Conduct Line is a dedicated, toll-free phone line that is available to you 24 hours a day, 7 days a week, 365 days a year. It is operated by an external third-party vendor that has trained professionals to take your calls, in confidence, and report your concerns to the Microsoft Director of Compliance for appropriate action. Your phone calls to the Business Conduct Line may be made anonymously.

If you are a Microsoft employee or vendor without access to our corporate intranet and wish to send a confidential e-mail to the Director of Compliance, you may do so by e-mailing the Business Conduct and Compliance alias (buscond@microsoft.com). A confidential e-mail may be delivered via the Internet by submitting a report via the Microsoft Integrity Web site. These e-mails will be received by a third-party vendor, who will remove your contact information prior to forwarding a summary of the e-mail to the Office of Legal Compliance.

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You may also send a letter to the Director of Compliance at Microsoft Corporation, Law and Corporate Affairs, One Microsoft Way, Redmond, WA 98052 or send a confidential fax to (425) 705-2985. Letters and faxes sent to the Director of Compliance may be submitted anonymously if you choose to do so.

If you have a concern regarding a questionable accounting or auditing matter and wish to submit the concern confidentially or anonymously, you may do so by submitting a report via the Microsoft Integrity Web site, calling the Business Conduct Line, or sending a letter or fax to the Director of Compliance as outlined above.

Microsoft will handle all inquiries discreetly and make every effort to maintain, within the limits allowed by the law, the confidentiality of anyone requesting guidance or reporting a possible violation.

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Compliance with the Standards of Business Conduct

The Microsoft Standards of Business Conduct are a general guide to the company's standards of business practices and regulatory compliance. Its requirements apply to Microsoft Corporation, to all subsidiaries, or affiliates in which Microsoft Corporation directly or indirectly owns more than 50 percent of the voting control ("Controlled Affiliates"), and to all directors, officers, and employees of each. All references to "Microsoft" include Microsoft Corporation and all Controlled Affiliates unless otherwise specified. All references to "employees" include directors, officers, and employees of Microsoft Corporation and it subsidiaries or affiliates.

Failure to read and/or acknowledge the Standards of Business Conduct does not exempt an employee from his/her responsibility to comply with the Standards of Business Conduct, applicable laws, regulations, and Microsoft policies that are related to his/her job.

Microsoft is a global company, and our business operations are subject to the laws of many different countries. Microsoft employees doing business internationally must comply with applicable laws and regulations and uphold the Standards of Business Conduct at all times. Cultural differences or local laws and customs may require a different interpretation of our Standards. If this situation arises, always consult your manager, Law and Corporate Affairs, or the Director of Compliance before taking any action.

The Standards are not intended to and do not create an employment contract, and do not create any contractual rights between Microsoft and its employees or create any express or implied promise for specific treatment in specific situations. Your employment relationship with Microsoft can be terminated at any time for any reason with or without cause unless otherwise required by local laws outside the United States or a written contract signed by a vice president.

Our Commitment: Integrity in All Our Interactions

Each day we interact with a variety of individuals and groups—including our customers, partners, competitors, co-workers, shareholders, vendors, government and regulatory agencies, and the communities in which we operate. We are committed to interacting with all of these audiences in a respectful, ethical manner and in compliance with applicable laws and regulatory requirements.

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Microsoft's Standards of Business Conduct

We manage our business in compliance with applicable laws and regulatory requirements.

Regulatory Compliance: We are aware of and obey the laws and regulations that govern the global management of our business. We are responsible for understanding these laws and regulations as they apply to our jobs and for preventing, detecting, and reporting instances of non-compliance to a member of Microsoft management, Human Resources, Law and Corporate Affairs, the Director of Compliance, or the Business Conduct Line.

Lobbying: We recognize our right and responsibility to lobby on behalf of issues that affect our company and business operations. We conduct our lobbying activities in compliance with applicable laws and regulations governing these activities.

Political Activities and Contributions: Microsoft employees are encouraged to exercise their right to participate in political activities. Any decision to become involved is entirely personal and voluntary. Employees' personal political activities are done on their own time and with their own resources.

Regulatory Investigations, Inspections, and Inquiries: We are direct, honest, and truthful in our discussions with regulatory agency representatives and government officials. During investigations, inspections, and inquiries we work with Microsoft's Law and Corporate Affairs members and cooperate by responding to appropriate requests for information.

International Business Activities: Microsoft acknowledges and respects the diverse cultures, customs, and business practices it encounters in the international marketplace. Microsoft will comply with both the applicable U.S. laws and regulations that govern its operations and local laws wherever it does business.

Sensitive Payments: Microsoft complies with the anti-corruption laws of the countries in which it does business, including the United States Foreign Corrupt Practices Act ("FCPA"). In compliance with the FCPA, Microsoft and its agents/partners/representatives will not make any direct or indirect payments or promises of payment to foreign government officials for the purpose of inducing the individual to misuse his/her position to obtain or retain Microsoft business.

Anti-Boycott Requirements: Microsoft complies with U.S. law that prohibits participation in international boycotts that are not sanctioned by the U.S. government.

Export Control: In order to protect U.S. national security, implement U.S. foreign policy, and preserve scarce resources, the United States government restricts the export of certain technology and products, including certain computer software and technical goods and data. We observe restrictions applicable to our business placed on the export and re-export of a U.S. product or component of a product, good, service, or technical data.

Fair Competition and Antitrust: As a global business, we encounter laws and regulations designed to promote fair competition and encourage ethical and legal behavior among competitors. Antitrust laws and fair competition laws generally prohibit any activity that restrains free trade and limits competition. We conduct our business in compliance with these laws.

We build and maintain the trust and respect of our customers, consumers, partners, and shareholders.

Responsible Leadership: We manage our business responsibly in order to maintain the confidence, respect, and trust of our customers, consumers, partners, shareholders, and other audiences. We are committed to acting with integrity, investing in new product development, being responsive and accountable to our customers and partners, and remaining a leader in our field. We understand the responsibility that comes with being a worldwide technology and business leader and accept our unique role in both our industry and the global business community.

Product and Service Quality: Microsoft's products and solutions are developed and managed to meet the expectations of our customers, consumers, and partners for high quality and exceptional service. We continually seek new ways to improve our products, service, and responsiveness.

Communication: We apply standards of full, fair, accurate, timely, and understandable disclosure in reports and documents that are filed or submitted to the Securities and Exchange Commission, and in other public communications as well. We establish and maintain clear, honest, and open communications; listen carefully; and build our relationships on trust, respect, and mutual understanding. We are accountable and responsive to the needs of our customers, consumers, and partners and take our commitments to them seriously. Our advertising, sales, and promotional literature seeks to be truthful, accurate, and free from false claims.

Obtaining Competitive Information: Microsoft has an obligation, and is entitled, to keep up with developments in our industry, including obtaining information about our competitors. We obtain information about our competitors through honest, ethical, and legal methods.

Fair Information Practices: Our business is built around technologies to manage information, and we treat that information with confidentiality and integrity. We are committed to creating a trustworthy environment for Internet users, and continually striving to protect their online privacy is at the core of this commitment. We have adopted privacy practices, developed technological solutions to empower individuals to help protect their online privacy, and continue to educate consumers about how they can use these tools to manage their personally identifiable information while they use the Internet.

Vendors: Microsoft vendors must adhere to the highest standards of ethical behavior and regulatory compliance and operate in the best interest of Microsoft. Vendors are expected to provide high-quality services and products while maintaining flexibility and cost-effectiveness. All vendors are required to read and comply with the Microsoft Vendor Code of Conduct and, when appropriate, train their employees and representatives to ensure that they are aware of Microsoft's expectations regarding their behavior. We do not engage in any unethical or illegal conduct with our vendors. We do not accept incentives such as kickbacks or bribes in return for conducting business with them.

We are responsible stewards in the use, protection, and management of Microsoft's assets.

Financial Integrity: We honestly and accurately record and report business information. We comply with all applicable local, state, and federal laws regarding record completion and accuracy. We require that financial transactions be executed in accordance with management's authorization, and recorded in a proper manner in order to maintain accountability for Microsoft's assets. Our financial information reflects only actual transactions and is in compliance with Microsoft and other applicable accounting practices. The CEO, CFO, Corporate Controller and other employees of the finance organization are also required to comply with the Microsoft Finance Code of Professional Conduct.

Use and Protection of Assets: We wisely use and protect the assets of the company, including property (both physical and intellectual), supplies, consumables, and equipment. We use these assets exclusively for Microsoft's business purposes.

Fiscal Responsibility: Microsoft employees exercise good stewardship over and spend Microsoft's funds in a responsible manner.

Use of Information Technology: At all times, we should use good judgment and common sense; conduct ourselves ethically, lawfully, and professionally; and follow applicable authorization protocols while accessing and using company-provided information technology and its contents. In using these company assets and systems, we do not create, access, store, print, solicit, or send any material that is intimidating, harassing, threatening, abusive, sexually explicit, or otherwise offensive or inappropriate, nor do we send any false, derogatory, or malicious communications.

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Intellectual Property: We comply with the laws and regulations that govern the rights to and protection of our own and others' copyrights, trademarks, patents, trade secrets, and other forms of intellectual property.

Creation, Retention, and Disposal of Records and Information Assets: We create, retain, and dispose of our business records and information assets, both written and electronic, as part of our normal course of business in compliance with Microsoft policies and applicable regulatory and legal requirements.

Confidential and Proprietary Information: We respect our ethical and legal responsibilities to protect Microsoft's confidential and proprietary non-public information and communicate it only as necessary to conduct Microsoft's business. We do not use this information for our personal advantage or for non-Microsoft business use, and maintain this confidentiality even after Microsoft no longer employs us.

Third-Party Software: We use software and other content information only in accordance with their associated licenses and/or terms of use. We prohibit the making or using of copies of non-licensed copyrighted material, including software, documentation, graphics, photographs, clip art, animation, movie/video clips, sound, and music.

Insider Information and Securities Trading: In the course of doing business for Microsoft or in discussions with one of its customers, vendors, or partners, we may become aware of material non-public information about that organization. Information is considered "material" if there is a substantial likelihood that a reasonable investor would consider it important in making a decision to trade in the public securities of the company. Individuals who have access to this type of information are called "insiders." We discuss this information on a limited, "need to know" basis internally, and do not share it with anyone outside Microsoft. We do not buy or sell the public securities of a company, including our own, on the basis of such information, and we do not share ("tip") this information with others. Because of the extremely sensitive nature of and severe penalties associated with "insider trading" and "tipping," contact Microsoft's Law and Corporate Affairs before you buy or sell public securities in situations that could be of this nature.

Conflicts of Interest: Microsoft employees are expected to act in Microsoft's best interests and to exercise sound judgment unclouded by personal interests or divided loyalties. Both in the performance of our duties for Microsoft and our outside activities, we seek to avoid the appearance of, as well as an actual, conflict of interest. If in doubt about a potential conflict, speak with your immediate supervisor, manager, another member of management, your Human Resources Generalist, or your Law and Corporate Affairs contact as specified in the Resources for Guidance and Reporting below.

Gifts and Entertainment: Microsoft policy and practice encourage the use of good judgment, discretion, and moderation when giving or accepting gifts or entertainment in business settings. Gift giving and entertainment practices may vary in different cultures; however, any gifts and entertainment given or received must be in

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compliance with law, must not violate the giver's and/or receiver's policies on the matter, and be consistent with local custom and practice. We do not solicit gifts, entertainment, or favors of any value from persons or firms with which Microsoft actually or potentially does business. Nor do we act in a manner that would place any vendor or customer in a position where he/she may feel obligated to make a gift, provide entertainment, or provide personal favors in order to do business or continue to do business with Microsoft.

Purchasing Decisions and Practices: In our purchasing decisions, negotiations, contract development, and contract administration we comply with the applicable laws and regulations that govern those relationships.

We promote a diverse, cooperative, and productive work environment.

Openness, Honesty, and Respect: In our relationships with each other, we strive to be open, honest, and respectful in sharing our ideas and thoughts, and in receiving input.

Diversity: Microsoft promotes and supports a diverse workforce at all levels of the company. It is our belief that creating a work environment that enables us to attract, retain, and fully engage diverse talents leads to enhanced innovation and creativity in our products and services.

Equal Employment Opportunity: Microsoft promotes a cooperative and productive work environment by supporting the cultural and ethnic diversity of its workforce and is committed to providing equal employment opportunity to all qualified employees and applicants. We do not unlawfully discriminate on the basis of race, color, sex, sexual orientation, religion, national origin, marital status, age, disability, or veteran status in any personnel practice, including recruitment, hiring, training, promotion, and discipline. We take allegations of harassment and unlawful discrimination seriously and address such concerns that are raised regarding this policy.

Safety and Health: A safe and clean work environment is important to the well-being of all Microsoft employees. Microsoft complies with applicable safety and health regulations and appropriate practices.

We are responsible, caring members of the global community.

Citizenship and Community Service: We have a strong and demonstrated commitment to the improvement of society as well as the communities we serve and in which we operate. We encourage the support of charitable, civic, educational, and cultural causes. Our contributions include cash, volunteer time, software, and technical assistance.

Respect for the Environment: Microsoft respects the environment and protects our natural resources. We comply with applicable laws and regulations regarding the use and preservation of our land, air, and water.

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Microsoft's Business Conduct and Compliance Program

Administration and Enforcement

Microsoft's Department of Law and Corporate Affairs is responsible for the overall administration of the company's Business Conduct and Compliance Program and for providing employees with resources and materials to assist them in conducting their business activities in a legal and ethical manner. In administering the program, Law and Corporate Affairs works closely with Finance, Human Resources, Internal Audit, and Security.

The General Counsel serves as the company's Chief Compliance Officer and has overall responsibility for the management of the program. The General Counsel reports directly to the CEO and, for this purpose, to the Audit Committee of the Board of Directors. The General Counsel oversees directly an Office of Legal Compliance (OLC). The Director of Compliance, who is part of the Office of Legal Compliance, reports to the Chief Compliance Officer and the Audit Committee of the Board of Directors and has the responsibility for the day-to-day administration of the Business Conduct and Compliance Program. This responsibility includes, but is not limited to, applying the Standards to specific situations in which questions may arise and interpreting the Standards in a particular situation.

The Standards of Business Conduct and the Business Conduct and Compliance Program are endorsed by and have the full support of Microsoft's Board of Directors. The Board of Directors and management are responsible for overseeing compliance with and enforcing the Standards of Business Conduct.

Violations of Microsoft's Standards of Business Conduct cannot and will not be tolerated. Consequences for such violations may include disciplinary action up to and including termination of employment. Individuals who have willfully failed to report known violations will also be subject to disciplinary action.

Waivers of provisions of the Standards of Business Conduct that are granted to any director or executive officer of Microsoft may only be made by Microsoft's Board of Directors or by Board committee designated by the Board of Directors. Any such waiver that is granted to a director or executive officer will be publicly disclosed as required by Nasdaq listing requirements and applicable laws, rules, and regulations.

Resources for Guidance and Reporting

It is your right and your responsibility to obtain guidance about a business practice or compliance issue when you are uncertain about what action you should take and to report possible violations of the Standards of Business Conduct.

If you need details on a specific policy, you may e-mail our compliance team at buscond@microsoft.com. If you need guidance regarding a business practice or compliance issue or wish to report a possible violation, talk to your

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immediate supervisor, manager, another member of management, your Human Resources Generalist, or your Law and Corporate Affairs contact.

You may also call the Business Conduct Line at 1-877-320-MSFT (6738). If you are calling from outside the United States, you may make a collect call to the Business Conduct Line by accessing an international operator and asking to place a collect call to 1-704-540-0139. The Business Conduct Line is a dedicated, toll-free phone line that is available to you 24 hours a day, 7 days a week, 365 days a year. It is operated by an external third-party vendor that has trained professionals to take your calls, in confidence, and report your concerns to the Microsoft Director of Compliance for appropriate action. Your phone calls to the Business Conduct Line may be made anonymously.

If you are a Microsoft employee or vendor without access to our corporate intranet and wish to send a confidential e-mail to the Director of Compliance, you may do so by e-mailing the Business Conduct and Compliance alias (buscond@microsoft.com). A confidential e-mail may be delivered via the Internet by submitting a report via the Microsoft Integrity Web site. These e-mails will be received by a third-party vendor, who will remove your contact information prior to forwarding a summary of the e-mail to the Office of Legal Compliance.

You may also send a letter to the Director of Compliance at Microsoft Corporation, Law and Corporate Affairs, One Microsoft Way, Redmond, WA 98052 or send a confidential fax to (425) 705-2985. Letters and faxes sent to the Director of Compliance may be submitted anonymously if you choose to do so.

If you have a concern regarding a questionable accounting or auditing matter and wish to submit the concern confidentially or anonymously, you may do so by submitting a report via the Microsoft Integrity Web site, calling the Business Conduct Line, or sending a letter or fax to the Director of Compliance as outlined above.

Microsoft will handle inquiries discreetly and make every effort to maintain, within the limits allowed by the law, the confidentiality of anyone requesting guidance or reporting a possible violation.

Microsoft will not tolerate any retribution or retaliation taken against any employee who has, in good faith, sought out advice or has reported a possible violation. However, if any employee makes a knowingly false report of a possible violation for the purpose of harming another individual, that employee will be subject to disciplinary action.

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Our Responsibilities

All Microsoft employees are accountable and responsible for understanding and complying with the Standards of Business Conduct, applicable laws, regulations, and Microsoft policies that are related to their jobs. In fulfilling these responsibilities each employee must:

- Read, understand, and comply with the Standards of Business Conduct and all Microsoft policies that are related to his/her job.
- Participate in training and educational programs/events required for his/her job.
- Obtain guidance for resolving a business practice or compliance concern if he/she is uncertain about how to proceed in a situation.
- Report possible violations of the Standards of Business Conduct, policies, applicable laws, and regulatory requirements.
- Cooperate fully in any investigation.
- Make a commitment to conduct Microsoft's business with integrity and in compliance with applicable laws and regulatory requirements.

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Developing an Antitrust Compliance Program that Really Works

Ted Banks
Chief Counsel, Global Compliance
Kraft Foods

Things to think about

- Is there a culture war in your company?
- Comic books are OK
- Never let a lawyer write anything
- If you don't have an iPod you're too old to do this
- The "one-button" approach
- The TV is my best friend

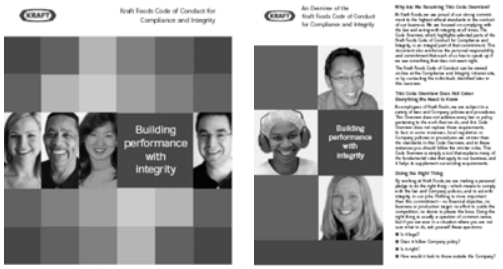
… as opposed to something that just looks good on paper and will fool certain antitrust enforcement folks because they really don't have a clue about what goes on in the real world other than conspiracies . . .

Culture War?

- What is the culture in your company?
  - Cynicism about management?
  - Communication with employees?
- Make everyone feel like they are part of the team
- ***Focus on the employee***

First Day on the Job

- Put yourself in the employee's shoes
  - What are they hearing?
  - What preconceptions do they bring to the job?
- We really mean it
- But, simple rules



Rules on a Page

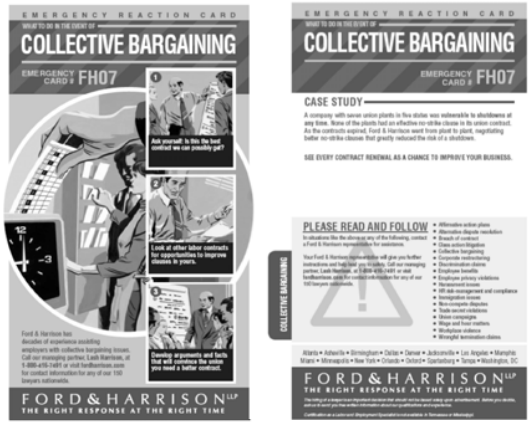
- We sell only wholesome and properly labeled products
- Our advertising contains only truthful claims
- We honor our commitments
- *We compete fairly and do not discuss prices or other aspects of competition with competitors*
- We never discuss non-public information with anyone outside of the company if the information could affect the price of the stock, and treat all sensitive information appropriately
- We don't infringe other companies' patents or trademarks
- We aggressively assert our legal rights when we think others may be violating them, in all these areas

Lawyers as Authors

- Only for briefs, law books, other boring stuff
- Work with professional writers if you want it to work (not an ego thing)

Comic Books are OK

- Focus on the employee
- Make it easy
- Make it fun
- Make it catchy
  - "Fair & equitable"
  - "The right response at the right time."



The One-Button Approach

- Make it as easy as possible to get information relevant to their job
- On their computer or desk or workplace
- In their language

In their language . . .

The Media is My Compliance Friend

- Use relevant articles
- Show, don't tell: the power of pictures

On their desk . . .

Distributor Category Management
Do's and Don'ts

Do	Don't
• What's best for the category and the customer	• Speak with competitors about prices, promotions, terms of sale, future business plans, boycotts, refusals to deal, market share or specific customers, nor about any other sensitive topic without first getting Law Department approval
• Use information received from the customer to manage the category to the benefit of that customer, and share it only with employees who need it for that purpose	• Share a customer's information with any employees who don't need it for the customer's benefit
• Use and communicate information honestly	• Manipulate data to make a case it doesn't really support
• Communicate with competitors only to the extent required to fulfill your category management responsibilities	• Target or gang up on specific competitors
• Play hard, as long as you play fair	

Ultimately it's the customer's decision – your job is to be a wise and honest counselor

Remember – Even Antitrust Compliance Can Be Fun!

Legal Stuff Made Easy!

Company Policy

- Legal compliance = part of our business life
- Right thing = long run benefits
- Deep pockets = lawsuits
  - *Ethics*
  - *Accountability*

Legal Overview

- Company policy
- Documents
- Antitrust & Other Laws
- The Penalties
- What Should I Do?

What Are You Writing?

- So, how would it look...
  - Out of context?
  - Meanings twisted?
- Everything is a "document"
- Almost everything is discoverable

How would it look to your mother?

Write Smart

- Write clearly and accurately
- Don't sensationalize
- Don't raise legal issues (except to lawyer)
- Follow record retention program
- Anything can be a "contract," so check with the Law Dept.

You are accountable, so...

Ask Questions.

No Surprises!

Q: What keeps the U.S. economy competitive?

$

A: Antitrust Laws = "Rules of the Road" for business

Antitrust Rules

- No anticompetitive *collusion*
  - Example: price fixing
- No unfair *domination*
  - Example: predatory pricing
- No *discrimination*
  - Example: injurious price differences
- No *unfair* practices
  - Example: tying

Sherman Act of 1890

- Conspiracy (agreement) between competitors = no competition
- Sherman Act: no agreements that unreasonably restrain trade
- What is unreasonable?

Antitrust Statutes

- Sherman Act
- Clayton Act
- FTC Act
- State Laws

Unreasonable "Per Se"

(Stuff that is always bad under the Sherman Act)

- Conspiracy (more than 1 person)
- Horizontal
  - Price Fixing
  - Group Boycotts
  - Market/Customer Allocation

Big Risk: Talking to Competitors

- General rule: *don't*
  - Prices, Promotions: cannot discuss
  - Terms of Sale: cannot discuss
  - Costs, deductions: cannot discuss
- If you feel you must: check with lawyer
  - Trade Associations: careful
  - Credit: information, not agreements

The Customer Relationship

- Can require prices be lowered to reflect promotional allowances, but should be reasonable.
- Sensitive business information: think about using a confidentiality agreement
- Ultimately, a matter of trade relations

What about Competitive Pricing or Promotional Information?

It's OK to get it, so long as you...

- Get from *customers,* not competitors
- Write when, where you got it on the document
- Ask yourself: How would my files look to the Justice Department?

Sherman Act Section Two

The Other Part of the Sherman Act

- No monopolization or attempts to monopolize
  - Large market share
  - Intent to eliminate competition
  - Unfair conduct to implement (usually below cost pricing)

Robinson Patman Act - 1936
A product of the Depression

- Unlawful to discriminate in price, or in services connected with resale, to competing customers

Promotional Allowances

- Promotional funds/services allocated in proportion to purchases
  - Offer to competing customers
    - Can require performance
      - Much flexibility
      - Must be feasible
        No performance = no money!

You CAN Charge Different Prices Based On...

- Customers not competing
- Cost (e.g., transport) savings
- Deterioration of goods
- Non-Profit Customers
  - Warning: U.S. Gov't
- Meeting competition
  - Can be selective
  - Trade relations?

Clayton & FTC Acts
Antitrust Statutes (cont'd)

- Tying or tie-in sales
  - Buy stuff you don't want
- Exclusive dealing agreements
  - Don't buy other stuff
- Unfair/Deceptive Practices
  - False advertising

Penalties

- Criminal (Sherman Act)
  - Jail (up to 10 years)
  - Fines
    - $10 million corps./$1 million individual
    - +2x gain/loss
- Civil (Sherman, Clayton, RP)
  - Treble Damages
  - Injunctions
  - Attorney Fees

Four Easy Rules

- Don't collude
- Don't abuse market power, or talk as if you are
- Don't illegally discriminate among customers
- Don't engage in unreasonable or deceptive competitive practices

Antitrust compliance is important, but...

- Don't fall for the "antitrust snow job"

One Even Easier Rule...

- Pick up the phone

Antitrust Statements in Selected Corporate Codes of Conduct

Cadbury

Competition
We are committed to free and open competition. We will compete vigorously but honestly, while complying with all competition and anti-trust laws wherever we carry out business.

Cisco

Antitrust/competition laws keep the marketplace where we operate thriving and competitive.
The economy of the United States, and in most nations, is based on the principle of a free competitive market. To make sure that this principle carries over to the marketplace, most countries have laws prohibiting business practices that interfere with competition. Cisco abides by these antitrust/competition laws wherever we do business, and we avoid conduct that might even suggest or make it appear that we are violating these laws.
Each of us should be familiar with antitrust/competition laws.
These laws touch upon and affect almost every aspect of our operations, so it is important that you are familiar with them and keep them in mind while doing your job. Remember, violations can carry serious penalties, not only for Cisco, but for you. If you ever have a question about a particular activity or practice, contact the Cisco Legal Department or Ethics Office for help.

Colgate

We comply with the antitrust laws.

Fair competition is fundamental to the free enterprise system. Colgate supports laws prohibiting restraints of trade, unfair practices or abuse of economic power.

The antitrust laws of the United States and similar laws in other countries are designed to prohibit agreements among companies that fix prices, divide markets, limit production or otherwise impede or destroy market forces. You must adhere to the letter and spirit of these laws. Some of the most serious antitrust offenses are agreements between competitors in restraint of trade, such as agreements to fix prices or to allocate customers, territories or markets. Any such agreement — even an unwritten, informal understanding — may be unlawful regardless of its commercial reasonableness. To minimize this risk, contacts with competitors must be kept to an absolute minimum. Membership in trade associations is permissible only if approved in advance by your unit's legal counsel.

Relationships with customers and suppliers can also be subject to a number of antitrust prohibitions, particularly attempts to restrict a customer's reselling activity through resale price maintenance. Other activities that create antitrust problems are discrimination in terms and services offered to customers, exclusive dealings, and tie-in sales.

The consequences for Colgate and its people for not complying with the antitrust laws are extremely serious. Violation of some antitrust provisions is a felony in the United States and can lead to fines and imprisonment for the individuals involved and to even heavier fines for the Company. Moreover, even in the absence of a criminal prosecution, civil antitrust suits may be brought to recover treble damages and attorney's fees.

Whenever you have any doubt as to whether a contemplated action may raise issues under the antitrust laws, you should consult your unit's legal counsel. For further information about antitrust issues, please refer to the "Colgate-Palmolive Antitrust and Trade Regulation Guidelines," which are found in the Company's Business Practices Guidelines and are available from the Business Practices Department.

Church & Dwight

It is the Company's policy to comply fully with the antitrust laws that apply to our operations domestically and throughout the world. The underlying principle behind these laws is that a person who purchases goods in the marketplace should be able to select from a variety of products at competitive prices unrestricted by artificial restraints, such as price fixing, illegal monopolies and cartels, boycotts and tie-ins. We believe in these principles of free and competitive enterprise and are firmly committed to them.

Certain violations of the antitrust laws are punishable as criminal offenses. Criminal sanctions include fines of up to $10 million for companies and up to $350,000 and three years imprisonment for individuals. Some violations of antitrust laws are felonies. The United States government may also seek civil injunctions. In addition, injured private parties may sue for threefold their actual damages stemming from any antitrust violation, plus an award of attorneys' fees and the costs of bringing suit. In light of all these considerations, antitrust compliance is extremely important to the Company and all of its employees.

Antitrust and competition laws are very complex and voluminous and vary from country to country. The brief summary of the law below is intended to help employees recognize situations that raise potential antitrust or competition issues so that they can then consult the Law Department.

- Discussion of any of the following subjects with competitors, whether relating to the Company's or the competitor's products, is prohibited: past, present or future prices, pricing policies, lease rates, bids, discounts, promotions, profits, costs, margins, new products or processes not previously disclosed publicly, terms or conditions of sale, royalties, warranties, choice of customers, territorial markets, production capacities or plans and inventories. Selected items of such information may be discussed with competitors who are also suppliers to us or distributors of our manufactured products, but such discussions should be limited to what is necessary in the supplier/distribution context. We can discuss with a supplier/competitor its prices and terms and conditions of sale to us and we can discuss with a dealer/competitor our prices to that dealer for our manufactured products.

- You must not discuss or agree with any competitor about what prices the Company and the competitor will charge to a customer or customers, nor about other terms (e.g., credit) or conditions of sale, nor discuss or agree upon production quotas or allocation of customers or sales territories.

- Competitive prices may be obtained only from sources other than competitors, such as published lists and mutual customers. It is advisable to mark directly on these materials from whom they were received, and when.

• If at any trade association meeting you become aware of any formal or informal discussion regarding the following topics, you should immediately leave the meeting and bring the matter to the attention of the Law Department. Such topics include:
  - Prices
  - Discounts
  - Exclusion of members
  - Terms and conditions of sale
  - Geographic market or product market allocations/priorities
  - Bidding on specific contracts or customers
  - Refusal to admit members or to deal with a customer
  - Standardization among members of terms, warranties or product specifications.

• Consult with the Law Department and appropriate senior sales management before creating or terminating a relationship with, or refusing to sell to, a dealer, distributor, customer or prospective customer. While the Company is free to select its own customers, terminations and refusals to sell often lead to real or claimed antitrust violations.

• Consult with the Law Department early in the process of evaluating any proposed merger, acquisition or joint venture.

• Distributors and dealers may resell Company products in accordance with their contracts at prices they independently establish and generally they may handle any competitive merchandise. You may not come to any understanding or agreement with a distributor or dealer concerning its resale prices. Limits on a distributor's territory or classes of customers must be reviewed with a member of the Law Department prior to implementation.

• It is against Company policy to make our purchases from a supplier dependent on the supplier's agreement to buy from us.

• You may not unfairly disparage or undermine the products or services of a competitor, whether by advertisement, demonstration, disparaging comments or innuendo.

• It is Company policy that all customers and suppliers be treated fairly and not be discriminated against.

Coca-Cola

Competition Law

The Coca-Cola Company competes fairly, and complies with all applicable competition laws around the world. These laws often are complex, and vary considerably from country to country—both in the scope of their coverage and their geographic reach. Conduct permissible in one country may be unlawful in another. Penalties for violation can be severe.

Accordingly, the Company has adopted *Competition Law Guidelines* applicable in various parts of the world. Employees should consult Company legal counsel and these Guidelines to understand the particular competition laws and policies applicable to them.

Con-Agra

ConAgra Foods' policy is to comply with the antitrust laws of the jurisdictions in which we operate. The U.S. antitrust laws seek to preserve a free competitive economy in the United States. ConAgra Foods believes that the preservation of a competitive economy is essential to the public interest, to the interest of the business community in general, and to ConAgra Foods specifically.

The objective of promoting competition coincides with ConAgra Foods' belief in competing vigorously and legally in all areas of its operations. ConAgra Foods provides quality products and services and can, therefore, sell its products and services at competitive prices in compliance with the antitrust laws. Consequently, for both legal and business reasons, it is the obligation and responsibility of all ConAgra Foods employees to comply with the antitrust laws.

All employees must carry out the policy of ConAgra Foods to compete vigorously and legally in all areas of its business operations. All employees shall comply with the antitrust laws. For example, ConAgra Foods employees:

• Must not agree on or even discuss with competitors any matter involved in competition between ConAgra Foods and the competitor (such as sales price, credit terms, marketing strategies, market shares or sales policies) except in those instances where there is a bona fide purchase from or sale to a competitor or bona fide credit checks for commercially reasonable purposes.

• Must not agree with a competitor to restrict competition by fixing prices, allocating customers or territories or any other means.

• Must not agree with a supplier or customer on the minimum price at which a product will be resold.

• Must not sell a product below cost with the intent to harm a competitor.

No employee of ConAgra Foods has authority to engage in any conduct inconsistent with the antitrust laws, or to authorize, direct or condone such conduct by any other person.

Dean Foods

Antitrust and Competition Law

Many routine business activities can present issues and challenges under the antitrust laws. If you are involved with establishing our prices or terms of sale, bidding for contracts, or dealing with customers, distributors or suppliers, you are expected to be familiar with the antitrust laws applicable to our business and will receive special antitrust compliance training. Understanding and complying with antitrust laws is essential to our continued success. At a minimum, you should never:

- make any agreement with a competitor regarding pricing of our products in the marketplace, pricing practices, bids, bidding practices, terms of sale or marketing practices;
- agree with a competitor to coordinate or allocate bids;

- divide customers, markets or territories with a competitor;
- agree with a competitor not to deal with another company;
- attempt to control a customer's resale price;
- illegally discriminate unfairly between customers regarding price or other terms;
- illegally force a customer to buy one product in order to get another product; or
- engage in any other unfair methods of competition or deceptive acts or practices.

Our Legal Department can advise you on what conduct is or is not permissible under the antitrust laws. Under the antitrust laws, a prohibited agreement with a competitor or customer does not have to be a written contract or involve an express commitment. A "nod and wink" tacit understanding or even silent approval may be sufficient. Since we operate in a highly competitive environment in which prices may be similar among competitors, it is important to avoid even the appearance of an illegal agreement. Therefore, it is our policy that (unless it has been approved by our Legal Department) you may not discuss with any competitor any sensitive subject such as customer pricing, bids or bidding practices, costs, production levels, selling strategies, terms or conditions of sale, market shares, territories or customer lists. If, for example, discussion during a trade association meeting turns to prohibited subjects, you must not participate in the discussion. Instead, you should leave the meeting, if necessary, and promptly report the incident to our Legal Department. Similarly, you must never send or receive any information of a type described above directly to or from a competitor.

Estee Lauder

Antitrust Compliance

The antitrust laws of the United States and other countries are designed to preserve vigorous competition. They are based on the belief that the public interest is best served by free enterprise. It is the policy of the Company to comply with the antitrust laws of the United States and of the various states and foreign countries in which we do business and to avoid practices that would violate the U.S. antitrust laws even in areas of the world where local laws do not prohibit such practices.

The U.S. antitrust laws and similar laws in other countries prohibit (a) "horizontal" agreements with competitors to fix prices or other terms of sale, to allocate customers, territories or markets, or to boycott certain customers or suppliers and (b) "vertical" agreements by a supplier with retailers to fix resale prices. It is lawful to provide a suggested retail price but not to agree or coerce the retailer to adopt it as the retail price.

Violations under the antitrust laws may be inferred from circumstantial evidence. Thus, it is critically important that all communications, including meetings, conversations and exchanges of information with competitors that may touch upon competitive matters, or with retailers that may touch upon resale prices, be approached with considerable caution and with the advice of the Legal Department. Where appropriate, a member of the Legal Department should attend any such meeting. You must terminate all improper conversations initiated by a competitor or retailer even in a social or industry-association setting and notify the Legal Department.

Violations of the U.S. antitrust laws are felonies, punishable by imprisonment and heavy fines for the individuals involved and by even heavier fines for the Company. The laws are complex and in many respects difficult to interpret and apply. Any employee who needs guidance should contact the Legal Department.

General Mills

Encouraging healthy competition

Competition laws, known as antitrust laws in the U.S., are intended to preserve fair, honest and vigorous competition. General Mills strongly supports this goal. Generally, the laws prohibit conspiracies between competitors, improper attempts to monopolize markets or control prices, and certain unfair business practices. The laws are very broad and complex, and their application often turns on specific facts and circumstances, but you should always:

- Know your responsibilities under the laws and report possible violations.
- Steer clear of formal or informal agreements with competitors on sensitive topics such as prices, margins, business plans, trade programs, discounts and production capacity.
- Treat competing customers fairly when offering prices, trade programs and resale assistance.

Questions about antitrust or competition laws or how they apply should be referred to the lawyer supporting your unit. Report any possible violation of law promptly to your manager, Human Resources or the Law department.

Heinz

Antitrust/Fair Competition

- Our Antitrust Policy – CC.04 requires that employees worldwide comply, as applicable, with U.S. antitrust laws, and with competition laws in every country in which the Company does business.
- No Heinz employee may enter into any agreement or understanding with any competitor regarding price or discuss with any competitor Heinz's or the competitor's past, present, or future prices or promotional programs or terms of sale.
- There are other laws dealing with restraints of trade or abuse of market power or dominance. Any questions relating to these issues should be referred to the Law Department.
- Any employee or employees of Heinz found to have engaged in price fixing will face termination plus potential prison terms and substantial fines, which must be paid personally. The Company will be exposed to substantial fines and money damages. Any employee who has a question about potential antitrust implications of a proposed course of action must consult with the Law Department before such action has taken place.

Henkel

Market and competitive behavior

Henkel and its employees are unconditionally committed to the principles of fair competition and must comply with the antitrust and fair competition laws of the countries in which Henkel conducts business.

As accurate legal assessment depends on the complexities of the laws concerned and the individual circumstances of each situation, an attorney from Henkel's Law Group should be consulted wherever doubt arises. Nevertheless, there are forms of conduct that typically constitute a violation of competition laws:

Relationships And Interactions With Competitors

Agreements with competitors and coordinated behavior aimed at or causing a restraint or limitation on competition are forbidden. These include agreements to fix or set prices, quotations, terms and conditions of sale, production or sales quotas, and also the apportionment or allocation of customers, territories, markets or product portfolios. Not only formal agreements are forbidden, but also coordinated behavior arising from, for example, informal talks or gentlemen's agreements aimed at or giving rise to such a restraint on competition.

In discussions with competitors, we must apply strict controls in order to ensure that we do not pass on or receive any information that would allow conclusions to be drawn about the current or future market behavior of the information donor. Thus, a Company attorney should always be consulted prior to engaging in a joint activity that involves communications with competitors. Current or future information regarding price, margins, costs, market share, internal proprietary practices, sales terms and specific customer or vendor information should not be obtained from or exchanged with a competitor.

Customer Relationships

Relationships with our customers, suppliers and also patentees or licensees are governed by a number of legal regulations relating to fair competition. In accordance with these laws and regulations, Henkel employees will not act in any way that would restrict a customers' pricing freedom or interfere with supply relationships with their business partners (geographical, personal or material restraints). Henkel employees will not encourage illegal tying and resale arrangements.

Abuse Of A Dominant Market Position

Owing to its market position in relation to certain products, Henkel also has to obey certain special rules. For example, abuse of a dominant market position may be deemed to have occurred in the event of differentiated treatment of customers without material justification, refusal of supply, the imposition of inappropriate purchasing/selling prices and terms and conditions, or tie-in transactions without any material justification for the demanded additional counter-consideration.

The definition of a dominant market position is variable from case to case, as are the limits of permissible behavior. In cases of doubt, early contact should be made with a Henkel corporate attorney.

Trade And Professional Association Meetings

While attendance at and participation in such meetings, on behalf of Henkel, may be important to further corporate objectives, it is also recognized that attendance at such meetings can present a potential antitrust/fair competition risk due to contacts with competitors during the course of the meeting. Henkel employees shall attend only meetings of legitimate trade and professional associations, conducted for proper business purposes. It is preferable that meeting minutes be taken and made available. Any benchmarking or comparative information supplied must be in full compliance with applicable laws and regulations. When in doubt, a Henkel corporate attorney must be consulted.

Hershey Company

Antitrust And Competition Laws

The United States federal government, most U.S. state governments, the European Union and many governments of other countries have enacted antitrust or competition laws. The antitrust and competition laws generally are intended to promote the free enterprise system by eliminating artificial restraints on competition. These laws prohibit "restraints of trade" which involves certain conduct involving competitors, customers or suppliers. The purpose of these laws is to ensure that the market for goods and services operate efficiently and competitively. Violations of these laws can subject corporate violators to criminal penalties and civil damages, and individual violators to criminal penalties involving substantial fines, imprisonment or both. It is the Company's policy that its directors, officers and employees will comply strictly with these laws. No director, officer, or employee should under any circumstances:

1. Discuss with competitors prices of, or marketing plans for, any of the Company's products, or prices paid or to be paid for products, services or materials purchased by the Company, or other business information affecting such prices ("price" includes all terms of sale, including discounts, allowances, promotional programs, credit terms and the like).

2. Discuss with competitors the division or allocation of markets, territories or customers, or discuss with customers the division or allocation among customers of their markets, territories or customers.

3. Discuss with competitors or customers the boycotting of third parties. -7-

4. Reach an agreement or understanding with a customer on the price at which the customer will resell the Company's products or discuss with one customer the resale prices for the Company's products charged by another customer. Hershey may suggest resale prices to its customers, but it must be made clear that the customer is free to accept or reject the suggestion.

In addition, the Robinson-Patman Act prohibits price discrimination in the U.S. While the Act is complicated and very difficult to apply, some general rules and guidelines may be stated:

• Discrimination Between Customers - It may be unlawful to sell the same product to competing customers at different prices where the effect is to injure competition. Competing customers should be treated on a proportionally equal basis when granting sales promotions, promotion discounts, advertising allowances, or assistance in the form of services and facilities. Discrimination in prices or services offered to competing customers is not *per se* illegal. That is, in some situations the law permits differentials which are justified on the basis of cost savings to the seller, meeting the equally low price of a competitor, or changes in the market for or marketability of a product. A number of rules govern the application of these justifications, and

therefore, the Law Department should be consulted whenever a situation described above arises.

• Territorial Price Discrimination - Selling in one section of the U.S. at a lower price than in another geographic area of the U.S. may be unlawful. The Law Department should be consulted whenever prices, pricing or promotions will not be the same in all territories.

The Law Department has prepared a *Guide to Antitrust Compliance* that deals extensively with compliance with the antitrust laws. Employees who have marketing, sales or purchasing responsibilities; who have any contacts with competitors; who attend trade association meetings or who have any involvement with trade associations are expected to be thoroughly familiar with the contents of this *Guide to Antitrust Compliance*. Copies are available from the Law Department.

It is the Company's intent to comply with all applicable antitrust and competition laws. If an employee has any question concerning the possible application or interpretation of such laws, he or she should contact the Law Department.

Hormel

Antitrust Compliance

Activity which violates the antitrust laws of the United States, any state thereof, or comparable laws of foreign jurisdictions, is prohibited. Employees, officers and directors must comply with all antitrust compliance policies adopted by the Company. Areas in which employees, officers and directors must be sensitive to antitrust problems include pricing, termination of existing relationships with customers or suppliers, the establishment of either exclusive customers or suppliers, tie-in sales, boycotts and reciprocity.

Jarden

Antitrust

The basic purpose of the antitrust laws is to protect and provide an open economic environment for independent businesses to compete in markets free from collusive or exclusionary behavior. When this objective is frustrated by concerted private action or abuse of market position, the antitrust laws are violated and our free market system is subverted. It is the longstanding policy of Jarden to observe and comply strictly with both the spirit and letter of the antitrust laws - both domestic and foreign.

Penalties for violating the United States antitrust laws can be onerous. Any individual who authorizes, orders or participates in conduct found to violate the Sherman Act may be fined $350,000 for each violation and imprisoned up to three years. Individuals found to have violated the antitrust laws have been required to serve substantial prison terms. Under new federal sentencing guidelines, a company may have to pay criminal fines of many millions of dollars as a result of an antitrust offense. A company may also be required to pay treble damages also potentially in the many millions of dollars - to competitors and other private parties injured by its anticompetitive conduct.

The antitrust laws are complex. However, here are ten basic "don'ts" of antitrust:

1. Don't discuss prices with competitors ever.
2. Don't agree with competitors to restrict or increase levels of output.
3. Don't divide customers, markets or territories with competitors.
4. Don't require a customer to buy products only from Jarden.
5. Don't agree with competitors to boycott suppliers or customers.
6. Don't offer a customers. prices or terms more favorable than those offered competing customers unless justified by cost savings, the need to meet competition or changed market conditions.
7. Don't use one product as leverage to force or induce a customer to purchase another product.
8. Don't forget the federal antitrust laws apply to Jarden activities engaged in overseas if they affect United States commerce.
9. Don't prepare documents or make presentations without considering the antitrust implications.
10. Don't cover up any wrongdoing, but report it promptly to your supervisor.

This policy is not intended as a comprehensive review of the antitrust laws, and is not a substitute for expert advice. If you have questions concerning a specific situation, you should contact the Vice President, Human Resources and Administration at 765-281-5000.

Kellogg's

Antitrust

We believe in free and open competition and note that the antitrust laws in the United States, competition laws of the European Union and various laws in other countries where we do business encourage companies to compete aggressively to increase their sales, market share and profits. We comply fully with these laws and if we have any questions about them we consult the Legal Department before acting.

We understand that certain business practices are prohibited by these laws, and that the following are likely prohibited:

• Exchanging information with competitors regarding pricing, marketing, production and/or customers;

• Entering into any formal or informal agreement with any competitor that fixes prices, or allocates production, sales territories, products, customers or suppliers;

• Entering into an agreement with customers and suppliers that establishes the resale price of a product, or conditions the sale of products on an agreement to buy other Kellogg Company products.

We recognize that the monetary cost of antitrust violations, even unintentional ones, can run into millions of dollars in fines and penalties and that the cost to Kellogg Company's reputation is even greater.

Kraft (long version)

Conducting Business - What We Aim For

In all our business dealings, our companies strive to be honest and fair. We will vigorously compete, but do so fairly, complying with all laws protecting competition and the integrity of the marketplace.

Competition and Antitrust Laws

Kraft Foods strictly adheres to what are called "competition" laws in many countries and "antitrust" laws in the U.S. — laws that protect markets around the world from anticompetitive behavior. Competition laws prohibit anticompetitive agreements, such as price-fixing and predatory efforts to eliminate competitors. Each operating company has competition policies. You should become familiar with the policies that apply to your job.

Facts About Competition Laws:

- **Competition Laws Vary Around the World.** Many countries, the European Union and individual states in the U.S., have laws prohibiting anticompetitive behavior. The laws that apply to you may vary depending on where you work.
- **They Can Cover Conduct Outside the Country.** Some competition laws — such as those in the U.S. and EU — may apply even when the conduct occurs outside the country's borders.
- **Penalties Are Severe.** In the U.S., individuals convicted of price-fixing often receive prison sentences, and some companies have been fined hundreds of millions of dollars; customers and competitors can sue for three times the harm caused. In the EU, fines for anticompetitive behavior can be ten percent of worldwide turnover (i.e., sales).
- **Careless Conduct Can Violate the Law.** What might appear to be ordinary business contacts, such as a lunch discussion with a competitor's sales representative or a gripe session at an industry trade association, can lead to competition law violations.

Basic rules to Know

Certain agreements almost **always** violate competition laws. **Never** talk with or exchange information with competitors to:

- Fix prices — this can include setting minimum or maximum prices, or "stabilizing" prices.
- Fix terms related to price, pricing formulas, trade promotions, credit terms, etc.
- Divide up markets, customers or territories.
- Limit production.
- Rig a competitive bidding process, including arrangements to submit falsified bids.
- Boycott a competitor, supplier, customer or distributor.

Because of the risk, **do not discuss competitive matters with competitors** — at any time or any place — without authorization of your Law Department.

Other activities may raise competition law issues. Always consult with your company's Law Department before:

- Discussing joint ventures, mergers, acquisitions, marketing, purchasing or similar collaborative arrangements with competitors.
- Establishing exclusive dealing arrangements (e.g., contracts that require a company to buy only from or sell only to an Altria company).
- Tying or bundling together different products or services (e.g., contracts that require a buyer who wants one product to also buy a second "tied" product).
- Engaging in activities involving trade associations or setting industry standards.
- Serving as a director or officer in a company that competes with us.
- Setting resale prices with resellers (in the U.S. and some other countries).

Q: *During a trade association meeting, I chatted with representatives of competing manufacturers. One representative said, "I don't know about the rest of you, but our profit margins aren't as good as they used to be." Another said, "I wish we could do something about all those deep discounts." I nodded my head, but never said anything. Over the next few weeks the companies whose representatives were present during the conversation raised their prices. Was the discussion a problem? What should I have done?*
A: *Yes, this discussion definitely was a problem. A court might conclude that everyone present during the conversation, whether they said anything or not, had engaged in price-fixing even though there was never an explicit agreement. Because of this risk, if you find yourself present during a discussion of prices with competitors, immediately break away from the discussion in a way that makes it clear you consider this improper, and promptly call your Law Department.*

Monopolizing, trying to monopolize markets and abusing a dominant position are illegal.

Some competition laws make it illegal to monopolize or attempt to monopolize a market, while others regulate the conduct of companies that hold a "dominant position." A company with a dominant position, for example, must not try to prevent others from entering the market, or to eliminate competition. Usually, competitors set prices to cover their costs — below-cost pricing may appear to be "predatory." If there is a reason to price below cost, this should be reviewed with your Law Department to ensure that it is not predatory or in violation of any law.

Charging different prices to customers who are competitors may be illegal.

In the U.S., a complex law called the "Robinson-Patman Act" in some cases prohibits charging different prices on sales of goods to customers who compete with one another. There are a number of exceptions to this law. Similar laws apply in many international jurisdictions. In the EU, differential pricing may raise issues where a company has a dominant position or where such pricing is done by agreement with a third party. Employees with authority to set prices need to learn the requirements of these laws and should consult their Law Department for guidance.

If you have questions or concerns about your responsibilities under the competition laws, consult your operating company policies or your Law Department.

Kraft Foods (very short version)

Unfair Business Practices:

Never engage in unfair methods to win business, such as making false statements about competitors. Never discuss sales or marketing plans with competitors, share customer information or agree on how we will compete.

Antitrust Compliance Essentials

(Excerpt from T. Banks & F. Banks, Corporate Legal Compliance Handbook, Ch. 20, published by Wolters-Kluwer/Aspen Law & Business, © 2008)

Introduction

One of the most important areas for establishment of a compliance program is in area of antitrust/competition law. In the United States, at least, because antitrust compliance has been an accepted fact of life for several decades, this premise is usually not met with any resistance on the part of corporate officers. However, more thought needs to be given to the substance of established antitrust compliance programs, which, by their very familiarity, may have faded into the background of ineffectiveness. Outside of the United States, a program to communicate the importance of compliance with local competition laws and corporate policy must take into account cultural tendencies – or even government actions -- that may run counter to the program.

There is a natural tendency for people to talk about subjects in which they have a common interest, like common business activities. Unfortunately, this tendency can slide into exchanges of information that replace competition in the marketplace. As Adam Smith said, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."[1]

"Modern" antitrust compliance came into prominence with the sentencing of executives in the electrical equipment cases in the 1960s. Interestingly, General Electric, one of the companies involved in the electrical equipment conspiracy, had a policy of antitrust compliance since 1946, and employees were told not to discuss prices with competitors. But the written policy alone was not effective in preventing unlawful conduct,[2] and did not serve as a defense to corporate liability.

In the United States, Sherman Act antitrust violations were made a felony in 1974,[3] and as federal prosecution and civil suits increased, corporate interest in effective antitrust compliance was heightened. On June 22, 2004 the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increased to 10 years the maximum prison term for criminal antitrust violations. Fines were increased to $1 million for individuals and $10 million for corporations, or twice the gain or loss resulting from the violation.[4] The Department of Justice has a special amnesty program for antitrust violators who voluntarily confess, described in Chapter 7, so the normal fine reduction provisions are not applied.[5] Consent decrees to resolve cases, as discussed in Chapter 7, may include imposed compliance requirements (examples are provided on the CD-ROM in the section "Imposed Compliance Requirements").[6]

More needs to be done than simply distributing an antirust compliance pamphlet each year to produce an effective compliance program under the Federal Sentencing Guidelines.[7] Instead, a program should combine training focused on the nature of an employee's job responsibilities, and creation of internal control systems that make it difficult to actually violate the law. Antitrust compliance training should cover both the civil and criminal aspects of the law, since the reality is that severe business disruption may originate from ignorance of laws that are the subject of non-criminal enforcement.

Antitrust compliance training should start with a theoretical underpinning. But not too much – the purpose is to give the audience an understanding of why antitrust matters, but they shouldn't have to work too hard. It should be approached like any other subject: principles should be explained in concepts familiar to the audience, not in abstractions. One way to explain antitrust law is to compare it to traffic laws. Speed limits exist to make sure all different kinds of vehicles can share the roads. This allows large trucks to co-exist with motorcycles. The antitrust laws provide rules so that different kinds of companies can co-exist in the U.S. economy. Rather than having detailed sets of rules about what products can be sold, what prices to charge, etc., companies are given a basic set of rules to adhere to. This system allows for competition to exist and deliver the maximum benefits (in most situations) to our economy. When a company violates the rules and behaves in an anticompetitive manner, the government or a private party will step in with the antitrust laws to attempt to restore competition. The theory should be illustrated with practical examples from their own industry. The goal is to enable employees to understand that their company likes these rules (since it protects them as well as limits their behavior), and that there are legal ways to accomplish their business goals. Thus, they would not only understand the antitrust laws, but that they would approach the antitrust compliance with a more receptive attitude.

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[1] Adam Smith, The Wealth of Nations (1776).

[2] There may have been no meaningful attempts to require employees to adhere to the policy. J. Herling, The Great Price Conspiracy: The Story of the Antitrust Violations in the Electronics Industry at 36 (1962).

[3] Antitrust Procedures and Penalties Act, Pub. L. No 93-258, §3, 88 Stat. 1706.

[4] Fines Enhancement Act, 18 U.S.C. §3571.

[5] P.L. 108-237. *See also* Federal Sentencing Guidelines §2R1.1 (bid rigging, price fixing or market allocation agreements among competitors), and application note §8C2.6. The U.S. Department of Justice believes that leniency programs are an extremely effective way to detect and dismantle price-fixing schemes. The Department's transparent policy encourages reporting, and of the 50 investigations of international cartels pending in late 2004, more than half were aided or initiated based on information received from a leniency applicant. Speech by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, to the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22, 2004). Under the Antitrust Criminal Penalty Enhancement and Reform Act, cooperation with prosecutors is encouraged by limiting private plaintiffs in a follow-on case to single damages.

[6] The Justice Department tried to revoke an amnesty agreement with Stolt-Nielsen SA, claiming that the shipping company had not taken "prompt and effective" action to halt illegal activities, and issued an indictment. After years of litigation, the court ruled that Stolt had cooperated, and dismissed the indictment. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir.), *cert. denied*, 127 S. Ct. 494 (2006); United States v. Stolt-Nielsen, S.A., 524 F. Supp. 2d 586 (E.D. Pa. 2007). Stolt also requested the release of amnesty agreements negotiated with other companies. Dkt. 07-5191 (D.C. Cir. July 25, 2008).

[7] The Canadian Competition Bureau has released similar guidelines for the determination of an effective compliance program under the Competition Act. Five elements are essential: 1) involvement and support of senior management; 2) development of relevant policies and procedures; 3) on-going education of management and employees; 4) monitoring, auditing and reporting mechanisms; and 5) disciplinary procedures. The full text is available at http://strategis.ic.gc.ca/SSG/ct01079e.html.

Pricing

Antitrust regulation in the United States is designed to preserve the American definition of free competition, which is essentially a market economy that functions with a set of antitrust rules that substitute for direct government control. When those rules are broken, the government or private parties can bring a legal action. The most sensitive area of competition – and therefore of antitrust enforcement – is pricing. So, there should be a strong antitrust compliance program to prevent any activity regarding the prices a company sells its products for, or purchases it products, that might be viewed as anticompetitive.

The most common concern in antitrust is that competitors will engage in coordinated activities instead of competing for business. This could take the form of agreeing on prices to charge when buying or selling a commodity, agreeing not to purchase from or sell to a specific customer, or establish a minimum price that resellers must observe. Employees must be trained to avoid contacts with competitors, and if contacts are unavoidable, not to discuss any competitive subjects unless counsel has approved the conversation.

The basics of the *per se* antitrust violations should be hammered home to employees, but it should be done in a way that they understand.[8] They should understand that they should not talk to competitors. The distinction between *per se* and rule of reason violations is the kind of thing that makes non-lawyers lose interest in legal matters, unless it is handled right. The message to employees should be simple: for things that might be per se violations, never do them; for things that might be other kinds of antitrust violations, call your lawyer for guidance.

The Department of Justice has suggested,[9] that an organization's antitrust compliance program should contain "affirmative steps to detect price fixing or bid rigging, steps premised on the possibility, or even the assumption, that education and admonition will not deter personnel determined, for whatever reason, to act in bad faith." It was suggested that there should be active monitoring of pricing or bidding, along with regular and unannounced audits of both pricing and the knowledge of personnel with regard to antitrust law and compliance.[10]

The presentation of antitrust compliance should focus on the types of risks that the company faces, and examples derived from familiar products or industries should be employed to illustrate how the laws are applied. As with all compliance training, specific subjects should be targeted to those employees who are most likely to encounter that risk area. For example, a sales representative who is likely to run into a competitor should understand the risks of price fixing. But if that sales representative has no ability to alter prices or promotional programs, then a lengthy discourse on price discrimination is probably not appropriate.

[8] "Every contract, combination, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . . ." Sherman Act §1, 15 U.S.C. §1.

[9] G. Spratling, International Cartels: The Intersection Between FCPA Violations and Antitrust Violations, Speech to American Conference Institute 7th National Conference on Foreign Corrupt Practices Act (Dec. 9. 1999) (see appendix).

[10] The Justice Department published "An Antitrust Primer for Federal Law Enforcement Personnel" in August 2003 (see appendix) and it provides an outline of the key areas that the Antitrust Division seeks to prosecute (price fixing, bid rigging, market allocation) and interesting hints as to how investigators uncover evidence of violations.

Trade Associations

One of the most common sources of antitrust violations is trade association activity.[11] Any area where competitors get together is risky, since people naturally look for subjects in common to talk about. In a trade association, the subject in common is the shared business activity, and, without training and supervision, conversations naturally drift to subjects that are not appropriate. The Department of Justice has obtained numerous convictions of price fixers by examining the activities of trade associations, and, while many trade associations are legitimate, many have been used as a cover for cartel activities.[12] Counsel should review the compliance procedures of all trade associations to which the corporation belongs, and any employee who participates in a trade association function should receive training on what subjects may or may not be discussed at the association.

Bigness and Badness

Employees usually understand the concept that big companies operate in the U.S. economy with certain constraints. They are usually the target of scrutiny from the government, the press and various interest groups. So, rather than going into detailed explanations of monopolization and attempts to monopolize, the key concept to convey to employees is that the flexibility of a company to engage in aggressive competitive behavior declines as the company (and its market share) gets bigger. It must move carefully to avoid "squishing" (inadvertently or otherwise) a smaller competitor.[13] It must be particularly careful should it find itself in a situation where it has a large market share and is selling products at a loss. Ideally, before these unprofitable sales occur (which may be characterized as "predatory pricing" in the antitrust context), the employee will contact her attorney to determine the limits of acceptable risk.

The "bigness" concept is also important when explaining other aspects of antitrust compliance. Tying and exclusive dealing may be techniques that a sales or marketing employee may want to try. When explained in the context of how a restrictive agreement imposed by a company with a large market share can choke a market, they can usually understand the reasoning behind the rule (even if they don't like the restriction it imposes on them). A key

[11] J. Sonnenfeld & P. Lawrence, Why Do Companies Succumb to Price Fixing?, Harvard Business Review (July-Aug. 1978).

[12] For example, evidence of price fixing using trade association activities was part of the government's case in the lysine and citric acid prosecutions. The Justice Department has noted that multinational companies should be particularly sensitive to the possibility of international cartels that may use trade association meetings as a cover. Because of the risk here, the DOJ suggests the company counsel consider attending these meetings, and make certain they understand the purpose of the association and all of its activities. G. Spratling, *supra*; W. Kolasky, Antitrust Compliance Programs: The Government Perspective, speech to the Practising Law Institute Corporate Compliance 2002 Conference (July 12, 2002) (*see* appendix).

[13] It is unlawful to "monopolize, attempt to monopolize, or combine or conspire . . ." to monopolize. Sherman Act §2, 15 U.S.C. §2. There is also a rarely used criminal provision of the Robinson-Patman Act, 15 U.S.C. §13A, which makes it illegal to use unreasonably low prices "for the purpose of destroying competition or eliminating a competitor."

concept to emphasize to sales and marketing personnel is simple: **don't lie**. False information provided by a company with a large market share, particularly when the information is about a competitor, will be used as evidence of a scheme to eliminate competition, which can result in devastating treble damage awards.[14] When dealing with acquisitions and joint ventures,[15] the concept of markets needs to be emphasized so the businesspeople understand how the government analyzes a transaction, and how sloppy language in documents can doom an otherwise unobjectionable deal.

The Freedom to Sell

Employees in the United States usually have an instinctive understanding of the fundamental American commitment to freedom. So, when discussing vertical restraints, distributor terminations, or resale price maintenance, the message should be couched in terms of a commitment to economic freedom: any time the company is thinking of doing anything that limits the freedom of a customer, there should be a legal review to make sure the planned action is proper. There are some areas where a seller can impose restrictions on how a buyer resells the goods that are purchased, but there must be a business plan prepared in advance that explains why those restraints are designed to improve the product's competitiveness with products made by other manufacturers.

The freedom concept can also be used to explain the underpinnings of the antitrust prohibition against horizontal (competitor) collusion. Our economy expects that sellers will compete against one another by offering better prices, better service, and better quality. In a free and open economy, every seller will be attempting to do a better job than its competitor, and thus every customer benefits. When sellers subvert this principle, by agreeing among themselves as to the prices they will charge, or the territories or customers they will serve, or the products they will sell, then the ability for competitive freedom to provide maximum benefits to the economy is lost.

The freedom to sell has its counterpart in the freedom to buy. Purchasing department employees must also understand that their activities as a buyer are also subject to the same antitrust laws. Thus, a cartel composed of all of the purchasers of a commodity could be attacked as anticompetitive just as a cartel of sellers would be.

Antitrust presentations should also include an explanation of the basic concept underlying the Robinson-Patman Act: that competing customers should be treated in a nondiscriminatory manner. While there is much disagreement about the economic wisdom of this statute, employees can accept the concept, particularly when they are selling packaged goods.

The antitrust laws also reward success when obtained properly, and the laws are designed to promote efficiency, as long as it is not achieved at the price of unreasonably reduced competition. Thus, when there are opportunities to achieve efficiencies that involve some coordination with competitors, the key message to deliver to the client is not to abandon the concept, but to discuss it with the lawyer to see if there is a legal way to accomplish the goal.

Antitrust and Lawsuits

Most antitrust disputes are between private parties. While there may be no criminal exposure for a distributor termination, it is important that employees understand that becoming involved in litigation can have a seriously adverse impact on the performance of the company – and on their careers. Thus, they should understand that litigation is something that should be avoided, and the best way to do this is to understand antitrust-sensitive situations and seek legal counsel before taking action.

Compliance Indicators:

- Establish a clear policy regarding compliance with the antitrust laws that tells employees how to behave and where to go for more information.

- Keep the antitrust message simple:

  -Don't fix prices
  -Don't try to eliminate competitors or talk as if you are
  -Don't lie or engage in unfair or deceptive practices
  -When in doubt, pick up the phone

- Make sure the policy has management support, and principles are not compromised when profits are short in a quarter. The person in charge of antitrust compliance should be sufficiently senior in the organization that he or she is involved in the formulation of all marketing and sales policies that may have antitrust implications.[16]

- Establish a method to deliver the antitrust policy that is focused on the risks of specific occupations. A message should be delivered to new employees so that they are conditioned to compliance from their first day on the job.

- Keep in mind the Justice Department's "red flags" that may signal an antitrust violation.[17]

  Trade Associations. Examine whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the

[14] In Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768, 2002 U.S. App. LEXIS 9158, 2002-1 Trade Cas. ¶ 73,675, 82 A.T.R.R. 494 (6th Cir. 2002), *cert. denied,* 537 U.S. 1148 (2003), treble damages of more that $1 billion were awarded to a small competitor who filed suit based on the unfair tactics of the market leader, which included providing false information to customers and removing the plaintiff's display racks from stores.

[15] *See* Antitrust Guidelines for Collaborations Among Competitors, issued by the Department of Justice and Federal Trade Commission at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[16] Under the Sentencing Guidelines, the person responsible for compliance should have "substantial control over the organization" or "a substantial role in the making of policy within the organization." U.S.S.G.§8A1.2, comment n(3)(b).

[17] W. Kolasky, Antitrust Compliance Programs: The Government Perspective, speech to the Practising Law Institute Corporate Compliance 2002 Conference (July 12, 2002) (*see* appendix).

association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

Sales transactions between your company and its competitors, particularly around the end of the year. While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to "true up" a market allocation scheme.

Data on market shares. Look at your company's market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long period of time are a strong indicator of collusion.

Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves. When conducting audits, therefore, talk not only to the executives, but to their assistants.

Sudden, unexplained price increases and copies of competitor price announcements in your company's files. If you find any, look at the fax footprints or the cover e-mail to see where they came from.

Everywhere we do Business,

Kraft employees will do the Right Thing

Preserving The Value Of The Business

"Nothing Is More Important Than Our Commitment To Integrity"
- No Financial Objective
- No Marketing Target
- No Effort To Outdo The Competition
- No Desire To Please The Boss Outweighs That Core Commitment

"Our Commitment To Integrity Always Comes First."

Kraft Foods Code Of Conduct For Compliance And Integrity

Letter To All Employees From The CEO Of Kraft Foods

Basic Principles

- Act Responsibly
- Always Be Honest…No Cover-Ups
- Be Fair…And Compete Fairly
- Act In The Company's Best Interest
- Don't Do Anything You Don't Want Others To
- Find Out About; Always Ask, If Not Sure
- Speak Up, If you Are Concerned Or See An Issue
- Kraft & CDO Are Serious About Zero Tolerance On Retaliation

Antitrust Rules

1. Don't Talk With or Signal to Competitors About Any Aspect of Competition
   - Pricing
   - Allocation of Customers or Products
   - Terms of Sales
   - Acquisitions/Divestitures
   - Future Business Plans
   - Specific Customers
   - Boycotts
   - Refusals to Deal
   - Market Share
   - Promotions
2. No Dirty Tricks, Dishonest Data, Acts You Hope No One Else Sees, and Watch Out for Competitive Excesses
3. Treat Customers Fairly and Equitably
   - Comply with Programs and Policies
   - May Meet Competition But Must Follow Policy
   - You Can Require a Maximum Price Point (But Not a Minimum)
   - Complicated - So Remember To Consult

Key Business Controls

1. Maintain Confidentiality and Security
2. Spend Kraft Foods Funds Prudently
3. Divide Key Control Responsibilities - Ensure Segregation of Duties
4. Maintain Good Accounting and Proper Documentation
5. Avoid Conflict of Interest
6. Ensure Proper Authorization/Approval - Splitting Invoices/Payments is Forbidden
7. Perform Effective Supervisory Reviews

Who Do I Call?

If You See a Kraft Employee Doing Something You Think is Wrong, Speak Up. Tell Your Supervisor, HR, Finance, Law or Compliance and Integrity Department, or Call the Integrity Help Line at 1-877-781-2421 or Access the Website at: http://compliance.kraft.com/compliance/

Speaking Up

Kraft Expects Our Employees to Speak Up and Report Non-Compliance with the Law, Company Policy and the Kraft Code of Conduct

Here Are a Few Examples of the Types of Issues You Should Report:

- Unsafe Work Practices
- Product Tampering or Alteration
- Improper Booking/Accounting of Sales Revenue
- Discrimination or Sexual Harassment
- Retaliation
- Intentional Misstatement of Accounting Records
- Inaccurate Creation, Reporting or Falsification of Company Financial Records or Regulatory Submissions
- Accepting or Giving Impermissible Gifts
- Collusion With Competitors
- Misuse of Intellectual Property Rights
- Kickbacks
- Bribery or Attempted Bribery
- Workplace Violence
- Marketing Policy Violation
- Theft or Fraud

India's Competition Law

by

Vinod Dhall
Former Member and actg Chairman,
Competition Commission of India

Economic reforms

- New competition law part of market oriented, economic reforms undertaken 1991
- 1st stage: existing MRTPAct amended / liberalised
- 2nd stage: FM's Budget Speech 1999- MRTPAct has become obsolete; need to shift focus from curbing monopolies to promoting competition
- High level committee set up to propose new law

India's Competition Law

Part-I: Highlights

New law, status

- Based on report of high level committee, Competition Bill introduced Aug,2001
- Competition Act,2002 enacted Jan,2003
- Competition Commission of India established Oct,2003; but only one Member-cum-actg Chairman
- Enforcement provisions not notified due to legal challenge leading to process of amendments
- Competition Amendment Act passed September,2007-- stage set for activation of enforcement provisions

A modern law

- OECD: *"close to state- of- the-art"* (Economic Survey of India Report 2007)
- WTO: *"Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics-based approach"* (Trade Policy Review of India, 2007

Competition Act-main areas

Four areas:

- Prohibits anti-competitive agreements
- Prohibits abuse of dominant position
- Provides for regulation of combinations
- Enjoins competition advocacy and public awareness

Competition Act: objectives

To provide, keeping in mind the economic development of the country, *for the establishment of a Commission* to-

- eliminate practices having adverse effect on competition
- promote and sustain competition
- protect interests of consumers
- ensure freedom of trade carried on by other participants in markets in India

Supported by relevant provisions of constitution

Anti-competitive agreements: horizontal

- Agreement includes arrangement or understanding, oral or written
- Agreement causing AAEC prohibited; is void
- Horizontal, hard core, *"shall be presumed"* to cause AAEC:
  - ✓ Price fixing
  - ✓ Sharing of markets
  - ✓ Limiting production, supply, etc
  - ✓ Bid rigging, collusive bidding
- Other horizontal agreements: rule of reason

Leniency provision for cartels

- Eligibility: full, true, and vital disclosure, continuing cooperation
- Marker system: first applicant entitled to full leniency; subsequent applicants to lesser leniency on graded scale
- Once agreement signed with CCI, leniency can be withdrawn only if terms of agreement violated
- Principles: 'first through the door', certainty, transparency, applicant's confidentiality

Exempt agreements

- Exports
- IPRs : reasonable conditions for protecting or restraining infringement
- Joint ventures that are efficiency enhancing not subject to "shall be presumed" principle

Anti-competitive agreements: Vertical

- Subject to rule of reason; analyse AAEC*
- Include:
  - ✓ Tie-in
  - ✓ Exclusive Supply
  - ✓ Exclusive distribution
  - ✓ Refusal to deal
  - ✓ Resale price maintenance

** Appreciable Adverse Effect on Competition*

Abuse of dominance

- Abuse of dominance by enterprise or group prohibited
- AOD is:
  - ✓ Imposing unfair or discriminatory condition or price
  - ✓ Limiting production, technical or scientific development
  - ✓ Denial of access
  - ✓ Supplementary, unconnected obligations
  - ✓ Using dominance in one market to enter/protect other market
  - ✓ Predatory pricing

Dominance

- Position of strength in relevant market enabling enterprise to operate independently, or affect competitors or consumers in its favour
- Factors include:
  - ✓ Market share
  - ✓ Entry barriers
  - ✓ Size and resources of enterprise
  - ✓ Size and importance of competitors
  - ✓ Vertical integration
  - ✓ Countervailing power

Combinations

See Part-II

Relevant market

- Relevant market: product, geographic
- Product market factors: physical characteristics and end use, price, consumer preference, industrial classification
- Geographic market factors: regulatory barriers, local specifications, procurement policies, transport costs, language

Advocacy and awareness

- Central or state government can refer policy or law relating to competition, or other matter to CCI; opinion not binding
- CCI may also give opinion *suo moto*
- CCI *shall* take measures for competition advocacy, awareness and training on competition issues
- Provision for mutual consultation between CCI and regulators

Advocacy

Examples of CCI interventions:

- Indian Post Office (Amendment) Bill: monopoly of letter mail, mandatory registration, mail regulator, USO contribution
- Warehousing bill: why regulation?
- Telecom: number portability, spectrum allocation, why additional merger regulation?
- Bus services: competitive bidding
- Competition policy for XIth 5-year Plan

Regulation of Combinations

- Combination is: acquisition of control, shares, voting rights, assets; or merger or amalgamation; above given thresholds
- Thresholds defined in terms of combined:
  - ✓ assets ***or*** turnover, and
  - ✓ local nexus
- Thresholds subject to revision by Government, every 2 yrs

India's Competition Law

Part –II
Combinations

Thresholds

In India	Assets	Turnover
Single	Rs 1,000cr ($ 250m)	Rs 3,000cr ($ 750m)
Group	Rs 4,000cr ($1,000m)	Rs 12,000cr ($3,000m)

Figures in brackets are converted at $1= Rs40

Thresholds *(cont)*

In India and outside	Assets total	Of which, assets in India (local nexus)	Turnover total	Of which, turnover in India (local nexus)
Single	$ 500m	($125m) Rs 500cr	$1,500m	($ 375m) Rs1,500cr
Group	$2,000m	($125m) Rs 500cr	$6,000m	($375m) Rs1,500cr

Figures in brackets are converted at $1=Rs40

Trigger

- Notice to be filed within 30 days of:
  - ✓ Approval by BoD, in case of merger or amalgamation (Regulations*- within last of the BoD approvals)
  - ✓ Agreement or other document, in case of acquisition (Regulations* - any doc purporting to convey bonafide intention to acquire)
- Who to file? Regulations* provide:
  - ✓ in case of acquisition, acquirer to file (with available information)
  - ✓ In case of merger or amalgamation, parties to jointly file

** Reference everywhere is to **draft** Regulations*

Features of combinations regime in Act

- Prohibits combinations having AAEC; is void
- Mandatory pre-merger notification
- Suspensory regime
- CCI* to decide in 210 days, else deemed approval
- CCI* can inquire *suo moto*, until 1 year after combination

**Competition Commission of India*

Notification forms and fees

- Notice may be filed in:
  - ✓ Form 1 (standard form), or
  - ✓ Form 2 (short form)
- Form 2 designed for combinations unlikely to have AAEC
- One time fee : Rs 4 m (= $100,000*)

**Figures in brackets are converted at $1= Rs40*

Fast track approvals

- Fast track introduced in Regulations: Form 1--30 days; Form 2-- 60 days
- Within above periods, CCI to decide *prima facie* whether combination likely to have AAEC, and serve show cause notice why (detailed) investigation should not be conducted
- Else, combination deemed approved

Effectively exempted from notifying

Regulations effectively exempt from notifying (examples):

- Where at least two parties do not have, in India, assets Rs 200cr ($ 50m*) or turnover Rs 600cr ($150m)
- Acquisition of shares/voting rights below 15%, provided not leading to control
- Acquisition of shares/voting rights where acquirer already has over 50%, or within same group.

** $ figures in brackets are converted at $1=Rs 40*

Effectively exempted from notifying *(cont)*

- Acquisition of shares/ voting rights from underwriting, sub-division, bonus or rights issue (but not involving renunciation)
- Amended or renewed tender offer, where notice already filed
- Acquisition through gift, intestate / testamentary succession, etc
- Acquisition of assets solely as investment, or in ordinary course of business, not leading to control (but not of entire business operation in a location)

Combinations Review Process

- On receipt of notice or *suo moto*, if CCI of *prima facie* opinion of AAEC, it will serve show cause notice why (detailed) investigation not be conducted.
- After receipt of parties' reply, DG's report may be obtained.
- If CCI of opinion that combination will have *AAEC*, it will direct parties to publish details of combination.
- CCI may invite affected persons to file objections.
- CCI can ask for additional information from parties

Combinations Review Process *(cont)*

- After consideration, CCI may approve or prohibit combination
- Alternatively, CCI may propose modification of combination, if that will eliminate AAEC
- Parties can accept modification or propose amendment to it
- If CCI does not accept amendment, parties given further time to accept modification
- If parties fail to accept, combination deemed to have AAEC, and will not be effectuated
- Time limits for each step

Penalties

- Failure to file notice of combination- up to 1% of assets/turnover of combination
- Making false statement / omitting material information by party to combination: penalty not less than $125,000* up to $ 250,000
- Failure to comply with CCI's direction / order: fine $2,500 per day, up to $ 2.5m
- Further, CCI may file complaint in court: imprisonment up to 3 yrs,fine up to $ 6.25m

**All figures in US$ arrived at after conversion at $1=Rs40*

Appointment of trustee

- If CCI of view that modification accepted by parties needs supervision, it may appoint independent trustee with specified mandate
- Trustee to be independent of parties, have appropriate qualifications, and have no conflict of interest
- Trustee responsibilities to be defined in Trustee Mandate
- Trustee to report after each constituent activity

India's Competition Law

PART - III

Other highlights

Effects doctrine

CCI has power to inquire and pass order if AAEC in India, notwithstanding that:

- Agreement or party outside India
- AOD party outside India
- Combination or party outside India

CCI can enter into memorandum or arrangement with agency of foreign country

Confidentiality

- Act: No information relating to an enterprise to be disclosed without its previous written permission
- General Regulations: party may request, giving reasons, for sensitive information to be kept confidential, and file separately: 'public version' and 'complete version'
- CCI to consider request based on listed factors, eg, information already available to outside parties or employees, extent of protective measures, ease of accessing information
- If request not accepted by CCI, party may withdraw information; information will be disregarded in the case
- If accepted, CCI's order also to have 'public' and 'complete' versions
- Provision for action against employees or others making unauthorised disclosure

CCI's procedure

- Power to regulate its own procedure
- But bound by principles of natural justice
- Call upon assistance of experts
- Power of civil court to:
  - ✓ Summon / examine on oath
  - ✓ Require production of documents
  - ✓ Receive evidence on affidavit
  - ✓ Issue commission for examination of witness
- Search and seizure with court permission

Remedies / Penalties by CCI

All or any of:

- Cease and desist order
- Penalty up to 10% of turnover
- For cartels: 10% of T.O. or 3 times profit for each year
- Agreement having AAEC is void
- Order can modify agreement
- In case of AOD, can order division of enterprise

Compensation

- Enterprise or person that suffered loss or damage as a result of contravention of Chapter II of Act *after finding* by CCI or CAT*(in appeal)
- Can apply to CAT* for recovery of compensation from enterprise
- Application to be accompanied by finding of CCI
- Provision for class action

** Competition Appellate Tribunal*

CCI-guiding principles

- Commission to be in sync with markets
- Minimize compliance costs for enterprises; minimize enforcement costs for Commission
- Professional organisation with required skills
- Confidentiality for business; transparency for Commission
- Consultative approach