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503 Developments in International Antitrust/Competition Laws

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Faculty Biographies

Belinda A. Barnett

Belinda A. Barnett is senior counsel for the U.S. Department of Justice antitrust division's deputy assistant attorney general for criminal enforcement. Her responsibilities include reviewing international cartel case recommendations, handling anti-cartel enforcement policy matters, providing advice to foreign governments in the development of their anti-cartel enforcement programs, and acting as a liaison with the Immigration and Naturalization Service.

Prior to becoming senior counsel, Ms. Barnett was a special assistant for the antitrust division's directors of merger, non-merger, and criminal enforcement in Washington, DC. In this position, she advised senior division officials on investigation and case recommendations and served as the division's clearance liaison with the Federal Trade Commission. Ms. Barnett was a staff attorney in the antitrust division's Atlanta field office, where her work focused on domestic and international criminal antitrust investigations and prosecutions involving price fixing, bid rigging, and market allocations.

Ms. Barnett received her undergraduate degree from the University of Alabama and her law degree from the University of Alabama School of Law, where she was a member of the *Alabama Law Review* and Order of the Coif.

Hillary Greene

Hillary Greene is project director for intellectual property in the Office of the General Counsel of the Federal Trade Commission. She is a principal organizer of the ongoing FTC/DOJ public hearings, *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*. She was also a significant contributor to the FTC's Public Workshop on *Competition Policy in the World of B2B Electronic Marketplaces*, the subsequent staff report, and the FTC workshop *Emerging Issues for Competition Policy in the World of E-Commerce*.

Before joining the staff of the Federal Trade Commission, Ms. Greene was a litigation associate at Cahill Gordon & Reindel, where she worked primarily in the areas of antitrust and First Amendment law.

Ms. Greene earned her BA summa cum laude and phi beta kappa and her JD from Yale University.

John J. Parisi

John Parisi is counsel for European Affairs in the Bureau of Competition of the U.S. Federal Trade Commission. In that position, he coordinates FTC antitrust enforcement activities with those of the European Commission and other European competition enforcement agencies. He has also authored articles on international antitrust enforcement.

Prior to joining the FTC as an attorney-advisor to then-Commissioner Deborah Owen, Mr. Parisi served for 11 years as staff counsel in the U.S. Congress, including the House Subcommittee on

Government Information and the Senate Committee on Governmental Affairs. In those posts, he contributed to the enactment of, *inter alia*, the CIA Information Act of 1984; the Presidential Libraries Act of 1986; the Inspector General Act Amendments of 1988; and the Omnibus Trade and Competitiveness Act of 1988.

Through a fellowship awarded by the Robert Bosch Foundation of Germany, Mr. Parisi worked in Germany's Federal Economics Ministry in Bonn and the Federation of German Industry in Cologne, on trade, competition, and communications matters.

Mr. Parisi is a graduate of Kalamazoo College where he was the recipient of the J.A.B Stone Prize in Education and pursued foreign studies in Münster/Westfalen Germany; he is also a graduate of Wayne State University Law School.

Steven P. Reynolds

Steven P. Reynolds supports the Sensors and Controls business of TI, which is headquartered in Attleboro, MA. S&C is a $1 billion annual revenue global supplier of various technology products to primarily industrial and commercial markets.

Mr. Reynolds has worked with TI's law department for over 10 years, holding positions also in Dallas and Villeneuve Loubet, France. Prior to TI, he worked at the law firm of Jackson & Walker and IBM Corporation.

He is currently the president of ACCA's Northeast chapter and a frequent author and conference speaker/panelist.

Mr. Reynolds is a graduate of Georgetown University and the Rutgers University School of Law.

Giuseppe Sanna

Giuseppe Sanna is general counsel Europe, Middle East, Africa, and India for General Electric Lighting based in London.

Mr. Sanna started his career in private practice 15 years ago and later joined Texas Instruments Inc., as European counsel. He was then appointed as director of legal services for the Italian subsidiary of Digital Equipment Corp. Mr. Sanna later joined Reckitt & Colman plc as legal director Europe.

Mr. Sanna has written papers in international law and lectured at international conferences and seminars on competition law. He joined ACCA 6 years ago and he is a member of the Board of Directors of ACCA's European Chapter.

Mr. Sanna holds degrees in Law and Political Science from the University of Sassari, Italy, and a master of arts in international relations from The Johns Hopkins University, School of Advanced International Studies, Washington DC. He completed his education at ENA in Paris. He is fluent in English, French, and Spanish.

DEPARTMENT OF JUSTICE

ANTITRUST BEYOND BORDERS

Presented By
Freeborn & Peters
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"FROM HOLLYWOOD TO HONG KONG- CRIMINAL ANTITRUST ENFORCEMENT IS COMING TO A CITY NEAR YOU"

By

SCOTT D. HAMMOND
Director of Criminal Enforcement
Antitrust Division
U.S. Department of Justice

Presented at

Westin Michigan Avenue
Chicago, Illinois

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FROM HOLLYWOOD TO HONG KONG — CRIMINAL ANTITRUST ENFORCEMENT IS COMING TO A CITY NEAR YOU

– *Come gather 'round people wherever you roam*
And admit that the waters around you have grown
And accept it that soon you'll be drenched to the bone.
If your time to you is worth savin' then you better start swimmin'
Or you'll sink like a stone for the times they are a-changin'

The Times They Are A-Changin', Bob Dylan

What are the risks to a multinational company if it engages in international cartel activity? The answer to that question is changing day by day because laws, policies, and attitudes towards cartel enforcement are constantly changing around the world. Perhaps one of most telling examples of how the image of antitrust enforcement has changed is its treatment in the media. News coverage of antitrust crimes has become almost sensational. For example, the fine art auction trial that started yesterday, which centers on a price-fixing conspiracy involving the world's two dominant auction houses, Christie's and Sotheby's, is being covered by nearly every news publication from the Wall Street Journal to People magazine. The best-selling book The Informant -- based on the Department's covert investigation of a worldwide lysine cartel involving the Archer Daniels Midland Company and others -- was on the New York Times bestseller list for months on end. Finally, something you may have thought you would never see -- even Hollywood has jumped on the antitrust bandwagon with last summer release of the movie titled, simply, "AntiTrust." Now, I grant you that the movie was quite dreadful, it had nothing to do with antitrust crimes, and it bombed at the box office. However, there is still hope for an antitrust blockbuster. The movie rights for The Informant were recently sold to Hollywood, and so there still could be an Oscar featuring the antitrust laws in the near future.

Of course, it is not just Hollywood taking notice of the antitrust laws for the first time. Consumer and business groups in the United States and abroad are becoming increasingly vocal about the need for strong antitrust enforcement. And, foreign law enforcement authorities are now investigating and punishing cartel activity that for years was overlooked and unpunished.

How did antitrust crimes suddenly become the rage? What has caused the media, the business community, consumers, and our sister law enforcement authorities to look differently at antitrust crimes? Those are the questions I will focus on today -- not just how attitudes around the world have changed with regard to anti-cartel enforcement, but a few thoughts on why they have changed.

First, in order to understand the conversion abroad, we need to begin by recalling how criminal antitrust enforcement has changed in the United States. So, I will start by offering some perspective by comparing what the Antitrust Division's criminal docket looked like 10 years ago with what it looks like today. Because in order to fully appreciate how much criminal antitrust enforcement has changed, we need to recall what it was like before.

Criminal Antitrust Enforcement -- 10 Years Ago Versus Today

The Department has a rich and distinguished history of aggressively investigating and prosecuting antitrust crimes. For the most part, however, the prosecutions were aimed at domestic conspiracies -- not because we made a conscious policy not to prosecute international cartels, but because we didn't have evidence of their existence. In the 1990's that began to change. Unfortunately, there is not enough time here to discuss all of the factors behind the Division's successful expansion into international cartel enforcement. I will simply state, without elaborating, that three of the biggest factors were: (1) a reallocation of Division resources to make international cartel enforcement one of the Division's highest priorities; (2) the 1993 expansion of the Corporate Amnesty Program; and (3) the development of cooperative relationships with foreign antitrust authorities.[1] To give you a flavor of the sea change in the Division's international cartel enforcement efforts, consider these statistics comparing the Division's docket 10 years ago with today.

Ten years ago, the Antitrust Division only opened a few investigations of suspected international cartel activity. Today, there are over 30 sitting grand juries looking into such offenses. The subjects and targets of these investigations over the past few years have been located on five continents and in over 20 different countries. Similarly, ten years ago, the Division filed only two cases against foreign-based companies, both involving domestic conspiracies, and not a single charge was brought against a foreign individual defendant. So that it is clear that I have not picked a year with a statistical anomaly, I should add that in the four previous years, from FY 1987 thru FY 1990, the Division did not bring a single case against a foreign firm or a foreign national. By comparison, last year nearly 70 percent of the companies charged by the Division were foreign-based firms, and roughly 33 percent of the individual defendants were foreign nationals. In fact, the Division has now convicted foreign executives from Germany, Belgium, The Netherlands, England, France, Switzerland, Italy, Sweden, Canada, Mexico, Japan, and Korea for engaging in cartel activity. Moreover, executives from Canada, Germany, Switzerland, and Sweden have served prison sentences for violating U.S. antitrust laws.

The international cartels that have been prosecuted over the last five years have, for the most part, dwarfed the domestic and regional conspiracies that the Division had traditionally prosecuted. Since fines for antitrust offenses under the U.S. Sentencing Guidelines are based in large part on the amount of commerce affected by the cartel, the fine levels for antitrust offenses have grown to levels that were unimaginable ten years ago. For example, ten years ago, roughly $20 million in total fines were imposed in Division cases for the entire year. In fact, in the five years before and after FY 1991, the Division obtained, on average, about $27 million in criminal

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1 For a more detailed discussion of the factors which have contributed to our success in fighting international cartels, see, Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?, Speech Before the ABA National Institute On White Collar Crime (March 6, 1998).

fines annually. In FY 2001, defendants were fined over $280 million, more than 10 times that prior average. Moreover, in the last five years, the Division has obtained over *$2 billion* in criminal fines -- many multiples higher than the sum total of all previous criminal fines imposed for violations of the Sherman Antitrust Act dating back to its inception in 1890. Well over 90 percent of these fines were in connection with the prosecution of multinational firms engaged in international cartel activity.

Similarly, ten years ago, the largest corporate fine ever imposed in an antitrust prosecution was $2 million. By comparison, six antitrust defendants have now been fined $100 million or more, including a $500 million fine imposed on F. Hoffmann-La Roche for its leadership role in the international vitamin cartel. The $500 million fine has the distinction not only of being the highest fine ever imposed in an antitrust case, it is also the largest single fine imposed in a Department of Justice case for any crime, under any statute.

Inside The Lysine Cartel -- The First Milestone

With that perspective, let's turn next to the issue of how and why attitudes towards international cartel enforcement have changed around the world. The first milestone, in my opinion, was the Division's high-profile prosecution of Archer Daniels Midland Company ("ADM"), its top executives, and their co-conspirators in the worldwide lysine cartel. This case was investigated by our Chicago Field Office and concluded with guilty pleas by all of the world's major lysine producers and the conviction by a Chicago jury of three former high-level ADM executives. I believe many of you are already familiar with this case, so I will not go into detail about the evidence given our limited time. This was a monumental case for the Division's criminal enforcement efforts because it grabbed the attention of so many groups that we were urgently trying to reach -- including the media, U.S. consumers, the business community, and foreign governments. The investigation also revitalized our relationship with the FBI. I will touch briefly on how this investigation impacted each one of these groups.

First, the investigation and trial received unprecedented exposure in the media for a number of reasons, including the identity of the defendants, the use of a government informant inside ADM, and the existence of video and audio tapes secretly recorded by the FBI showing the conspirators in the act of fixing prices and carving up the world market for lysine. Developments in the investigation and trial were tracked closely by newspapers and weekly magazines. Excerpts of the FBI tapes were played on television news shows. And, as I mentioned earlier, the investigation spawned a best-selling book. This type of media exposure for an antitrust crime had never happened before. So, for many Americans, this was their first exposure to antitrust crimes. I know that I had friends and, I'm reluctant to admit, even family members call me about the case and say, "Oh, now I finally get what you do for a living -- go and nail the crooks!" When the public viewed the tapes, they saw with their own eyes an unmitigated, undeniable crime of fraud and deceit. One could not have asked for a better introductory lesson for the U.S. public as to why price fixing is a crime and why those that commit it are criminals.

Secondly, the investigation completely revitalized our partnership with the FBI. After the investigation, the FBI leadership declared that antitrust crimes were one of the top priorities of its white-collar crime program and then backed it up by dedicating unprecedented resources to investigating antitrust crimes. Agents followed their lead and became excited about working antitrust investigations. Today, FBI agents are assigned to all of the Division's ongoing international cartel investigations.

Thirdly, ADM's record-breaking $100 million fine and the incarceration of its top executives reverberated through the board rooms of multinational companies around the world -- a prime group of interest to the Division. The fine was more than six times greater than the then-highest fine. Moreover, the executives, including the Vice Chairman of the Board of Directors, were given at or near the maximum three-year jail sentence allowable under the Sherman Act. Of course, what also grabbed the business world's attention was the way we collected the evidence against the lysine cartel -- the co-opting of one of the company's top executives as a cooperating witness, the covert audio taping of telephone conversations and video taping of meetings in bugged conference rooms, and the simultaneous execution of search warrants by dozens of FBI agents at the offices of the corporate subjects around the United States. By using informers, tape recordings, and search warrants, the message to the business community was clearly communicated — we will not pull any punches. These are the bare knuckle tools that the Division will use to detect and crack antitrust crimes.

Lastly, this case, and more specifically the tapes themselves, had a monumental impact on a number of foreign governments. After the case was tried, we sat down with foreign government officials and played the tapes for them. In most cases, we were addressing more than antitrust authorities, because, in many countries, the antitrust officials did not need to be persuaded. They were already well aware of the harm caused by cartel activity, and they were already pushing for reform in their laws or in their investigative powers. Thus, they would arrange for us to meet with key government policy makers, treasury officials who held the purse strings for additional funding, or representatives of influential trade or business groups, so that we could help win them over. And so we would play the tapes for them, and they would see with their own eyes how their businesses and their consumers were being victimized. We would talk about the lysine and other international cartels prosecuted by the Division, and they would see how these cartels had acted with impunity within their borders. Simply put, the lysine tapes made foreign governments question, if not rethink, how they investigated and treated cartel offenses. And then came the knockout punch -- the exposure of "Vitamins, Inc," the worldwide vitamin cartel.

Exposing Vitamins, Inc. -- The Next Milestone

The detection and prosecution of the worldwide vitamin cartel is the next major milestone, in terms of influencing the way many people looked at cartel offenses, that I want to discuss. Once again, it had a major impact on key audiences like the media, consumers, the business community, and foreign governments -- this time for many of the same reasons, but also for a few new ones.

Like the lysine cartel, the vitamin cartel involved a sophisticated secret global cartel, huge multinational defendants, and massive fines. However, unlike lysine, this cartel involved a high- visibility consumer product with tremendous media and consumer appeal. Here was a cartel that impacted products that appeared in nearly every household, and in every cupboard, of every consumer in America. Here was a cartel that was so sophisticated that its members were able to carve up the world's billion dollar vitamin market among a few multi-national companies and fix prices on a country-by-country basis around the world. Here was a cartel that operated for nearly ten years with such precision and profit that it was tabbed "Vitamins, Inc." by one of its members. It was the single largest antitrust conspiracy the Division had ever uncovered, and the fines and sentences imposed on the cartel members reflected just that.

And so, if there were any companies or executives who were asleep when the lysine sentences were imposed, they would have to be in a coma not to be awakened by this. Nearly a billion dollars in fines were imposed against the cartel members, including a $500 million fine imposed against F. Hoffmann-La Roche and a $225 million fine imposed on BASF AG. In addition, 11 executives, including 6 European executives, were sentenced to serve time in U.S. prisons for their role in this conspiracy.

Of course, the high-profile nature of this conduct and the massive fines that were imposed also grabbed the attention of the foreign press, as well as foreign businesses and consumers. Many of these groups demanded to know whether their governments would be acting to protect their interests against cartel behavior. So, the vitamin cases fueled the movement towards rethinking the adequacy of competition laws and law enforcement powers that was already beginning to take place in many governments abroad. These governments began to ask themselves whether they had sufficient penalties in place to deter cartel activity. Did their competition authorities have the necessary investigative tools to detect cartel activity when it occurs? Should cartel activity be treated as an administrative or a criminal offense? Should individuals as well as corporations be sanctioned for cartel offenses?

Cracking Down On Hardcore Cartels In The United Kingdom

The United Kingdom is a prime example of a nation that has grappled with these issues over the last few years and has instituted dramatic changes in their cartel enforcement program. In March 2000, the British government implemented a new competition law that prohibited cartels and other anti-competitive behavior and gave its Office of Fair Trading new investigative powers and expanded resources for detecting cartel activity. The new civil powers included the creation of a leniency program that was modeled after the Division's Corporate Leniency Policy. The Competition Act also imposed a fining scheme that will lead to stiff penalties of up to 30 percent of a company's U.K. annual turnover for violators. Little more than a year later, the U.K. and U.S. governments agreed to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty ("MLAT") which had excluded antitrust matters from the scope of the cooperation provisions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines. Finally, in November 2001, the U.K. government proposed legislation that would create a new criminal offense for individuals that engage in hardcore cartel activity. The proposed law would provide for maximum jail sentences of up to five years for antitrust offenders. The criminalization of cartel offenses in the U.K. may also make it possible in the near future to extradite individuals involved in cartels from the U.K. to face antitrust charges in the United States.

Here is an excerpt about the proposed legislation from a letter that appeared in last week's Financial Times. I think you will agree that the letter speaks volumes as to how dramatically the debate has changed in the United Kingdom, not just because of its content, but because of the identity of its author. The letter begins:

> If there is a guiding principle that dictates the way we do business in the United Kingdom it is that it should be conducted fairly. Anti-competitive practices create weak markets, protect the inefficient, deprive us of choice, stifle innovation and support bad practice. They defraud consumers and break the will of those business people who work hard to pursue their ambitions. . .

The letter goes on to say:

> The [current] Competition Act imposes sanctions and fines on businesses, not on the managers who decide to operate a cartel. It is right that mangers should also face sanctions, because they can gain significantly if the companies they work for make excess profits -- it feeds through into executive bonuses and share options. Those operating a cartel are engaging in theft and should face a similar sanction. . .

The letter then goes on to take issue with the various arguments that have been advanced against the proposed legislation, which I will not recount here, and concludes by stating:

> I want to see a business environment that is fair for all businesses. I will not defend the indefensible and will be supporting the government and its bill.

Who is the author of this letter? You might expect by its tone that it was written by a government official at the United Kingdom's Office of Fair Trading or the Department of Trade and Industry. No. The letter was written by David Lennan, who serves as the Director General of the British Chamber of Commerce.

Global Criminalization Of Cartel Activity -- The Next Milestone?

What is in store for the future of international anti-cartel enforcement? Could the United Kingdom's proposed legislation to criminalize cartel offenses for individuals be the next major milestone? A number of countries already have laws in place that provide for criminal sanctions, including Canada, Japan, Ireland, France, Norway, Austria, Germany, Korea, and the Slovak Republic. Other countries, such as Australia, are already considering similar laws. Is the day coming when hardcore cartels are prosecuted criminally around the world? Sound farfetched? Could any of us have predicted the changes that occurred in the last ten years or even in the last few years? A few years ago, when the United Kingdom did not even fine companies for cartel activity, would you have guessed that today they would be moving towards jail terms for culpable individuals? Back in the early 1990's, when antitrust fines topped out at $2 million in the United States, did you advise clients that the time was coming when they would risk fines of $100 million or more if they engaged in cartel activity? Who among us expected to see the day when European business executives would begin voluntarily submitting themselves to U.S. jurisdiction and serving time in U.S. prisons because they feared looking over their shoulders the rest of their lives as international fugitives? The times they are a-changin'.

In two weeks time, antitrust enforcers from more than 25 countries around the world will be attending a workshop in Canada to exchange best practices for fighting cartels. The Division organized the first event of this kind two years ago in Washington. Last year it was hosted by the United Kingdom. Each year the debate shifts. The interest in stronger and more aggressive anti-cartel enforcement measures grows, while the safe havens for cartel activity shrink. So stay tuned, because the one sure thing that you can predict is that more changes are in store for the future.

DEPARTMENT OF JUSTICE

The 2002 Antitrust Conference:
Antitrust Issues In Today's Economy

Presented By
The Conference Board

"A REVIEW OF RECENT CASES AND DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM"

By

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Director of Criminal Enforcement
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Presented at

The Waldorf Astoria
New York, New York

March 7, 2002

A REVIEW OF RECENT CASES AND DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM*

I. Introduction

This paper reviews recent cases and developments in the Antitrust Division's criminal enforcement program, recent actions by foreign governments which greatly impact the Division's enforcement efforts, and some significant "firsts" and record achievements in the prosecution and punishment of cartel activity here and abroad. Highlights from the last year include:

- The Division obtained over $280 million in criminal fines with the average corporate fine topping $18 million;

- A Japanese corporation, a 50% owner of a U.S. corporation that encouraged that U.S. affiliate to engage in international cartel activities, was not only convicted as an aider and abetter of the international cartel but also was sentenced to the fourth largest antitrust fine in history -- $134 million;

- The percentage of corporate defendants in criminal cases that were foreign-based firms grew from approximately 50 percent to nearly 70 percent;

- The Division obtained the longest jail sentences -- 10 years in one case -- and the largest restitution orders in the Division's history; and

- The trend toward more frequently imposed and longer average prison terms for antitrust offenders continued -- with the average jail sentence last year increasing to 15 months.

While the high fines and rising jail sentences in Division cases garner much of the attention, it is the recent actions of antitrust authorities abroad which may have the biggest impact on how international cartels are investigated, prosecuted, and defended in the United States. As discussed below, foreign antitrust authorities are: (1) joining the Division in creating effective leniency programs to detect cartel activity; (2) working together with the Division in the conduct of our investigations; and (3) aggressively investigating and punishing cartel activity that affects their businesses and consumers.

* An earlier version of this paper was presented by the author at the ABA's National Institute on White Collar Crime on February 28, 2002. This version contains updates on a number of recent events, including a discussion of the EC's new leniency program.

II. Criminal Antitrust Enforcement Trends

A. Crackdown On International Cartels Continues

A comparison of the Division's criminal docket last year with those of previous years demonstrates its continued emphasis on cracking international cartels that target U.S. businesses and consumers. While ten years ago, the Antitrust Division only opened a few investigations of suspected international cartel activity, today there are nearly 35 grand juries around the country investigating suspected international cartel activity. Similarly, ten years ago, the Division filed only two cases against foreign-based companies, both involving domestic conspiracies, and did not bring a single case against a foreign individual defendant. Moreover, in the four preceding years, from FY 1987 thru FY 1990, the Division did not bring a single case against either a foreign firm or a foreign national. By comparison, nearly *70 percent* of the companies charged by the Division last year were foreign-based firms, and roughly *33 percent* of the individual defendants were foreign nationals. The Division has convicted foreign executives from Germany, Belgium, The Netherlands, England, France, Switzerland, Italy, Sweden, Canada, Mexico, Japan, and South Korea for violating U.S. antitrust laws. Moreover, executives from Canada, Germany, Switzerland, and Sweden have submitted to U.S. jurisdiction and served prison sentences in the United States for antitrust crimes.

B. Criminal Fines Up Again

The Division has prosecuted international cartels affecting well over $10 billion in U.S. commerce in the last five years. The commerce involved in these prosecutions has generally dwarfed the domestic and regional conspiracies that the Division had traditionally prosecuted over the years. Since fines for antitrust offenses under the U.S. Sentencing Guidelines are based in large part on the volume of affected commerce, the fine levels for antitrust offenses have increased dramatically. For example, going back ten years, antitrust defendants were fined a total of approximately $20 million. In fact, in the five years before and after FY 1991, the Division obtained, on average, about $27 million in criminal fines annually. By comparison, in FY 2001, the Division obtained fines of over $280 million, more than 10 times that prior average. Moreover, in the last five years, the Division has obtained over *$2 billion* in criminal fines. Well over 90 percent of these fines were in connection with the prosecution of multinational firms engaged in international cartel activity.

Similarly, ten years ago, the largest corporate fine ever imposed in an antitrust prosecution was $2 million. By comparison, six antitrust defendants have now been fined $100 million or more, including a $500 million fine imposed on F. Hoffmann-La Roche for its leadership role in the international vitamin cartel.

The $500 million fine has the distinction not only of being the highest fine ever imposed in an antitrust case, it is also the largest single fine imposed in a Department of Justice case for any crime under any statute. To date, the Division has obtained fines of $10 million or more against thirty-six companies, including six defendants in fiscal years 2001 and 2002 (partial) — Mitsubishi Corp ($134 million/graphite electrodes); Bilhar International Establishment ($54 million/US AID construction); ABB Middle East & Africa Participations AG ($53 million/US AID construction); Sotheby's Holdings ($45 million/fine art auctions); Akzo Nobel Chemicals ($12 million/monochloroacetic acid); and Ueno Fine Chemicals ($11 million/sorbates).

C. Longer Jail Sentences For Individual Offenders

Antitrust offenders are being sent to jail with increasing frequency, and for longer periods of time, than at any time in the Division's history. Nearly 50 years of imprisonment have been imposed on antitrust offenders in the last three years. During that time period, over 20 defendants were sentenced to incarceration for one year or longer. The average prison term in FY 2001 increased to nearly *15 months*.

In the last six months, a string of record-breaking jail sentences were imposed back-to-back-to-back on defendants convicted of antitrust and related offenses. As discussed in more detail below, the first two sentences were imposed on defendants convicted of bid rigging and other crimes associated with schemes to rig bids in the New York food distribution industry. Nicholas Penachio was sentenced to serve four years in prison and pay a $1 million fine and ordered, along with his company, to pay $4.2 million in restitution to the victims of the crimes.[1] Penachio's then-record prison sentence was topped when Melvyn Merberg, convicted two months later for his role in the same New York bid-rigging schemes, was sentenced to serve 63 months in prison and ordered to pay $2.2 million in restitution and $2 million in back taxes, penalties, and interest.[2] On January 22, 2002, these sentences were eclipsed in a prosecution bought by the Division and the Guam U.S. attorney's Office charging Austin "Sonny" Shelton, a former Guam government official, with orchestrating a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts in Guam.[3] The official was sentenced to *10 years imprisonment.*

1 U.S. v. Nicholas A. Penachio et al., S2 00 Cr. 584 (JSR) (S.D.N.Y.).

2 U.S. v. Melvyn Merberg, S1 00 Cr. 1176 (LTS) (S.D.N.Y.).

3 U.S. v. Austin J. "Sonny" Shelton, CR 01-00007 (Territory of Guam).

III. Major International Enforcement Cases

Three of the Division's most notable international cartel prosecutions in 2001 were in industries as diverse as graphite electrodes manufacturing, wastewater treatment plant construction, and fine art auctions.

A. Graphite Electrodes -- U.S. v. Mitsubishi

In February 2001, Mitsubishi Corporation was convicted, after a two-week trial in Philadelphia, of aiding and abetting a five-year conspiracy among the world's major manufacturers of graphite electrodes to fix prices and allocate sales volumes in the United States and around the world.[4] At sentencing, Mitsubishi was ordered to pay a fine of $134 million -- the fourth largest fine ever imposed in an antitrust case. In total, the Antitrust Division's graphite electrode investigation led to: the conviction of seven corporations and three individuals; over $400 million in criminal fines, including the highest antitrust criminal fine ever imposed on an individual ($10 million); and jail sentences ranging from 9 to 17 months. However, it is Mitsubishi's conviction that has perhaps the furthest-reaching implications.

The Mitsubishi prosecution and conviction is important, not for the additional entry the case provides on the list of corporations convicted and fined over $100 million for participating in international antitrust conspiracies, but for the precedent it sets on issues of fact and law and Division prosecutorial policy regarding aiding and abetting of price-fixing conspiracies. Mitsubishi did not manufacture graphite electrodes, but it owned 50% of the stock of a U.S. producer, UCAR International, and was also a trading house for several Japanese manufacturers. Mitsubishi aided the price-fixing cartel by encouraging UCAR to fix prices, facilitating cartel meetings, selling product on behalf of manufacturers at prices it knew to be fixed, and concealing the existence of the conspiracy from customers, allowing the continuation of the conspiracy. Mitsubishi began facilitating the workings of the cartel within days of purchasing its UCAR ownership interest and continued facilitating the cartel even after it sold its ownership interest for a hefty profit. The Division's prosecution in these circumstances under the aiding and abetting statute confirms that the Division will hold accountable parent companies, organizational shareholders, joint venture partners, and/or trading houses if they knew of, assisted, and profited from a cartel.

4 U.S. v. Mitsubishi Corporation, Crim. No. 00-033 (E.D. Pa.).

Mitsubishi's $134 million fine was near the very top of its Guidelines fine range. The fine was based on the following calculations:

(1) Base Fine. *[U.S.S.G. §§ 2R1.1, 8C2.4.]*

50% of UCAR's volume of affected sales of graphite electrodes in the U.S. for the portion of the conspiracy period during which Mitsubishi owned 50% of UCAR (50% of $336,300,000)	$168,150,000
Mitsubishi's sales of graphite electrodes (manufactured by conspirator Tokai Carbon) to its only U.S. customer during the conspiracy.	$7,300,000
Volume of Affected Commerce	$175,450,000
Base Fine (20% of volume of affected commerce)	$35,090,000

(2) Culpability Score. *[U.S.S.G. §§ 8C2.5 and 8C2.6]*

Base level *[§8C2.5(a)]*	5
200+ employees and high-level personnel involved *[§8C2.5(b)]*	+3
Prior criminal history *[§8C2.5(c)]*	+2
No effective program to prevent and detect violations *[§8C2.5(f)]*	0
No acceptance of responsibility *[§8C2.5(g)]*	0
Total Culpability Score	10

(3) Minimum and Maximum Multipliers *[§8C2.6]*	2.0 - 4.0
(4) Guidelines Fine Range *[§8C2.7]* [base fine x multipliers]	$70,180,000 - $140,360,000
(5) Fine Imposed	$134,000,000

As indicated in the calculations above, the volume of commerce attributable to Mitsubishi for its participation in the conspiracy was based on: (1) half of UCAR's volume of affected sales in the United States during that portion of the conspiracy period when Mitsubishi owned 50 percent of UCAR's stock; plus, (2) the U.S. sales made by Mitsubishi as a trading house for another co-conspirator. This total was then multiplied by .20 (or 20 percent) to calculate Mitsubishi's base fine. The next step under the Sentencing Guidelines is to calculate the organization's culpability score and its minimum and maximum multipliers. Because of the involvement of a high-level Mitsubishi employee in the crime, the company's prior antitrust conviction, and Mitsubishi's failure to cooperate or accept responsibility for its criminal conduct, Mitsubishi received the maximum culpability score resulting in the highest minimum and maximum multipliers (2.0 to 4.0) allowable under Chapter 8 of the Sentencing Guidelines. The Division's recommendation to fine Mitsubishi near the top of its Guidelines range took into account the seriousness of the offense, the highly profitable nature of the scheme, the objective of divesting Mitsubishi of illegal pecuniary gains from the offense, and the further objective of promoting adequate deterrence to protect U.S. businesses and consumers from similar criminal conduct in the future. Mitsubishi's $134 million fine, which amounted to 76 percent of the volume of commerce attributable to it in furtherance of the conspiracy, hopefully met these objectives.

B. Wastewater Treatment Plants -- Bid Rigging On U.S. AID Contracts

The Division's Egyptian wastewater treatment investigation is an example of an international cartel that focused its collusive conduct in another country, but still victimized U.S. taxpayers. The investigation targeted companies and individuals who rigged bids on water treatment construction contracts in Cairo, Egypt funded by the United States Agency for International Development ("U.S. AID"). These construction projects were funded by the United States as part of the 1970's Camp David Peace Accords in order to foster stability and promote public health in the Middle East. The cartel involved hardcore bid rigging that included payoffs to co-conspirators totaling millions of dollars in order to suppress competition and inflate prices on taxpayer-funded projects.

The investigation was assisted by two investigative tools that have become increasingly common in international cartel investigations. The first is the execution of search warrants by foreign authorities on the Division's behalf to seize evidence abroad. In this investigation, over 100 German police officers assisted in the simultaneous execution of search warrants on multiple companies at locations across Germany. Germany is one of numerous countries to assist the Division in recent investigations by executing search warrants in response to assistance requests from the Division. Another tool in this investigation was the use of border watches. When a foreign executive was nabbed while entering the country, the individual was taken before a grand jury and his cooperation significantly advanced the investigation.

In July 2001, the Division obtained indictments against the U.S.-based company Bill Harbert International Construction, Inc. ("BHIC"); its Liechtenstein affiliate, Bilhar International Establishment ("Bilhar"); Bilhar's former president, Roy Anderson; and Peter Schmidt, a former executive of Philipp Holzmann AG

("Holzmann"), for rigging bids and conspiring to defraud U.S. AID on over $250 million of construction work on the U.S.-funded projects in Egypt. On the eve of trial, Bilhar agreed to plead guilty and pay a $54 million fine. [The case against BHIC was dismissed as part of the plea agreement with Bilhar.] Anderson went to trial and was convicted by an Alabama jury. His sentencing is scheduled for May 16, 2002. Schmidt remains a fugitive. In addition to these indictments, the Division brought cases against U.S.-based American International Contractors, Inc.; ABB Middle East & Africa Participations AG of Switzerland ("ABB"); and Holzmann, all of which pled guilty to bid rigging on U.S. AID construction contracts in Egypt and received fines of more than $87 million. In addition, ABB and American International Contractors agreed to pay more than $10 million in restitution to the U.S. government.

At sentencing, the court not only imposed a term of probation on both Holzmann and ABB, but also imposed, as one of the conditions of their probation, the following requirement:

> "The defendant shall publicize at its expense in the Wall Street Journal and in the New York Times in prominent, one-quarter page advertisements within ten days of the date of conviction the nature of the offense committed by the defendant in this case, the fact of conviction, the sentence imposed in this case, and the steps that will be taken to prevent the recurrence of similar offenses."

The Division will seek similar orders in appropriate cases.

C. Fine Art Auctions -- U.S. v. Alfred Taubman

The art auction price-fixing scheme, plotted by the world's two dominant auction houses through their top executives and exposed by the Division, received unprecedented coverage by the media. For generations, the Sotheby's and Christie's auction houses were known publicly as archrivals that competed vigorously on commissions and other terms in the fine arts auction business. Contrary to public perception, however, for most of the 1990s top officials of the two firms, which controlled more than 90 percent of the world's auction business, in fact had colluded in secret to defraud the sellers of art, antiques, and collectibles who had entrusted those firms with the sale of their merchandise. The criminal scheme injured both art and antique dealers and individuals selling their personal possessions. The scheme involved agreements on the sellers' commissions charged by the auction houses. Sellers' commissions are fees charged by the auction houses to the owners of art items for the sale of their goods. Prior to the conspiracy, sellers were often able to negotiate with the auction houses for commissions that were far below the firms' published commission rate schedules. But, when the conspiracy began, top officials of the two auction houses met in secret in the United States and Europe in order to limit competition for the sellers' goods by agreeing to raise sellers' commissions and to cease negotiating discounts from the published rate schedules.

The cartel was cracked, in large part, by the cooperation of Christie's and its executives who reported the criminal conduct pursuant to the Division's Corporate Leniency Program. Christie's defection from the cartel led directly to guilty pleas by Sotheby's and the company's president and chief executive officer at the time of the conspiracy, Diana D. Brooks, who admitted to fixing the price of sellers' commissions charged in the United States and elsewhere. Sotheby's was sentenced to pay a $45 million fine, and Brooks is awaiting sentencing. In May 2001, the Division indicted Alfred Taubman, former chairman of the board of Sotheby's Holdings, Inc., and Anthony Tennant, former chairman of the board of Christie's International plc, for fixing sellers' commissions charged in the United States and elsewhere. Taubman was convicted at trial in December 2001. Tennant is a U.K. citizen who has refused to submit to U.S. jurisdiction and remains an international fugitive.

Taubman's trial was closely tracked by the defense bar as well as the media. This was the first trial where the Division relied heavily on testimony from a witness protected by a Corporate Amnesty agreement. The defense team aggressively cross-examined the witness about the grant of amnesty to his former employer as well as the terms of his non-prosecution agreement. The guilty verdict in this case demonstrates that evidence from an amnesty recipient can be very persuasive to a jury. Taubman's sentencing is scheduled for April 2, 2002.

IV. Major Domestic Enforcement Cases

The Division also has remained active on the domestic front. Two of its most publicized domestic investigations, the New York food brokers investigation and the Guam FEMA construction investigation, focused on local bid-rigging conspiracies that defrauded public agencies. In these two investigations, the Division uncovered and prosecuted, in addition to the Sherman Act violations, other offenses such as tax violations, bribery, and money laundering. Such collateral offenses often accompany bid-rigging conspiracies, and the Division has aggressively prosecuted such offenses in conjunction with antitrust crimes. Finally, as discussed below, the Division recently prosecuted Moody's Investors Service, Inc. for obstructing justice by destroying documents responsive to a Civil Investigative Demand ("CID") that was issued in connection with an investigation of Moody's business practices. The case was the first of its kind by the Division under 18 U.S.C. § 1505.

A. New York Food Brokers Investigation

To date, 31 individuals and 15 companies have been convicted for participating in massive bid-rigging conspiracies among food suppliers which defrauded multiple New York-area public and non-profit entities, including New York City schools, children's facilities, homeless shelters, hospitals, and jails; Newark, New Jersey schools; and Nassau County, New York jails. These fraudulent schemes affected contracts valued at more than $210 million. The bid-rigging conspiracies involved not only the usual agreements on price levels and allocations of contracts but also a slush fund totaling hundreds of thousands of dollars, which was used to pay off potential competitors to bid high, or not to bid at all, on contract solicitations that other conspirators were slated to win. In addition, many of the defendants also engaged in, and were charged with, multiple collateral crimes, including tax and conspiracy offenses related to the nonreporting of payoffs, kickbacks, and "off the books" compensation; obstruction of justice related to document destruction or concealment; and fraud offenses involving payment of kickbacks and fraudulent procurement of loans.

All but two of the 46 defendants charged in the investigation ended up pleading guilty. The two exceptions, a company and one of its owners charged with bid rigging on frozen food contracts for the New York City schools, were convicted after trial in June 2001. In October 2001, the individual defendant was sentenced to serve 18 months in prison and to pay a $60,000 fine and the corporate defendant was ordered to pay $540,000 in restitution. At sentencing hearings held in the investigation thus far, 19 food company executives have been sentenced to prison, more than half of whom have been sentenced to prison sentences of 12 months or longer, including one executive who was sentenced to a then-record 63 month jail term. In addition, the court imposed more than $20 million in restitution for the New York City Board of Education and other victims, which contributed to a record amount of restitution imposed in Division cases in fiscal year 2001. Sentencing hearings for the remaining defendants are scheduled through July 2002.

B. Bid-Rigging on FEMA-Funded Contracts in Guam

The Division, in a bid-rigging and public corruption investigation conducted jointly with the Guam U.S. Attorney's Office, has thus far charged six individuals in connection with multiple schemes to rig bids for the repair of damage caused by supertyphoon Paka in 1997. In this ongoing investigation, the most significant conviction to date has been that of Sonny Shelton, who was the Director of Guam's Department of Parks and Recreation and was responsible for awarding contracts to repair the typhoon damage. At Shelton's trial, four co-conspirators who had pled guilty to bid-rigging charges testified against him. A fifth co-conspirator who was scheduled to go to trial in March recently pled guilty to bid-rigging charges.

Shelton was convicted of organizing three separate bid-rigging conspiracies. Additionally, Shelton was convicted of soliciting and receiving bribes in excess of $100,000, committing wire fraud, and conspiring to launder money. Shelton is the highest-ranking official to have been convicted of such crimes in Guam in over a decade. The indictment and prospective trial received intense pretrial publicity on the island, which led the defense to file a motion for change of venue and the government to request that the jury be sequestered during deliberations. The court denied the change of venue motion. However, the court *ordered sequestration, not just during deliberations, but for the duration of the three-week trial*. In making this determination, the court cited the ongoing publicity, the defendant's visibility and importance in the community, the defendant's long-time presence in Guam, the importance of extended family connections on the island, and the general interconnected nature of the local population (and the jury pool).

Following the trial, the prosecutors and the Probation Office separately submitted Sentencing Guidelines calculations in support of sentencing level 27 (70-87 months). The court thereafter informed the parties that it intended to *depart upward* from level 27 on the bribery counts, and it requested briefs on the merits of such a course. The Guidelines for bribery note that where the defendant's conduct was "part of a systematic or pervasive corruption of a governmental function" an upward departure is appropriate. The government filed a brief requesting the court to make findings that established the defendant's systematic corruption of the governmental bidding process. At the sentencing hearing the Court received testimony on the upward departure issue, departed upward, and sentenced Shelton to serve ten years in prison.

C. U.S. v. Moody's -- Obstruction Of Justice

On April 10, 2001 the Division prosecuted Moody's Investors Service, Inc., the largest credit ratings agency in the United States, for obstructing justice by destroying documents responsive to a Civil Investigative Demand ("CID") that was issued in connection with an investigation of Moody's business practices. The case was the first of its kind by the Division under 18 U.S.C. § 1505. The investigation revealed that a Moody's employee deliberately destroyed responsive documents after learning of the CID. This misconduct was further exacerbated by the fact that Moody's later certified that it had produced all responsive documents, even though Moody's executives knew of, or should have known of, the destruction. Moody's reported the document destruction to the Division. However, it did not do so until nearly two years after the fact and a full year after certifying full compliance with the CID. Moreover, the disclosure was made only after Division attorneys had asked other witnesses about compliance with the CID and the Division had scheduled the depositions of witnesses who had knowledge of the destruction. Moody's pled guilty to the charge and was sentenced to pay a $195,000 fine for obstruction of the CID process.

V. Widespread Interest Abroad In Following The Antitrust Division's Corporate Leniency Policy As A Model

The Division's Corporate Leniency Program -- which provides for a complete pass from prosecution for companies and their executives who are the first to come forward, cooperate, and meet the program's other requirements -- has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The extraordinary success of this program has generated widespread interest around the world. As a result, we have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. In the last few years, countries such as Canada, Brazil, the United Kingdom, Germany, France, Ireland, The Czech Republic, and Korea have announced new or revised leniency programs, with still other countries in the process of following.

The adoption of effective leniency programs by foreign antitrust enforcers has a direct impact on the Division's efforts to prosecute international cartels, because the existence of an effective leniency policy in another jurisdiction may influence whether an organization comes forward under the leniency program in the United States.[5] In some cases, companies who have exposure in multiple jurisdictions for their cartel conduct may want to simultaneously seek immunity in the jurisdictions where they are at risk. If differences exist in the respective leniency programs such that a company believes that it can not be assured of immunity in the jurisdiction where it faces the greatest, or even just significant, exposure, then it may decide against reporting its conduct anywhere. Nowhere is the need for convergence in leniency programs more important than between the U.S. and European Commission ("EC") leniency programs.[6] Up until now, there have been significant differences in the application of our respective leniency programs. Fortunately, these differences, and the concerns that they have raised, are ending.

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5 See, Scott D. Hammond, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?" Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/7647.htm.

6 ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.; Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. (C 207) 4. Commission notices are available at http://europa.eu.int/eur-lex/en/search/search_oj.html.

A. The EC's Revised Leniency Program

On February 13, 2002 the EC adopted a new leniency policy to replace its 1996 Notice on the Non-Imposition or Reduction of Fines in Cartel Cases ("1996 Notice").[7] The revised program establishes a far more transparent and predictable policy than its predecessor and brings the EC's program closely in line with the Division's Corporate Leniency Policy. In fact, in greatly reducing the amount of discretion involved in assessing amnesty applications and in creating the opportunity for companies to qualify for full immunity after an investigation has begun, the blockbuster revisions are similar to the ones made by the Division when we successfully expanded our program in August 1993.[8]

Requirements For Full Immunity. The EC's revised program promises complete immunity from fines to the first member of the cartel to inform the EC of an undetected cartel by providing sufficient information to allow the EC to launch an inspection on the premises of the suspected companies. In addition to being the first company to report the cartel activity, the immunity applicant must also: (1) provide full and continuous cooperation, (2) end its involvement in the infringement, and (3) not have taken any steps to coerce other companies to participate in the cartel.

If a company does not come forward until after the EU commences an investigation, full immunity may still be available under the revised program. In order to qualify for full immunity in these circumstances, the company must provide the EC with sufficient evidence to enable it to establish an infringement as well as meet the three other requirements listed above -- full cooperation, prompt termination of wrongdoing, and no coercion of others. Full immunity after an investigation is opened will only be available in cases where no other cartel member has qualified for immunity by initially reporting the cartel activity to the EC.

Expanding the program to allow the prospect of full immunity after an investigation has begun is a major change for the EC. Under the 1996 Notice, companies contemplating whether to come forward after an investigation had begun could only qualify for a maximum discount of between 50 to 75 percent off of their fine. Full immunity will serve as a powerful new inducement to create a race to Brussels every time the EC reveals one of its investigations with the execution of dawn raids. It certainly has been the case in the United States

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7 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

8 Since the EC only fines companies and not individuals for their participation in cartel activity, the EC's program does not include a promise of non-prosecution for officers, directors, and employees who come forward with the company and agree to cooperate -- the third major revision to the Division's program.

where investigations of suspected international cartels involving vitamins, graphite electrodes, fine art auctions, US AID construction contracts, and many others were cracked with the assistance of amnesty applicants that came forward after the Division opened an investigation.

Full vs. Partial Immunity. Another striking change made by the EC is that it has changed its band or sliding scale approach when rewarding the first company to report cartel activity in favor of an automatic full, 100 percent immunity grant. Under the EC's 1996 Notice, a company that reported wrongdoing before an investigation had begun, and met the program's other requirements, was eligible for a reduction in fines ranging from 75 percent to 100 percent. (The potential reduction dropped down to between 50 percent and 75 percent if the company met all of the program's conditions, but came forward only after the EC opened an investigation.) However, since the EC fine guidelines mandate that an organization's potential fine exposure is up to 10 percent of the worldwide turnover for all products sold by the company, the difference between full (100%) and partial (75%) amnesty could be very striking. The EC's new program provides certainty together with a bigger prize for coming forward by promising full, 100 percent immunity to the first company to qualify under the leniency program.

Prompt Feedback In The Application Process. The EC has adopted a new process for handling requests for immunity that will greatly increase the level of certainty and transparency for applicants. Under the 1996 Notice, companies which came forward and sought immunity in exchange for their cooperation received no assurances up-front as to how much credit they would receive for their cooperation and had to wait until the very end of the case when the EC announced the disposition of all of the parties to learn how it fared. However, under the new program, the EC has committed itself to promptly notify a company in writing whether it conditionally qualifies for full immunity. As is the case under the Division's program, a written conditional grant of immunity is conditioned on the applicant meeting the programs' other requirements. In the EU, this means full and continuous cooperation, prompt termination of the wrongdoing, and no evidence of coercion of other cartel members by the applicant.

Changes To The Role In The Offense Requirement. Another significant change relates to a redrafting by the EC of the "role in the offense" requirement for obtaining full immunity. A condition of the 1996 Notice was that a company not have acted as *"a"* ringleader or *"an"* instigator or played *"a"* determining role in the cartel. This language differed from the Division's policy which states that the applicant must not have coerced another party to take part in the offense and must not have been "*the*" instigator or *"the"* leader of the illegal activity. Thus, under the Division's program, applicants will only be disqualified from obtaining total amnesty if they are clearly the single organizer or single ringleader of a conspiracy.[9] While under the EC's old program, there was a far greater degree of prosecutorial discretion involved and more than one company (or even, potentially, all of the companies) could be viewed as ineligible for full immunity in a given cartel. Of course, the cost of retaining greater discretion may have been that potential applicants were leery about seeking immunity in the EC because of uncertainty as to how the EC would apply this standard.

Fortunately, the EC's new program narrows the class of cartel members which would be ineligible under the program and makes it easier for companies to predict with certainty whether they qualify for full immunity. The revised program does not exclude from full immunity those cartel members that played an instigating or determining role, rather it simply requires that the leniency applicant not have taken steps "to coerce other undertakings to participate in the infringement." This change eliminates the uncertainty that existed in the old program and creates a greater opportunity for companies to qualify for full immunity.

B. <u>The EC's Commitment To Rewarding Leniency Applicants</u>

With a flurry of cases announced over the last three months, the EC set the stage for its new leniency program by demonstrating a clear commitment to rewarding companies who are the first to come forward and report cartel activity, while at the same time imposing heavy fines on those who engage in cartel activity and do not provide timely cooperation. Until November 2001, the EC had never granted full, 100% immunity to a company that came forward and cooperated pursuant to its 1996 Leniency Notice. The EC then did it twice within a month, and it did so in two of the biggest cartel matters ever investigated by the EC.

The first 100% leniency grant was awarded in the EC's investigation of the worldwide vitamin cartel.[10] The French corporation, Aventis S.A., was granted full immunity in regard to its participation in the vitamin A and E cartels after being the first company to cooperate with the EC in these matters. On November 21, 2001, the EC fined eight companies a total of more than 850 million euro for participating in cartels affecting vitamin products, including fines of 462 million euro against F. Hoffmann-La Roche AG ("HLR") and 296

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9 For example, if there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for amnesty. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for amnesty.

10 Press Release, European Commission, Commission Imposes Fines on Vitamin Cartels 4 (November 21, 2001). Commission press releases are available at http://europa.eu.int/rapid/start/cgi/guesten.ksh.

million euro against BASF AG.[11] Aventis, which has previously announced its acceptance into the Division's leniency program, likely avoided hundreds of millions of dollars in fines in the U.S. and Europe as a result of its decision to come forward and seek leniency. In addition, unlike both HLR and BASF which had three of their high-level European executives serve time in U.S. prisons, the officers, directors and employees of Aventis received non-prosecution protection in exchange for their cooperation with the Division.

Shortly after the vitamin fines were announced, the EC announced its second-ever grant of full immunity to Sappi Limited (South Africa) after the company came forward and supplied information on a price-fixing cartel in the European carbonless paper market.[12] While Sappi, which was identified by the EC as one of the three largest companies in the cartel, paid nothing in fines, the EU imposed fines against ten other companies totaling over 310 million euro, including a 184 million euro fine against Arjo Wiggins Appleton, the alleged leader of the cartel.

The EC's timing in announcing these cases on the eve of its introduction of its revised leniency program is perfect. While the new program on paper is a tremendous improvement in terms of the level of transparency that it provides to potential leniency applicants, the real test is how it is implemented -- which is why these recent cases are so important. They demonstrate that the EC is committed to fairly rewarding leniency applicants who are the first to report cartel activity with full immunity. This signal was clearly sent even before the new policy went into effect. I have no doubt that the EC's message, together with the revised leniency program, will lead to a substantial increase in the number of firms reporting international cartel activity to both authorities.

VI. Cracking Down On Hardcore Cartels Abroad

The high-profile nature of some of the Division's international prosecutions -- such as the lysine, vitamin, and fine art auctions cases -- and the massive fines that have been imposed have grabbed the attention of foreign governments, as well as business and consumer groups around the world. This focus has caused many governments to question: (1) whether they had sufficient penalties in place to deter cartel activity; (2) whether their antitrust authorities had the necessary investigative tools to detect cartel activity when it occurs; (3) whether cartel activity should be treated as an administrative violation or a criminal offense; and (4) whether individuals, as well as corporations, should be

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11 The Division's prior prosecution of the vitamin cartel has resulted, to date, in the conviction of 10 corporations and 12 individuals, the imposition of nearly $900 million in fines, and the incarceration of 11 vitamin executives.

12 Press Release, European Commission, Commission Fines Ten Companies for Carbonless Paper Cartel 4 (December 20, 2001).

punished for participating in cartel offenses?[13] The United Kingdom and Brazil are two prime examples of countries that have grappled with these issues over the last few years and have instituted dramatic changes in their cartel enforcement programs.

In March 2000, the British government implemented a new competition law that prohibited cartels and other anti-competitive behavior and gave its Office of Fair Trading new investigative powers and expanded resources for detecting cartel activity. The new civil powers included the creation of a corporate leniency program modeled after the Division’s program. The Competition Act also imposed a fining scheme that will lead to stiff penalties of up to 30 percent of a company’s U.K. annual turnover for violators. Little more than a year later, the U.K. and U.S. governments agreed to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty ("MLAT") which had excluded antitrust matters from the scope of the cooperation provisions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines. Finally, in November 2001, the U.K. government proposed legislation that would create a new criminal offense for individuals who engage in hardcore cartel activity. The proposed law would provide for maximum jail sentences of up to five years for antitrust offenders. The criminalization of cartel offenses in the U.K. may also make it possible in the near future to extradite individuals involved in cartels from the U.K. to face antitrust charges in the United States.

The Brazilian government has advanced the fight against cartels in the face of reduced investigative resources and a lack of a culture of competition, a common scenario in many countries around the world. Increased competition advocacy in Brazil has enhanced the culture of competition in the business community and society in general and, in turn, increased the demand for anti-cartel enforcement. Hence, two government initiatives have promoted the effort to detect, and obtain evidence of, cartels. First, the government recently enacted a leniency program for individuals and organizations which should encourage cartel members to confess and cooperate with competition authorities. Second, Brazilian antitrust agencies are scheduled to sign a cooperation agreement with the federal police that will provide additional resources through police assistance in antitrust cases.

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[13] For example, legislative changes affecting hardcore cartel enforcement have been recently proposed or enacted in Sweden, Spain, the Czech Republic, Canada, Denmark, Switzerland, the United Kingdom, and Brazil. Leniency Programs have been revised or enacted in the EC, the United Kingdom, Canada, Sweden, the Czech Republic, and Brazil. Other recent developments over the last year include: record breaking fines in the EC (vitamins) and Australia (vitamins); the first-time imposition of jail sentences for antitrust offenders (Israel); and the establishment of specialized cartel units (Finland).

This assistance will be of particular importance during searches, increasing their effectiveness. In addition, the Brazilian government has taken measures to clarify the law relating to cartel agreements, which will assist competition authorities and the courts in enforcing and applying the law. One such measure is proposed legislation to make cartel agreements per se illegal, which will aid in deterring and more efficiently prosecuting cartel activity. Another measure will clarify the type of agreements that constitute criminal offenses. Under the proposed legislation, only traditional hardcore cartels will be considered a crime.

To foster cooperation with foreign governments with respect to the investigation and prosecution of international cartels and other aspects of antitrust enforcement, the Division has in the last few years entered antitrust cooperation agreements with four foreign governments -- Japan, Brazil, Israel, and Mexico. The agreements complement agreements previously reached with Australia, Germany, Canada, the European Union, and Israel. In addition, in the last fiscal year, the Division's International Antitrust Enforcement Assistance Agreement with Australia became effective. This agreement is a comprehensive antitrust mutual legal assistance agreement which allows the two countries to exchange evidence and assist each other's antitrust investigative efforts.

VII. Conclusion

Now more than ever, those that engage in international cartel activity face an increasingly greater risk of detection, prosecution, and punishment by antitrust authorities in the United States, Europe, Canada and around the world. Antitrust enforcers have taken a page from the cartel handbook by coordinating investigative strategy, cooperating in evidence gathering, and learning from each other by sharing "best practices." This "harmonization" stems from a growing global consensus that cartel activity needs to be deterred and punished. Countries that used to wink at cartel enforcement are now drafting new laws, allocating additional resources, and developing aggressive policies aimed at fighting cartels. If you practice in this area, be advised -- more changes are ahead.

DEPARTMENT OF JUSTICE

Antitrust Compliance Programs: The Government Perspective

Address by

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Before the

Corporate Compliance 2002 Conference
Practising Law Institute (PLI)
San Francisco, CA

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Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practicing Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

I. The Antitrust Division's Criminal Enforcement Program

As I've said in other speeches,[ii] investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels — whether in the form of price fixing, output restrictions, bid rigging, or market division — raise prices and restrict supply**,** enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly $2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels.[iii] This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program.[iv] Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.

II. Common Characteristics of Multinational Cartels

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

A. Brazen Nature of Cartels

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- *i.e.* facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company's rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particulary true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel's so-called "masters," *i.e.*, the senior decision-makers for the cartel members, held a series of secret, conspiratorial, "unofficial" meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a "combination of cover and convenience" for the citric acid cartel. As he explained it, ECAMA provided "cover" because it gave the citric acid conspirators "good cause" to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an "unofficial capacity" for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual “budget” for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. Audits And The Use Of Scoresheets

Most cartels develop a “scoresheet” to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the “auditor.” The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm’s monthly sales, year-to-date sales, and annual “budget” or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line.

H. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term “over budget” and “under budget” in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for "compensation."

J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

K. The Structure of Cartels

We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed,[v] cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated "If colluders push prices too high, defectors and new entrants will set things right." Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division's many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite electrodes, the victims included every major steel producer in the world.

It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s.

III. Designing an Effective Compliance Program

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of *respondeat superior*. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. <u>Minimum requirements for an effective compliance program</u>

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation.[vi] These are:

- Clearly established compliance standards;

- Assigning overall responsibility to oversee compliance to high-level executives within the company;
- Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;

- Taking reasonable steps to communicate standards and procedures effectively to all employees;

Taking reasonable steps to achieve compliance with standards;

- Consistent enforcement of standards through appropriate disciplinary mechanisms; and
- Taking reasonable steps when an offense occurs to respond and to present future violations.

It's important to stress that these are minimum requirements. To be truly effective, a compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.

a. *Effective communication*. Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than $1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

b. *Steps to achieve compliance*. While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

c. *Enforcement of standards through appropriate discipline.* It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

d. *Reasonable steps to respond to violations.* When the worst happens and you discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sale force, for example, to have an incentive to sell more, not less at a higher price.

IV. Important Red Flags

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

Trade association activity. Look to see 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 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.[vii]

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.

V. Conclusion

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. I hope my remarks today will serve their intended purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

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[i] Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.

[ii] *See, e.g., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y., January 25, 2002, at http://www.usdoj.gov/atr/public/speeches/9848.htm.

[iii] U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy, at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

[iv] The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.

[v] *See* Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, pp. 44-61 (1964).

[vi] U.S. Sentencing Guidelines, Chapter 8 (effective Nov. 1, 1991).

[vii] *See, e.g.,* U.S. International Trade Commission, *Report to the President on Global Steel Trade: Structural Problems and Future Solutions* 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

CORPORATE LENIENCY POLICY

August 10, 1993

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

U. S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., Suite 3214
Washington, D.C. 20530

MODEL CORPORATE LENIENCY LETTER

[name and address]

Dear [name]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and [ABC, Inc. ("[ABC]")], in connection with possible [insert description of conduct: e.g., price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: e.g., widget] industry [insert geographic scope--e.g., in the United States and elsewhere]. This agreement is conditional and depends upon [ABC], satisfying the conditions set forth below. After all of these conditions are met, the Division will notify [ABC] in writing that the application has been granted. It is further agreed that disclosures made by counsel for [ABC] in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. **Representations**: [ABC] desires to report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [e.g., in the United States and elsewhere] ("the anticompetitive activity being reported"). [ABC] represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

(a) took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity; and

(b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the anticompetitive activity being reported.

2. **Cooperation**: [ABC] agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) providing a full exposition of all facts known to [ABC] relating to the anticompetitive activity being reported;

(b) providing promptly, and without requirement of subpoena, all documents or other items in its possession, custody or control, wherever located, requested by the Antitrust Division, to the extent not already produced;

(c) using its best efforts to secure the ongoing, full and truthful cooperation of the current [and former][1] directors, officers and employees of [ABC], and encouraging such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported;

(d) facilitating the ability of current [and former] directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division;

(e) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly and truthfully to all questions asked in interviews and grand jury appearances and at trial;

(f) using its best efforts to ensure that current [and former] directors, officers and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which [ABC] was a participant.

3. **Corporate Leniency**: Subject to verification of [ABC]'s representations in paragraph 1 above, and subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept [ABC] into [Part A/Part B] of the Corporate Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against [ABC] for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of [ABC], the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or

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1 Former employees are not covered by the Leniency Policy, but may be included in the negotiated coverage of the agreement in appropriate cases. The decision on whether the Division includes former employees will depend on a number of factors, including whether the applicant company is interested in protecting its former employees and whether it has the ability to help to secure the cooperation of key former employees.

administrative agencies. If the Antitrust Division at any time determines that [ABC] has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of [ABC] into the Corporate Leniency Program. Should the Antitrust Division revoke the conditional acceptance of [ABC] into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against [ABC], without limitation. Should such a prosecution be initiated, any documentary or other information provided by [ABC], as well as any statements or other information provided by any current [or former] director, officer or employee of [ABC] to the Antitrust Division pursuant to this Agreement, may be used against [ABC] in any such prosecution.

4. **Non-Prosecution Protection For Corporate Directors, Officers And Employees**: Subject to [ABC]'s full, continuing and complete cooperation, the Antitrust Division agrees that current [and former] directors, officers and employees of [ABC] who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed [during their period of employment at [ABC]] prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

(a) producing in the United States all documents and records, including personal documents and records, and other materials requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph, that he or she may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of [ABC], the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current [or former] director, officer or employee of [ABC] fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division.

Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. **Entire Agreement**: This letter constitutes the entire agreement between the Antitrust Division and [ABC], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. **Authority And Capacity**: The Antitrust Division and [ABC] represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: ______________

James M. Griffin
Deputy Assistant Attorney General
Antitrust Division

_________________________________ Date: ___________________

[Name]
[Position]
[ABC, Inc.]

_________________________________ Date: ___________________

[Name]
Counsel for [ABC, Inc.]

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

INDIVIDUAL LENIENCY POLICY

August 10, 1994

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion. If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

C. Leniency Procedure

If the staff that receives the request for leniency believes the individual qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Deputy Assistant Attorney General for Litigation, setting forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General for Litigation will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, the individual and his or her counsel may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation to make their views known. Individuals and their counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1994

U. S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., Suite 3214
Washington, D.C. 20530

MODEL INDIVIDUAL LENIENCY LETTER

[name and address]

Dear [name]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and [you/your client], [Name] ("Applicant"), in connection with possible [insert description of conduct: e.g., price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: e.g., widget] industry [insert geographic scope--e.g., in the United States and elsewhere]. This agreement is conditional and depends upon Applicant satisfying the conditions set forth below. After all of these conditions are met, the Division will notify Applicant in writing that the application has been granted. It is further agreed that disclosures made by counsel for Applicant in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. **Representations**: Applicant desires to report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [e.g., in the United States and elsewhere] ("the anticompetitive activity being reported"). Applicant represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, [he/she] did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity.

2. **Cooperation**: Applicant agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) producing in the United States all documents and records, including personal documents and records, and other materials requested by attorneys and agents of the United States;

(b) making [himself/herself] available for interviews in the United States upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information;

(d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph, that [he/she] may have relevant to the anticompetitive activity being reported; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402) and obstruction of justice (18 U.S.C. § 1503), in connection with the anticompetitive activity being reported.

3. **Individual Leniency**: Subject to verification of Applicant's representations in paragraph 1 above, and subject to Applicant's full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into the Individual Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1994 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense [he/she] may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. If the Antitrust Division at any time determines that Applicant has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Applicant into the Individual Leniency Program. Should the Antitrust Division revoke the conditional acceptance of Applicant into the Individual Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Applicant, without limitation. Should such a prosecution be initiated, any documentary information, statements or other information provided by Applicant to the Antitrust Division pursuant to this Agreement may be used against Applicant in any such prosecution.

4. **Entire Agreement**: This letter constitutes the entire agreement between the Antitrust Division and Applicant, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein. The commitments in this paragraph are binding only upon the Antitrust Division.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely,

Date: ______________	James M. Griffin Deputy Assistant Attorney General Antitrust Division
________________________________ [Applicant Name]	Date: ___________________
________________________________ [Counsel Name] Counsel for [Applicant Name]	Date: ___________________

Developments in EU Competition Law & Policy - 2001:
Mergers & International Aspects

ABA seminar, Washington, DC, March 7, 2002
John J. Parisi
U.S. Federal Trade Commission[1]

Synopsis

This paper highlights developments in European Union (EU) merger control law and practice during the year 2001, the eleventh year since the EU's Merger Control Regulation[2] went into effect and the second year of Mario Monti's tenure as Competition Commissioner. It provides synopses of these developments with links to principal sources for more detailed study.

The year was a tumultuous one. The European Commission blocked five mergers, while in the previous ten years, it had blocked a total of only 13. Businesspeople charged that EC merger control had become too strict and was contrary to the EU's economic integration goals. One of the five prohibition decisions, GE/Honeywell, roiled transatlantic relations more than at any time before or since the 1997 Boeing/McDonnell Douglas case. However, another prohibition decision, CVC/Lenzing, along with several cases settled with undertakings, involved routine EC/US cooperation. At the end of the year, the EC issued its long-awaited Green Paper on review of the Merger Regulation,[3] in which it raised issues not only of jurisdictional allocation with the Member States, but also serious inquiries into the substantive standard applied to merger review and the procedural rules; in particular, the deadlines.

The paper begins with an overview of the fundamental features of EU merger control. It then reviews some notable case decisions of the past year. A synopsis of the EC's Green Paper on Review of the Merger Regulation follows. Then, to conclude, the paper reviews the EC's international relations in competition policy.

This paper has been written by an American author, primarily for an American audience. Accordingly, "Euro-English" terms referred to in the paper are highlighted in bold print and are defined in a glossary annexed to the paper. Moreover, the paper attempts at appropriate points to describe developments in ways that compare them to America rules and practices.

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[1] The author is Counsel for European Union Affairs in the International Antitrust Division of the United States Federal Trade Commission. The views expressed herein are his own and do not necessarily reflect the views of the Federal Trade Commission or any Commissioner thereof.

[2] Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395 (30 Dec. 1989); corrected version OJ L 257 (21 Sept. 1990); as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180 (9 July 1997); corrected version OJ L 40/17 (13 Feb. 1998) (Hereinafter "EC Merger Regulation" or the "Merger Regulation"). Complete texts of the Regulation and related documents are available on DG COMP's website at http://europa.eu.int/comm/competition/mergers/legislation/.

[3] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745/6, 11 Dec. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/review/ (Hereinafter "Green Paper").

Outline of Presentation

I. Introduction - distinguishing features of EC Merger Control

As the European Commission (EC or Commission) entered its second decade of merger control, it is worth recalling some fundamental features of that regime in order to better understand recent developments in the areas of case law and policy.

A. Scope of jurisdiction and accountability for its exercise

Merger Control at the Community level was adopted in 1989, as one of many measures in the "EC-92" program to facilitate the development of a single, integrated - or "common" - European market. EC merger control was intended to provide a level playing field for the examination of mergers with significant cross border effects.

1. Federalism - the reality vs. the goal of a "one-stop shop"

Merger control in Europe is divided between the Commission and the EU Member States' competition authorities, unlike the concurrent Federal-State jurisdiction that exists in the United States.[4]

• Mergers of a "**Community dimension**" (defined by world-wide and EU-wide **turnover** thresholds) are within the EC's <u>exclusive</u> jurisdiction. Mergers may be of community dimension is one of two ways:

- where the merging parties' (the "**undertakings concerned**") combined world-wide **turnover** is > € 5 billion; each of (at least two of) the merging parties' realized > € 250 million turnover in the EU; unless each of the merging parties obtains more than 2/3 of its EU turnover in one and the same Member State, or

- under a 1997 amendment to the Merger Regulation, where the merging parties' combined world-wide turnover is > € 2.5 billion; in each of at least three Member States, the combined turnover of the merging parties is > € 100 million; in each of those three Member States, the turnover of each of at least two of the merging parties is > € 25 million; the Community-wide turnover of each of at least two of the merging parties is > € 100 million; unless each of the merging parties obtains more than 2/3 of its EC turnover in one and the same Member State.

• Mergers falling outside those definitions may come under the scrutiny of one or more of the 14 EU Member States that practice merger control (9 just since 1990).

[4] Accordingly, comparisons between the number of premerger filings under the U.S. Hart-Scott-Rodino Act and just the EC Merger Control Regulation are incomplete without considering the number of mergers reviewed by the EU Member State competition authorities. *See* colloquy between Ky Ewing and Robert Pitofsky at 66 Antitrust L J (no. 3, 1998) 831-2.

According to statistics gathered by the Commission, during the year 2000, a total of 3,021 notifications were made to the EU's national competition authorities compared to 345 cases notified to the Commission.[5] Thus, the European Commission reviewed approximately 10% of the mergers reviewed in total by European Union competition authorities.

Where to draw the jurisdictional boundary between the European Commission and the EU Member States was one of the most controversial issues in the debate over enactment of the Merger Regulation. Since its enactment, the Council of Ministers has kept open the possibility of revising the thresholds. Such a revision would require legislation proposed by the EC, considered by the Parliament, and enacted by the Council of Ministers by **qualified majority vote**; a unanimous vote in the Council would not be necessary.

2. Accountability[6]

Final decisions in merger cases in which **proceedings** have been conducted are taken by the full Commission, upon recommendation by its **Competition Commissioner**, after investigation by its **Competition Directorate (DG COMP, f/k/a DG-IV**). The Commission has delegated significant decision taking authority to the Competition Commissioner. The Competition portfolio is comparably one of the Commission's most robust and prominent figures (Sutherland, Brittan, Van Miert, Monti) have been drawn to it. Given the current membership of the Commission, and the regard with which Commissioner Monti is held by his colleagues, he has been able to count on their deference and support.

To whom is the Commission accountable in the exercise of the authority granted it under the Merger Regulation?

The Courts: Commission decisions are subject to judicial review in the EU Court of First Instance (CFI) and, ultimately, in the European Court of Justice (ECJ). Typically, judicial review consumes several years - for example, an appeal of the Commission's September 1999 decision in the *AirTours/First Choice* case remains pending before the CFI.

During the past year, as one prohibition decision followed another, critics charged that judicial review is not a sufficient check on the Commission's power and that judicial review does not occur quickly enough to salvage a merger prohibited by the Commission. For those reasons, some have focused criticism on the fact that the Commission's machinery includes both investigators and decision takers. The Commission replies that its dual function as investigator and decision making body does not contravene the European Convention on Human Rights.[7]

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[5] Green Paper, *supra,* note 3, at p. 9, note 1.

[6] For a thorough and thoughtful treatment of some of the issues raised in this subsection, *see* Rachel Brandenburger and Thomas Janssens, European Merger Control: Do the Checks and Balances Need to be Re-Set, 2001 Fordham Corp L. Inst. ___ (B. Hawk ed.) (Forthcoming).

[7] Green Paper, *supra*, note 3, at ¶ 233.

The Parliament: The European Parliament does not appear to exercise much more than perfunctory oversight of the Commission's enforcement of EU competition policy - reflecting, perhaps, its position as the weakest of the four Community institutions.

B. Procedure - The discipline of deadlines

The EC Merger Regulation imposes strict, non-waivable deadlines for Commission decisions. If the Commission fails to issue a final decision within those deadlines, "the **concentration** shall be deemed to have been declared compatible with the common market . . ." in the form in which it was notified.[8]

Although the deadlines were viewed by the Council as a necessary constraint on the Commission at the time of enactment - and, thereby, provide certainty to the merging parties as to the duration of review - the number and complexity of recent mergers has highlighted difficulties in meeting these deadlines:

- The number of cases has grown from about 60 per year in the pre-Merger Wave days of the early 1990s to over 300 annually today. But, the staff has grown only slightly over its original number. The MTF now consists of 93 staff members of whom 57 are professionals - small in comparison to the FTC or the Antitrust Division.

- Counselors claim that MTF has resorted to procedural devices to extend the review period, for example by extending pre-notification consultations or declaring a notification incomplete.[9]

- Yet, counselors also can find themselves in a "squeeze" toward the end of a second stage proceeding, especially with regard to the requirement to submit proposed **undertakings** by the end of the third month of Phase II review.[10]

C. The substantive standard of review - contemporary or "Old World"?

The Merger Regulation's substantive standard is the dominance test, taken from the Abuse of Dominance article of the EC Treaty, Article 82. At the time of its enactment, some commentators noted uncertainty whether the Merger Regulation covered "collective dominance" and whether "industrial policy" could be an overriding factor in reviewing mergers.[11] However,

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[8] EC Merger Regulation, Art. 10.6.

[9] *See, e.g.,* Venit & Huser, Coming of Age - EU Merger Control After Ten Years, The M&A Lawyer, July/August 2000 (Vol. 4, no. 4), at 10. *See also* Green Paper, ¶¶ 197-202 re: completeness of notifications.

[10] Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in [the Merger Regulation], Article 18.2. (The Implementing Regulation). See also the discussion in section on deadlines in III.A.2.c.ii.

[11] *See, e.g.,* Bernd Langeheine, Substantive Review under the EEC Merger Regulation, 1990 Fordham Corp. L. Inst. 481, 500-1 (B Hawk, ed. 1991), and James S. Venit, The Evaluation of Concentrations Under Regulations 4064/89: The Nature of the Beast, 1990 Fordham Corp. L. Inst. 519, 531-544 (B Hawk, ed. 1991).

- the *Aerospatiale/Alenia/deHavilland* decision[12] established that **industrial policy** would not be applied to trump conclusions based on competition analysis.

- the *Nestlé/Perrier* decision[13] showed that the EC would challenge mergers that would increase concentration in oligopolistic markets. The Commission's interpretation and application of the Merger Regulation to cases of **collective dominance** was subsequently upheld by the courts in the *Kali und Salz*[14] and *Gencor* cases.[15] The Commission applied this doctrine in its 1999 *Airtours/First Choice* decision,[16] a matter that remains on appeal in the CFI.

The *deHavilland* decision contained a seed of potential divergence, however, with the United States. In that decision, the Commission reserved the question whether it was appropriate to take cost-savings, or efficiencies, into account in merger review.[17] To some commentators, it appeared that the Commission's position was not neutral, but rather hostile to efficiencies.[18] That concern was magnified by the *Boeing/McDonnell Douglas* case.[19]

More recent Commission decisions - including the past year's prohibition decisions in the *GE/Honeywell* and *Tetra Laval/Sidel* cases - have been met with criticism that they are based upon economic thinking of the kind that marked enforcement in the United States in the 1960s and 70s but has since been discredited.[20]

D. Joint Ventures - concentrations or "orphans"

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[12] *Aerospatiale-Alenia/deHavilland*, OJ L 334/42 (5 Dec. 1991), [1992] 2 CEC 2,034 (*deHavilland*).

[13] *Nestlé/Perrier*, OJ L 356/1 (5 Dec. 1992), [1993]1 CEC 2,018.

[14] *France v. Commission,* joined cases C-68/94 and C-30/95, [1998] ECR I-1375.

[15] *Gencor v. Commission,* Case T-102/96, Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 25 Mar. 1999; [1999] CEC 395.

[16] *Air Tours/First Choice*, [2000] CEC 2,203.

[17] *Supra*, note 12, ¶ 65.

[18] Frédéric Jenny, EEC Merger Control: Economies as an Antitrust Defense or an Antitrust Attack, 1992 Fordham Corp. L. Inst. 591 (B. Hawk ed. 1993).

[19] *Boeing/McDonnell Douglas*, Case No IV/M.877, Comm. Decision 97/816 of 30 July 1997, OJ L 336/16 (8 Dec. 1997); [1998] CEC 2069. For a thorough account of this case, and in particular, the divergence of EC and FTC approaches, *see* William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 Antitrust L. J. (2001, Issue 3) 805, 831.

[20] *See, e.g.,* William J. Kolasky, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels, remarks before the George Mason University Symposium, Washington, DC, Nov. 9, 2001, *available at*: http://www.usdoj.gov/atr/public/speeches/9536.pdf; and, Göran Grosskopf and Henri Lachman (CEO's, respectively, of Tetra Laval and Schneider), Think Again, Mario, Financial Times, 6 Dec. 2001.

As originally enacted, the Merger Regulation distinguished between "concentrative" and "cooperative" joint ventures; the former were deemed "concentrations" for purposes of the Merger Regulation, while the latter were not. This distinction proved hard to clearly divine in actual practice[21] and the Commission set about finding ways to shoe-horn more joint ventures within the "concentrative" rubric. Finally, the Commission proposed an amendment to the Merger Regulation (that was adopted by the Council of Ministers in 1997) to cover full-function cooperative joint ventures under the Merger Regulation.[22] Left out of this scheme was the partial-function production joint venture. The Green Paper raises the issue whether such joint ventures should be folded into the Merger Regulation, but concludes that they should not.[23] This decision led commentator Alec Burnside, a Brussels-based practitioner, to lament that such joint ventures have been "orphaned" and all the more so since, under the EC's "Modernization" program, there will no longer be *ex ante* review of such agreements under Article 81.[24]

II. Notable cases during CY 2001

A. Statistics[25]

During CY 2001, 335 mergers were notified to the EC (compared to 345 in 2000), of which:

- 5 were prohibited (compared to 2 in 2000)
- 10 were cleared, subject to commitments, after Phase II proceedings (compared to 12 in 2000)
- 13 were cleared, subject to commitments, in Phase I (compared to 28 in 2000)
- 12 were withdrawn, 4 of them in Phase II (compared to 14 & 6 in 2000).

B. Prohibitions

The prohibition decisions in 2001 were remarkable both in their number and level of controversy. Some (like *SCA/Metsä Tissue* and *GE/Honeywell*) echoed previous Commission decisions (*Volvo/Scania* and *Boeing/McDonnell Douglas* respectively); one (*CVC/Lenzing*) involved routine cooperation and coordination with U.S. authorities; and most generated criticism from political officials in the merging parties' home countries. Some of the criticism

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[21] *See* Barry Hawk, Joint Ventures under EEC Law, 1991 Fordham Corp. L. Inst. 557, 575-6 (B. Hawk ed. 1992).

[22] Merger Regulation, Art. 2.4. For a discussion of the operation of this provision, *see* Green Paper, ¶¶ 114-119.

[23] Green Paper, ¶¶ 120-124.

[24] Alec Burnside's comment was made during his presentation in an ABA-sponsored tele-conference on the Green Paper on Jan. 15, 2002.

[25] Regularly updated statistics of EC Merger Control can be found at: http://europa.eu.int/comm/competition/mergers/cases/stats.html.

questioned the bases and efficacy of the Commission's analyses and some went further to question whether the Commission is too isolated from independent oversight and review of its decisions. Although some of these concerns have been raised in past in the wake of earlier decisions, the sheer magnitude of prohibitions and the stereophonic criticism from both sides of the Atlantic raises criticism of EU merger control to a higher plateau.

1. *SCA/Metsä Tissue* - echoes of Volvo/Scania?

One of the cases reviewed in this program last year was the Commission's decision to prohibit Volvo's acquisition of fellow Swedish truck maker, Scania.[26] That decision seemed to suggest that, as to some products and services, Scandinavia might be a separate geographic market from the rest of the EU. That appears to have been the finding in *SCA/Metsä Tissue*,[27] as well.

The Commission found very high market shares (up to 90% in some markets) throughout the entire Nordic region (Sweden, Norway, Denmark and Finland) for toilet paper and kitchen towels, and it concluded that the merger would lead to the creation of single dominant market positions in 21 tissue paper markets in Sweden, Norway and Denmark; to the creation of duopolistic dominant positions in two tissue product markets in Finland (between the merged entity and Fort James of the United States); and to the strengthening of dominant positions in three product markets in Finland. The Commission also found that Nordic supermarkets' countervailing buyer power would be insufficient to restrain the merged company's market power. Significant for Scandinavia was the Commission's finding that tissue products can be transported over distances of approximately 800-1000 kilometers, beyond which supply of the relatively bulky products becomes increasingly uneconomical.

The parties offered divestitures in first phase, but did not "up" their offer upon conclusion of the second stage proceedings. The Commission thereupon decided to prohibit the concentration. What was notable about the Commission's press release, announcing its decision, was what some might view as a defensive passage, stating that "[a]s statistics show, the Commission has been able to clear the overwhelming majority of mergers and acquisitions involving Nordic companies either with or without conditions."

Unlike Volvo's strong reaction to the Commission's decision in the Scania case, SCA issued a very matter-of-fact press release in response to the Commission's decision. It noted the divestitures it offered and what the Commission demanded in addition to which SCA stated, "acceptance of the Commission's demands would be incompatible with this goal."[28]

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[26] *Volvo/Scania*, Case No COMP/M.1672, Comm. Decision of 15 Mar. 2000, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m1672_en.pdf.

[27] *SCA/Metsä Tissue*, Case No COMP/M.2097, Comm. Decision of 31 Jan. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2097_en.pdf.

[28] SCA press release, Acquisition of Metsä Tissue not approved by European Commission, 31 Jan. 2001, *available at*: http://www.sca.se/.

Sweden's Prime Minister, Göran Persson, was more outspoken when, in September - and in the wake of the withdrawal of merger plans by two Swedish banks - he charged that the Commission discriminated against smaller Member States, saying "the present rules are disadvantageous to us since we tend to dominate our market fraction to such a great extent." He added "there is a structural error in the EU's competition rules."[29] Commissioner Monti replied to this criticism in a speech on market definition in October in Helsinki, in which he said,

> "I believe that consumers deserve a high degree of protection from dominant suppliers irrespective of the size of the country. If we were to approve mergers that create national champions in small markets even if they implied the creation or strengthening of dominant positions, as our critics seem to suggest, we would be guilty of serious discrimination. We would, indeed, be discriminating against customers of small Member States, who would eventually suffer from higher prices and lower quality."[30]

2. *GE/Honeywell* - echoes of Boeing/McDonnell Douglas?

Much has been written about this case, especially - and fortunately - by most of the principal actors in the case.[31]

General Electric (GE) announced its intention to acquire Honeywell in October, 2001. In the United States, the Department of Justice examined this matter and reached a consent agreement with the parties requiring certain divestitures that was announced on May 2, 2001.[32] The EC, after conducting a full second phase inquiry and after considering the parties proposed remedies, decided to prohibit the merger on July 3, 2001.[33]

The Commission's findings and reasons for its decision can be synopsized as follows: GE has a dominant position in jet engines for large commercial aircraft. Honeywell is the leading

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[29] Quoted in Dagens Industri on 20 Sept 2001, *cited in* Mario Monti, Market Definition as a Cornerstone of EU Competition Policy, remarks before Workshop on Market Definition, Helsinki, 5 Oct. 2001, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/01/439|0|AGED&lg=EN&type=PDF.

[30] Monti speech, *supra*, note 28.

[31] *See, e.g.,* Götz Drauz, Unbundling GE-Honeywell, 2001 Fordham Corp. L. Inst. ___ (B. Hawk ed.) (Forthcoming); Deborah Platt Majoras, GE-Honeywell: The U.S. Decision, remarks before the Antitrust Law Section, State Bar of Georgia, Nov. 29, 2001, *available at*: http://www.usdoj.gov/atr/public/speeches/9893.pdf; Transatlantic Antitrust: Convergence or Divergence? A Roundtable Discussion and Commentaries by several principal participants in the case, including Francisco-Enrique Gonzalez-Diaz, Carl Shapiro, and Donna Patterson, *contained in* Antitrust, Vol. 16, no. 1 (Fall 2001), American Bar Assoc., pp.5-34. And, there is the account by Jack Welch, then GE's CEO, in his autobiography, Jack: Straight from the Gut, Warner Books, 2001.

[32] *See* Dept. of Justice press release, *available at*: http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

[33] *General Electric/Honeywell*, Case No COMP/M.2220, Comm. Decision of 3 July 2001, *available at:* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

supplier of avionics and non-avionics products for large commercial aircraft; it supplies over half the market for these products and, together with its rivals, Rockwell Collins and Thales, they account for more than 90 percent of these markets. Simply stated, the Commission concluded that GE could leverage its dominance in jet engines - through bundling of engines with avionics, and with the aid of financing from GE Capital and purchases of aircraft by GE Capital Aviation Services (GECAS) - to achieve a dominant position in the avionics markets. Honeywell's competitors could not effectively compete with GE's "tool kit" of engines, avionics, financing, and a purchaser; their progressive marginalization in the face of GE's offerings would lead to their exit from the market.

These conclusions sounded vaguely familiar - as when, in 1997, the Commission found that Boeing's acquisition of McDonnell Douglas would entrench Boeing's already dominant position in large commercial aircraft and, thereby, marginalize Airbus Industrie.

Perhaps anticipating the criticism to come, the Commission's press release, announcing its decision, concluded as follows: "European merger control is not about protecting competitors but about ensuring that markets remain sufficiently competitive in the long run so that consumers benefit from sufficient choice, innovation and competitive prices."[34]

The announcement of the Commission's decision on July 3rd was almost anti-climactic. On June 14, GE had proposed undertakings in an effort to alleviate the Commission's concerns. Reports that the Commission deemed the proposals insufficient led to expressions of concern from Members of the United States Congress[35] and a last ditch effort by Honeywell to persuade GE to sweeten its offer. On June 28 - beyond the deadline provided in the Commission's regulations for submission of commitments[36] - GE proposed further remedies; but, the Commission found them unacceptable because they did not resolve the problems identified in a sufficiently clear way at such a very late stage in the procedure.

Nonetheless, the July 3rd Commission announcement was met with strong criticism from U.S. Government officials. The Assistant Attorney General for Antitrust, Charles James, issued a statement in which he said, *inter alia*,

> "Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence."

U.S. Treasury Secretary, Paul O'Neill said the EC's decision was "off the wall."

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[34] European Commission press release, IP/01/939 (3 July 2001), *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/939|0|RAPID&lg=EN.

[35] Specifically, Senator Jay Rockefeller in a letter to the Commission and Senators Mike DeWine and Herb Kohl in a public statement.

[36] Implementing Regulation, *supra*, note 10, Art. 18.

More will be said about the ramifications of this decision later in this paper at section IV.A. concerning U.S./EC relations.

3. *Schneider/Legrande* - disconnection required

On October 10, the Commission announced its decision to block Schneider's acquisition of Legrande, a deal which would have merged France's two leading manufacturers of electrical equipment.[37]

The Commission found that Schneider and Legrande are Europe's market leaders in low-voltage electricity distribution. Broadly speaking this covers all systems used for electricity distribution and the control of electrical circuits in buildings, factories or homes. A whole range of products are involved: distribution boxes, plugs and switches, cables and cable carriers. Schneider and/or Legrande are strongly positioned in France, Italy and the Nordic countries. The merger would give rise to significant overlaps in market shares for most of the products concerned. The main competitors at European level are ABB, Hager and Siemens.

According to the Commission's press release (the public version of the Commission's decision is not yet available), "[i]n France, the merger gave rise to particularly serious problems over virtually the whole range of products concerned and would, in most cases, have resulted in the strengthening of a dominant position. Schneider and Legrande are by far the largest players on the French market, and the Commission's investigation demonstrated clearly that there was little prospect of any significant development in the activity of foreign competitors in the short and medium term. Furthermore, competition problems were also identified in Denmark, Spain, Greece, Italy, Portugal and the United Kingdom."

The Commission went on to suggest that the parties had waited too long to discuss remedies, using the occasion to urge that, where the Commission finds clear competition problems, the parties should enter into discussions without delay with the competition authorities about possible remedies.

The Commission also, however, cited this case as an example of an effort to create a "national champion," something the Commission cannot countenance unless the conditions of competition, "ensuring in particular fair prices for consumers," continue to apply or are rapidly restored.

This case - like *Tetra Laval/Sidel* - is noteworthy for another reason. This was an attempted take-over that was governed by the rules of France's take-over code. Unlike such codes that apply elsewhere - for example, that which applies in the United Kingdom - a bidder for the shares of a French-listed firm may not make his bid conditional upon regulatory approvals, such as antitrust clearances. Thus, during the course of the Commission's investigation, Schneider acquired 98 percent of Legrande's shares. Accordingly, upon the

[37] *Schneider/Legrande*, Case No COMP/M.2283, Comm. Press Release of 10 Oct. 2001, *available at:* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1393|0|RAPID&lg=EN. (Public version of Comm. Decision not available yet.)

Commission's decision to prohibit the deal, a plan had to be devised and approved by the Commission for Schneider to divest the shares it had acquired. On January 30, the Commission announced that it had reached a decision on the arrangements for the "demerger" of Schneider and Legrande.[38] The Commission allowed Schneider to retain no more than 5 percent of Legrande's shares and to either refloat the shares within an "appropriate" (but not publicly-disclosed) deadline or to sell the shares to a third party subject to Commission approval.

4. *CVC/Lenzing* - transatlantic *t☹te-👌-t☹te* torches textile tie-up

Passing virtually unnoticed among the series of higher-profile prohibition cases was the Commission's decision of October 17 to block CVC's proposed acquisition of the Austrian firm, Lenzing.[39] Investigation of the matter was closely coordinated with the U.S. Federal Trade Commission and was facilitated by the grant of waivers of confidentiality by the parties.

CVC, an investment house, already controlled Acordis, Lenzing's principal rival in Europe and only rival in the United States in the market for viscose fibers that are used in textile applications (such as fabrics and garments) and in non-textile applications (such as wipes, surgical gowns, swabs, band-aids and tampons). Acordis and Lenzing are the world's only producers of lyocell and, together, they hold the vast majority of patents for lyocell production. Interestingly, during the course of the EC and U.S. FTC investigations of this matter, Acordis closed its U.S. manufacturing facility in Mobile, Alabama.

Early in the investigation, CVC offered settlement proposals that were deemed insufficient, but it did not make a further offer.

Upon announcement of the Commission's decision, Lenzing issued a press release expressing disappointment but stating its resolve that the decision "does not provide us with any problems – not even in the long run."[40]

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[38] European Commission press release, IP/02/173 (30 Jan. 2002), *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/173|0|RAPID&lg=EN.

[39] *CVC/Lenzing*, Case No COMP/M.2187, Comm. Decision of 17 Oct. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2187_en.pdf.

[40] Lenzing press release of 17 Oct. 2001, *available at*: http://www.lenzing.com/lenzred/frameset.jsp?sn=ebody/subnavi/lenzinggruppe.jsp?act=0&co=/lenzred/publish.xml?cat=LenzingGruppe_style=./ebody/content/default2.xsl_lang=2_type=news&hn=ebody/hauptnavi/default.jsp?act=1&bn=ebody/bottomnavi/default.html. Despite the brave words of October 17, Lenzing announced sale of its U.S. subsidiary to a group of investors, including management of its subsidiary, on January 2, 2002. *See* Lenzing press release, *available at*: http://www.lenzing.com/lenzred/frameset.jsp?sn=ebody/subnavi/lenzinggruppe.jsp?act=0&co=/lenzred/publish.xml?cat=LenzingGruppe_style=./ebody/content/default2.xsl_lang=2_type=news&hn=ebody/hauptnavi/default.jsp?act=1&bn=ebody/bottomnavi/default.html.

5. *Tetra Laval/Sidel* - packaging - or more substantive - problems?

Last, but not least, the Commission's decision to block this merger on October 30[41] - coming on top of the Commission's decision two weeks earlier to block a merger of two French firms (Schneider and Legrande) - seems to have generated as much controversy in France as GE/Honeywell did in the United States. Tetra's CEO, Göran Grosskopf, and France's Finance Minister, Laurent Fabius, have criticized the decision.

The Commission found that Tetra Laval was the dominant producer of aseptic cartons and the machinery with which to fill them with liquids. (These are the cartons that are used to package a wide variety of liquids, including milk, but, which in the United States have been limited to small juice boxes.) Sidel was a leading making of PET plastic bottles and the machinery to fill them with liquids, but was by no means dominant. The Commission found that aseptic cartons and PET containers were separate product markets, but that they were "related" markets, given that the same liquids could be filled into both types of containers and both types of packaging were purchased by many of the same customers. With reasoning that seemed to echo that in *GE/Honeywell*, the Commission concluded that Tetra Laval could leverage its dominance in the market for aseptic containers into that for PET containers.

Tetra offered commitments that were deemed by the Commission to be insufficient. The Commission, thereupon, decided to prohibit the acquisition.

As noted above, in the discussion of *Schneider/Legrande*, this case, too, involved a bid by Tetra Laval for the publicly traded shares of Sidel, a French firm. And, as in that case, since the bid, under French law, could not be made conditional on antitrust approvals, Tetra Laval had acquired most of the shares of Sidel. Therefore, it would have to submit a "demerger" plan to the Commission for its consideration and approval. It did so and, coincidentally, its plan was approved on the same day (January 30, 2002) as that for *Schneider/Legrande*.[42]

Tetra expressed disappointment with the Commission's decision in a press release.[43] And, Tetra has appealed the Commission's decision to the CFI.[44]

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[41] *Tetra Laval/Sidel*, Case No COMP/M.2416, Comm. Decision of 31 Oct. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2416_en.pdf.

[42] European Commission press release, Commission adopts decision for the divestiture of Tetra Laval's shareholding in Sidel, IP/02/174, 30 Jan. 2002, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/174|0|RAPID&lg=EN.

[43] Tetra Laval press release, 30 Oct. 2001, *available at*: http://www.tetralaval.com/pressrel/pressrel3010.html.

[44] European Information Service, European Report, Tetra Laval Appeals Against Commission Merger Veto, Jan. 19, 2002. (retrieved through LEXIS/NEXIS).

C. Notable clearances

This section may not appear to do justice to other unmentioned clearances. It is certainly not the author's intent to seemingly minimize their importance by focusing so heavily on the prohibition decisions and not give sufficient attention to other illustrative cases - for example, the *Buhrmann/Samas* case[45] concerning the office supplies market in the Netherlands, that, to an American, recalled the Office Depot/Staples case.[46] Other notable clearance decisions, most involving settlements with the parties, are mentioned later in the paper in IV.A.2., since they are cases that also involved cooperation with U.S. authorities.

1. *BASF/Pantochim/Eurodiol* - a "rescue" merger[47]

What is notable about this case is that it was decided on the basis of what Americans call the "failing firm defense."[48] Eurodiol and Pantochim were two Belgian companies that were subsidiaries of the SISAS Group, based in Italy and Luxembourg. In September 2000, both companies were placed under control of the bankruptcy court of Charleroi, Belgium. The Court sought buyers and the Commission conducted its own inquiries. The only company to make a firm offer was BASF. Given the condition of the plants involved and certain environmental considerations, absent BASF's acquisition the capacity of Eurodiol and Pantochim would have exited the market. BASF would keep the capacity in operation.

Whether U.S. authorities would reach the same conclusion under the similarly-stated criteria for a "rescue merger" would require too much speculation, especially without access to the evidence. The subject matter and the decision received specific attention in an article that appeared in the EC's Competition Policy Newsletter.[49]

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[45] *Buhrmann/Samas Office Supplies*, Case No COMP/M.2286, Comm. Decision of 11 Apr. 2001, press release *available at* (public version of decision not yet available): http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/555|0|RAPID&lg=EN.

[46] *FTC v. Staples, Inc. and Office Depot, Inc.*, 970 F.Supp. 1066 (DDC 1997)

[47] *BASF/Pantochim/Eurodiol*, Case No COMP/M.2314, Comm. Decision of 11 July 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2314_en.pdf.

[48] U.S. DoJ and FTC, Horizontal Merger Guidelines, Apr. 2, 1992 (as amended Apr. 8, 1997), § 5.

[49] Andreas Strohm, BASF/Pantochim/Eurodiol: Change of direction in European merger control?, Competition Policy Newsletter, Oct. 2001, at 22, *available at*: http://europa.eu.int/comm/competition/publications/cpn/cpn2001_3.pdf.

2. *Metso/Svedala*[50]

Contemporaneously, with its decision to block the *SCA/Metsä Tissue* merger, the Commission announced clearance, subject to conditions, of this merger of Scandinavian firms in the industry for rock and mineral processing machinery. This equipment is used to reduce the size of rock to make it suitable for its expected application. It is primarily used for the production of aggregates and cement and in the mining industry. The markets are world-wide in scope.

Metso and Svedala are two of the world's leading firms in this industry and the merger would have resulted in very high shares in each affected market. The conditions for clearance included commitments to divest Svedala's jaw crusher and cone crusher businesses as well as Metso's primary gyratory crusher business.

More will be said about this case in section IV.A.2.a. of this paper, as it involved close cooperation with the U.S. Federal Trade Commission..

D. Referrals to - and from - Member States:

1. Art. 9 referral of *Shell/DEA* to Germany

In the early days of the Merger Regulation, referrals to Member States were rare. There were just three in the first five years of the Merger Regulation. They have become much more commonplace in recent years. Furthermore, in some cases, the Commission makes a "partial" referral of a case to Member States - that is, some markets are examined by the Commission and others by the Member State(s).

Such was the case in *Shell/DEA*, a joint venture that would combine Shell's and DEA's downstream oil and petrochemicals businesses. The *Bundeskartellamt* requested referral of that part of the venture that affected the markets for motor fuels retailing and several other oil products markets in Germany. The Commission agreed, reserving the petrochemicals markets to itself.

On December 20, in contemporaneous announcements, the Commission[51] and the *Bundeskartellamt*[52] announced that they had reached settlements with the parties.

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[50] *Metso/Svedala*, Case No COMP/M.2033, Comm Decision of 24 Jan. 2001, Comm. press release *available at* (public version of decision not yet available): http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/01/103|0|AGED&lg=EN&type=PDF;

[51] *Shell/DEA*, Case No. COMP/M.2389, Comm. Decision of 20 Dec. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2389_en.pdf.

[52] *Bundeskartellamt* press release, *available at*: http://www.bundeskartellamt.de/20_12_2001_englisch.html. The *Bundeskartellamt*'s decision (in German only) is *available at* http://www.bkarta.de/B8-120-01.pdf.

2. Art. 22 referral in *Promatech/Sulzer*[53]

Article 22 of the Regulation permits a Member State to request that the Commission examine a concentration that falls outside the Community Dimension thresholds. It is called the "Dutch clause," because it was suggested by the Netherlands at a time when it and several other EU Member States did not yet have merger control laws.

Now that all Member States but Luxembourg have merger control, one might question the continued efficacy of Article 22. However, given the number of mergers falling below the community dimension thresholds that have significant cross-border effects, it seemed reasonable (at least to an American) that such a case might be jointly referred by the Member States to the Commission. That finally happened on December 19th of last year when the authorities of the United Kingdom, Spain, Germany, and Italy jointly referred to the Commission the proposed acquisition of the weaving machine business of Sulzer AG, a Swiss firm, by Promatech S.p.A., an Italian firm.

The *Bundeskartellamt*'s press release mentions the Green Paper and its proposals for revising the lines of jurisdiction between the Commission and the Member States. In that regard, *Bundeskartellamt* President Ulf Böge stated, "The referral of merger cases in both directions is necessary in order to guarantee effective protection of competition in Europe."

As is highlighted later in this paper at III.A.2.a.i., the prospect of a busier two-way street between Brussels and the Member States (numbered, perhaps, A9 from Brussels and A22 from the Member States) is not one that is attractive to businesses or their advisors.

E. Judicial Review

The length of time consumed by judicial review in Europe has not deterred parties and third parties from challenging Commission decisions. As the Commission notes, as of October 1, 2001, seven of the 15 prohibition decisions had been appealed.[54] Since that date, the Commission prohibited three more mergers, two of which hav been appealed - *Tetra Laval/Sidel* and *Schneider/Legrande*. Given the number of cases and the breadth of the issues raised, it is possible to contemplate that the Commission may not enjoy the position that Justice Potter Stewart attributed to the U.S. Government in his dissent from the Supreme Court's decision in the *Von's Grocery Co.* case - "the Government always wins."[55]

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[53] *See* Bundeskartellamt refers Promatech/Sulzer merger to competition authority in Brussels, 19 Dec. 2001, *available at*: http://www.bundeskartellamt.de/19_12_2001_englisch.html.

[54] Green Paper, ¶ 251.

[55] *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 301 (Stewart, J. dissenting).

1. *RJB Mining plc v. Commission*, CFI decision of 31 Jan. 2001[56]

This case arose out of the Commission's decision in the merger case of *RAG/Saarbergwerke/Preussag*.[57] The merger was one element of a package of measures, collectively referred to as the Coal Compromise, agreed among the German Government, two of its state governments, the coal industry and the coal miners' union in 1997. The measures included a number of State Aids that were reviewed by the European Commission under the State Aids provisions of the European Coal & Steel Community Treaty. One of those measures was the privatization and sale of Saarbergwerke to RAG for the price of DM1. Saarbergwerke's assets were estimated to be worth approximately DM 1 billion.

This case is of interest for the following reasons:

First, for the simple fact that the court annulled the Commission's merger decision. This is only the second merger decision that has been annulled by the courts (the previous one being *Kali und Salz*). The Court's decision was issued about two and one-half years after the Commission's merger decision.

Second, because the case was brought by a third party competitor. The court, citing a string of precedents, ruled that the plaintiff had standing, stating (in ¶59), "an undertaking is concerned by a Commission decision [and therefore may institute judicial proceedings for its annulment] that allows benefits to be granted to one or more undertakings which are in competition with it." This appears broader than in the United States where "[a] competitor in the merging industry ordinarily lacks antitrust standing."[58]

Third, because the court annulled the Commission's merger decision based on its finding that the Commission had not taken into account and assessed "whether and, if so, to what extent the purchase price of DM 1 strengthened the financial and thus the commercial strength of RAG." (¶122 of the CFI Decision) This decision may have two implications: one, that the Commission may have to "twin-track" merger and state aids proceedings where the latter are a factor in the merger assessment;[59] and, two, that the "economic and financial" power of merging firm is a factor the court expects the Commission to take into account. "Economic and financial power" is one of the factors "enshrined," as Europeans like to say, in the Treaty and the Merger Regulation. It has been a critical, distinguishing factor in the Commission decisions in, for

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[56] Text of the decision *available at*: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=T-156%2F98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[57] *RAG/Saarbergwerke/Preussag*, Case No COMP/ECSC.1252, Comm. Decision of 29 July 1998.

[58] *See AlliedSignal, et al. v. B.F. Goodrich, et al.*, 183 F.2d 568, 575-6 (1999).

[59] *See* Alec Burnside, Judges and Merger Control: a Brewing Controversy, In Competition, March 2001, Sweet and Maxwell, *available at*: http://www.linklaters-alliance.com/in_competition.htm

example, *Boeing/McDonnell Douglas*,[60] and *GE/Honeywell*, leading to divergence from the U.S. decisions in those cases.

2. Pending cases in Court of First Instance:

Although many practitioners, business people, and commentators criticize the efficacy of judicial review Commission decisions, they have not shunned the courts. The Commission's Legal Service has quite a bit of work pending before the courts. Some of the notable matters before the court (all of them, at the moment, before the CFI) are:

a. *Air Tours/First Choice*

In September 1999, the Commission blocked this merger in the U.K. holiday tour industry.[61] The case was described in last year's paper.[62] As noted there, some commentators believe that the Commission has "pushed the envelope" of collective dominance doctrine.[63] It remains in the hands of the CFI to decide - two and one-half years since the Commission's decision.

b. *MCIWorldCom/Sprint*

On June 28, 2000, the Commission decided to prohibit MCI-WorldCom's proposed acquisition of Sprint, finding that it would have resulted in the creation of a dominant position in the market for top-level universal internet connectivity.[64] The parties attempted to avoid a prohibition decision by withdrawing their Form CO. They did not, however, abandon their binding merger agreement and so the EC issued its prohibition decision. On September 28, 2000, WorldCom announced that it had appealed the decision on both substantive and procedural grounds and the case is pending before the CFI.[65]

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[60] *Boeing/McDonnell Douglas*, Case No IV/M.877, Comm. Decision 97/816 of 30 July 1997, OJ L 336/16 (8 Dec. 1997); [1998] CEC 2069.

[61] *Air Tours/First Choice*, [2000] CEC 2,203.

[62] John Parisi, Recent Developments in EU Competition Law & Policy: Mergers & International Aspects, Wash., DC, Feb. 22, 2001, *available from the author at* jparisi@ftc.gov

[63] *See, e.g.*, John Temple Lang, Oligopolies and Joint Dominance in Community Antitrust Law, 2001 Fordham Corp. L. Inst. ___ (B. Hawk ed.) (Forthcoming); *and*, Competition Law of the European Community (Valentine Korah, Gen. Ed.), §8.08, by Nicholas Levy.

[64] *MCI-WorldCom/Sprint*, Case No COMP/M.1741, Comm. Decision of 28 June 2000, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf. Contemporaneously, the U.S. Department of Justice announced a challenge to the merger; *see* Justice Dept. press release of June 27, 2000, *available at*: http://www.usdoj.gov/atr/public/press_releases/2000/5049.pdf.

[65] WorldCom Press Release, WorldCom Appeals European Union Decision on Sprint Merger, Sept. 28, 2000, *available at*: http://www.worldcom.com/about_the_company/press_releases/display.phtml?cr/20000930-2.

c. *GE/Honeywell*

Although for all practical purposes the Commission's decision in this case killed the merger of GE and Honeywell, it raised issues that the parties have decided to challenge in the CFI, among them the Commission's finding that GE holds a dominant position in the market for large commercial aircraft engines.[66]

d. *Tetra Laval/Sidel*

As noted in the discussion of this case, above at II.A.5., Tetra Laval has appealed the Commission's decision, seeking an annulment thereof, in the CFI. Tetra challenges not only the analysis leading to the conclusion that the merger would create or strengthen a dominant position, but also the Commission's rejection of the remedial commitments Tetra offered.[67]

III. Policy Developments

A. The Green Paper on Review of the Merger Regulation

1. Background

The Commission's much-anticipated Green Paper was issued on December 11, 2001.[68] This is the third Green Paper exercise in the eleven year history of the Merger Regulation and it is worth recalling the original purpose of the exercise and how it has evolved.

As the Green Paper recalls, the Merger Regulation was "based on an understanding that the establishment of the internal market would lead to major cross-border corporate reorganization, and that a *level playing field* was necessary to ensure that such transactions would not result in lasting damage to competition. The level playing field should ensure that the same notification requirements, procedure, and legal standards apply to all concentrations with significant cross-border effects."[69] This is the vaunted "one-stop shop" principle.

The Council's 1989 enactment of the Merger Regulation embodied a compromise between the Commission and the Member States. The Commission obtained exclusive jurisdiction over mergers of a "community dimension" subject to (a) strict deadlines for decisions and (b) a limited delineation of what constituted a merger of a community dimension, as expressed in world-wide and community-wide turnover thresholds. The Council also granted the Commission a statutory invitation to propose revision of the community dimension

[66] Francesco Guerrera, GE and Honeywell decision challenged, Financial Times, 13 Sept. 2001, p. 23.

[67] *Supra*, note 42.

[68] Green Paper, *supra*, note 3.

[69] Green Paper, ¶ 3.

thresholds three years after the Regulation took effect. That is the statutory basis for the Green Paper exercise.

This jurisdictional division is one of the notable examples of the larger, on-going debate in Europe over Federalism and "Subsidiarity." It is a continuing tug of war:

> On one side of this tug of war are the Member States who jealously guard their sovereignty against the centralization of more power in Brussels.
>
> On the other side of this tug of war is business, that has believed from the beginning that the community dimension turnover thresholds are set too high; that is, too few mergers fall within the Commission's jurisdiction. Business' concern has been magnified by the unharmonized expansion of merger control at the Member State level. Fourteen of the fifteen member states practice merger control now. The laws and practices of some, like Italy, are fully harmonized with EC law; those of others, like the United Kingdom are very different and may diverge further from EC law.

In the first Green Paper (1993), the Commission proposed no revision of the thresholds. But, by the second Green Paper exercise (1996), the Commission was concerned that there were mergers that fell below the thresholds that had significant cross-border effects within the EU. Accordingly, the Commission proposed an amendment to the Merger Regulation to provide that mergers falling below the community dimension thresholds and which would be reviewed by at least three Member States would, instead, fall within the Commission's exclusive jurisdiction. The Council, instead, in 1997, enacted a multi-factor formula intended to enable the Commission to catch mergers with significant impacts in at least three Member States.

The current community dimension thresholds result in the Commission reviewing approximately ten percent of the total number of mergers reviewed by some European authority. Meanwhile, very few mergers that fall below the community dimension thresholds, but have significant effects in three or more Member States, are reviewed by the Commission. In the year 2000, for example, only 20 cases came to the Commission under the provision of the 1997 amendment, compared to 75 mergers notified to three or more Member States. Moreover, in a majority of those 75 cases, the Member State authorities found that the relevant geographic market was broader than their national boundaries.

These findings should be kept in mind in relation to a much broader policy development in Europe - the proposed enlargement of the European Union.[70] Some reports on enlargement suggest that as many as ten states might enter the EU in this decade. Several of the candidate countries, such as Poland, the Czech Republic, and Hungary, have merger control regimes. Thus, examination of the Merger Regulation's community dimension thresholds must take the potential enlargement of the EU into consideration and the Green Paper offers some ideas for consideration including replacing the turnover thresholds altogether with a test that would be based on multijurisdictional impact.

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[70] Materials concerning EU enlargement are available at: http://europa.eu.int/pol/enlarg/index_en.htm

The Council's 1997 amendments to the Merger Regulation invited the Commission to make recommendations as to other aspects of the Regulation, beyond jurisdictional issues. The Commission's 2001 Green Paper embodies discussion, recommendation, and inquiry as to a number of issues beyond the jurisdictional division between itself and the Member States - specifically, as to the substantive standard for review and procedure. Those will now be described.

2. Green Paper recommendations

While the previous two Green Paper exercises were focused mostly on the issues of the jurisdictional allocation between the Commission and the Member States (as delineated in the "Community Dimension" thresholds), this Green Paper addresses many other issues, some well-known and others much less apparent. This paper does not identify and address all of the issues raised in the Green Paper, but rather focuses on those that are addressed to broadly-significant issues that have been raised concerning the functioning of the Merger Regulation. In addition to those discussed in depth below, the Green Paper also invites comment on a couple of matters that will resonate with an American audience - filing fees and the calculation of time limits.

a. Jurisdiction

i. vis-à-vis Member States[71]

In this realm, the Commission addresses four issues:

- First, regarding the basic community dimension threshold, the Commission does not recommend that it be changed.

- Second, regarding the alternative (three-member state) threshold, the Commission recommends that the Regulation be amended to provide that mergers falling below the community dimension threshold that must be notified to three or more Member States would, instead, come within the Commission's jurisdiction.

- Third, regarding referrals by the Commission to Member State authorities under Article 9, the Commission proposes simplifying the rules for Member States to seek and obtain referrals and for the Commission to initiate and make referrals in the absence of a Member State request.

- Fourth, regarding referrals to the Commission by Member States under Article 22, the Commission requests suggestions to improve the functioning of this provision.

Viewed in their totality, these recommendations reflect the fact that the expansion of merger control in the Member States has resulted in more multiple filings, thereby undermining the one-stop-shop principle. The Commission has chosen to focus on, and seek to remedy, the multiple filing problem through replacement of the alternative threshold, enacted in 1997, rather than through a lowering of the basic community dimension threshold. Is this apparently

[71] Green Paper, ¶¶ 15-99.

restrained position credible enough to give the Commission an advantage in the tug-of-war? Maybe not. Realizing the opposition it is likely to face to proposals interpreted as an expansion of its jurisdiction, vis-à-vis the Member States, the Commission has included the proposal to make Article 9 easier to utilize. Not to be outdone, some Member States have agreed for the first time to refer to the Commission under Article 22 mergers that have been notified to several Member States.[72]

Some commentators have already indicated concerns over these proposals. First, there is a practical concern with the three-country-notification proposal and that is that not all Member States have mandatory premerger notification (*e.g.*, the United Kingdom); thus, clarification will be needed on the mechanics of such a rule. Second, some observe that these proposals - specifically that concerning Article 9 - will further undermine the one-stop-shop principle by introducing more uncertainty over whether the Commission or one or more Member States will review a merger.[73] The proposal concerning Article 9 seems striking in that it would not only reduce a hurdle facing a Member State's application for a referral, it would also allow the Commission to refer a case to a Member State whether it has sought referral or not. Whether adoption of these proposals will actually increase the number of referrals is uncertain, but they certainly seem to make it easier to accomplish.

ii. What is a 'concentration'?[74]

The Merger Regulation covers acquisitions of "control" of an undertaking which may amount to less than 50 percent of the shares, but with voting rights, assures control. Other merger control regimes cover acquisitions of lesser percentages.

Although the Commission does not recommend making any changes in the current definition of what constitutes a "concentration" subject to control under the Merger Regulation, it does raise a number of issues for consideration - including minority shareholdings and certain types of joint ventures - and invites comment thereon.

b. Substantive standard of review[75]

The Commission has put the substantive test of its merger control regulation - the dominance standard - up for examination against the substantial lessening of competition (or, SLC) test as used in the United States, Canada, Australia, and, perhaps in the near future, the United Kingdom and Ireland.

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72 *See, e.g.*, Promatech/Sulzer, *supra*, note 52.

73 Alec Burnside expressed such concerns during an ABA-sponsored tele-conference on the Green Paper on January 15, 2002.

74 Green Paper, ¶¶ 100-158.

75 Green Paper, ¶¶ 159-172.

The Commission raises this issue in the wake of examinations by other authorities, specifically, Germany's *Bundeskartellamt* which in October 2001 issued a study of the topic,[76] and the United Kingdom whose government proposed amendments to its merger control law in July 2001 that would adopt the SLC standard.[77]

The main reason given for a re-evaluation of the substantive standard is that "it could allow an alignment of the Merger Regulation's appraisal criteria with those applied in other major jurisdictions," which utilize the SLC test.

In the course of the discussion of the issue, the Commission states that the application of the notion of dominance has evolved, "allowing it to be adapted both to developments in economic theory and to refinements of the now available econometric tools to measure market power. Nevertheless, the Commission notes that it has been suggested that "the SLC test might be closer to the spirit of the economically-based analysis undertaken in merger control and less (legally) rigid than the dominance test." Perhaps anticipating a complaint from industry, the Commission states, "it has also been suggested that adopting the more open-ended SLC test would lead to a greater degree of legal uncertainty."

Commentators have in-fact pounced on that point, pointing to their perception of the American experience with the SLC test that suggests a standard so flexible in its interpretation that it leads to pendulum swings as to the intensity of enforcement from time-to-time.[78]

Also at issue is how much more flexibility is available in the dominance standard. The Commission approaches - but does not exactly pose - that question with respect to the issue of merger-specific efficiencies. In ¶170, the Commission states that "the issue of efficiencies has only been raised in a limited number of decisions under the Merger Regulation, and the precise scope for taking such considerations into account may not have been fully developed." It goes on to say that it "is aware of and supports the ongoing debate on how, and the extent to which, efficiencies should be taken into account in competition analysis," and invites comment as follows: "Accordingly, and independently of the discussion on the two substantive tests, views are invited as to the proper role and scope of efficiency considerations in the field of merger control."

[76] German Federal Cartel Office discussion paper, "Prohibition Criteria in Merger Control - Dominant Position versus Substantial Lessening of Competition?", *available at*: http://www.bundeskartellamt.de/discussion_papers.html.

[77] U.K. Dept. of Trade and Industry, A World Class Competition Regime, Presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty, July 2001.

[78] For example, Peter Plompen, a noted European practitioner, offered that view during an ABA tele-conference on the Green Paper on 15 Jan. 2002. For a contrasting view, *see*, Thomas Leary, The Essential Stability of Merger Policy in the United States, remarks made before a conference in Paris, France, Jan. 17, 2002, *available at*: http://www.ftc.gov/speeches/leary/learyuseu.htm.

c. Procedure

i. Notification "trigger"[79]

The Merger Regulation requires merging parties to submit their premerger notification Form CO within seven days after reaching their agreement to merger or after making a public bid. As interpreted by the Commission, the agreement triggering this notification requirement must be "definitive" - that is, something more than a one-sided letter of intent.

This provision and practice is quite different from that which prevails in the United States under its premerger notification law and rules. Merging parties may notify on the basis of a letter of intent whenever they please prior to consummation. They must allow the reviewing agency thirty days to make an initial assessment after which - if the agency does not issue a "second request" for further information - the parties are free to consummate.

In actual practice, the Commission has been flexible in applying the seven-day rule, a bit less so concerning the binding agreement practice. Particular concerns behind the binding agreement requirement are the efficient use of Commission resources and the ability of the parties to provide all the information necessary on the Form CO.

One argument made in favor of relaxing these rules is to afford parties more flexibility in coordinating multijurisdictional reviews. The Commission notes that such coordination is possible within the current array of notification requirements; but, it understands business' desire to get the merger review process started as early as possible. Believing that the possibility to introduce greater flexibility - which would allow better coordination of merger investigations in different jurisdictions - should be examined, the Commission has invited comments on this issue.

ii. Commitments process and deadlines

As noted earlier in this paper (at I.B.), one of the distinguishing features of the Merger Regulation in comparison to other regimes, is its set of unwaivable decision deadlines. The Regulation gives the Commission little slack - if it misses a decision deadline, the concentration is deemed cleared in the form notified by operation of law.[80] And, once second stage proceedings begin, time seems to pass at an ever-increasing rate up to the deadline for a decision.

Prior to 1998, parties could conceivably try to negotiate a settlement with the Commission up to the "Midnight hour." The *Boeing/McDonnell Douglas* case was a good example of that. But, that experience put severe strains on the system - especially as to the consultations with the Member States Advisory Committee, stipulated by the Merger Regulation. Accordingly, when the Commission revised its implementing regulation in the wake of the Council's 1997 amendments to the Merger Regulation, it included deadlines on the parties for

[79] Green Paper, ¶¶ 180-186.

[80] Merger Regulation, Art. 10.6.

submission of proposed settlement commitments.[81] Under that provision, parties must submit final settlement proposals by the end of the third week after notification in first stage and by the end of the third month of proceedings in second stage.

As the Commission acknowledges in ¶¶ 207-8 of the Green paper, this measure has contributed to compression of the time available for development and evaluation of settlement commitments. Typically, the parties would begin serious settlement talks with the Merger Task Force upon the conclusion of the Oral Hearing. Yet, the deadline for submission of commitments often arises very soon after the hearing.

Some parties have responded to this situation by trying to engage the MTF is settlement talks in parallel with development of its response to the Statement of Objections and preparation for the hearing. Others have waived the hearing and devoted the time to working out a settlement.

Even so, competition authorities (not just the EC) have become more demanding as to the suitability of remedies as some of the mergers confronting them raise complex remedial issues. Evaluating the suitability of a settlement offer can involve an investigation just as strenuous as that for the underlying case. Little time is left under the EC's deadlines for such inquiries, especially since the Member States must be kept in close and constant liaison thereon.

The Commission therefore proposes the adoption of a "stop the clock" provision. Parties could invoke this provision before the deadline for submission of commitments. The Commission stipulates that the clock be stopped for a finite period of time (20-30 days). In addition to inviting comments on the "stop the clock" proposal, the Commission also invites comments on the desirability of the Commission taking "a more active role in identifying the measures it deems necessary in order not to oppose a notified concentration."

iii. Due Process considerations

By the inclusion of ¶¶ 232-253, the Commission implicitly takes note of criticisms of its merger control regime - for example, that it is investigator, prosecutor, judge, and jury. The Commission defends the process and articulates its views on the efficacy of the existing checks and balances, including judicial review. Given the debate that has arisen among officials, businesspeople, practitioners, and commentators - and the efforts underway now in the International Competition Network - to identify best practices and to try to converge procedures and substantive analysis, it is worth noting some of the points the Commission raises in this section of the Green Paper - specifically, the transparency of the EC process (including provision of a written decision upon entering second stage and the elaborate - compared to a typical U.S. complaint - Statement of Objections) and the numerous actors involved in the process, including other Commission Directorates, its Legal Service, and the Member States' competition authorities.

[81] Implementing Regulation, *supra*, note 10, Art. 18.

The Commission likely will have a difficult time convincing its critics on both sides of the Atlantic that the overall regime strikes the right balance in terms of due process. Moreover, some of the critics believe that the Commission does not have the investigatory tools and sufficient personnel resources to obtain and accurately evaluate the best evidence. Finally, the efficacy of judicial review cannot be determined on the basis of statistics as related by the Commission. Pre-decision judicial review (as in the United States) is a more direct check of a merger challenge in the United States than it is in the EC. Judicial review of the Commission's decision is, of course, possible; but, given the length of time it takes, it is unlikely that merger plans would outlive the review.

B. Commission Notices (Guidelines)

1. Ancillary Restraints

In last year's paper, it was reported that the Commission proposed revisions to its then nine-year-old Notice on the treatment of ancillary restraints. The proposed revision appeared to update and clarify the Commission's view on what ancillary agreements were deemed to be "restrictions directly related and necessary to the implementation of the concentration" and, thereby reviewed under the merger procedure.

On June 27, the Commission announced a new policy:[82] It will no longer analyze ancillary restraints under the merger procedure. As the Commission put it, "Instead, companies and their lawyers will have to assess whether any such restraints can be covered by the merger decision, by a relevant block exemption or whether they might fall under Article 81." The Commission went on to say that it "has never been under a legal obligation to assess and formally address "ancillary restraints" in its decisions under the Merger Regulation."

This came as a surprise to at least some practitioners. Naturally, concerns were raised under the usual rubric of "legal certainty."[83] But, the Notice does raise a question about the Commission's interpretation of its obligations under the Merger Regulation: Is the Commission correct that Articles 6.1.(b) and 8.2. do not obligate it to rule on ancillary restraints? These articles describe the Commission's power to issue first and second stage clearance decisions on the merits of the case and both include the phrase "the decision . . . shall also cover restrictions directly related and necessary to the implementation of the concentration." It is reasonable to interpret that as an obligation, but the Commission says that "any statements in past merger decisions have been of a purely declaratory nature, without having a legally binding effect on the parties or the national courts." Maybe so, but the Commission included in its Notice (at ¶ 5) a statement that its interpretation of Articles 6.1.(b) and 8.2. "is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities."

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[82] Commission Notice on restrictions directly related and necessary to concentrations (ancillary restraints), 27 June 2001, *Notice and press release available* at: http://europa.eu.int/comm/competition/mergers/legislation/ancillary_restraints/.

[83] *See, e.g.*, "New 'Ancillaries' Notice: Commission u-turn," In Competition, Linklaters & Alliance, July 2001, *available at*: http://www.linklaters-alliance.com/200107.htm.

2. Remedies

Commissioner Monti presented an assessment of the first year under the Commission's Notice on Remedies[84] in his remarks on January 18, 2002.[85] He reviewed a number of cases during the past year to illustrate how the Remedies Notice had been applied; a couple of those cases (Metso/Svedala and Nestlé/Ralston Purina) are mentioned later in this paper (in IV.A.2.).

The Commissioner also reported the establishment of a separate Enforcement Unit within the Merger Task Force - akin to the FTC's Compliance Division in the Bureau of Competition - "to ensure that the general principles set out in the Commission's Remedies Notice are applied in a coherent manner." Monti went on to mention two projects underway by the Enforcement Unit: One is the development of best practice guidelines; the other is the composition of a model for commitments "that would include standardized language to address the relevant issues that are necessary for producing an acceptable commitments package."

C. Hearing Officers

The Merger Regulation affords parties the right to an oral hearing to reply to the Commission's Statement of Objections.[86] This is one of the "rights of defense" - which includes access to the file[87] - afforded by Community competition law. Safeguarding those rights is a particular responsibility of the Hearing Officer, along with the job of presiding over the hearing.

1. Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings[88]

Under the decision taken by the Commission on 23 May (replacing its 1994 decision setting out the terms of reference for the Hearing Officer), the Commission shall appoint one or more hearing officers (and retain the authority to remove them) who will be attached, for administrative purposes, to the Competition Commissioner. This is a change from past practice where the Hearing Officer was administratively attached to the Competition Directorate General,

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[84] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68/3 (2 Mar. 2001), *available at*: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

[85] The Commission notice on merger remedies - one year after, remarks by Comm. Mario Monti, 18 Jan. 2002, Paris, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/10|0|RAPID&lg=EN&type=PDF.

[86] Merger Regulation, Art. 18.

[87] *See* Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, *available at*: http://europa.eu.int/comm/competition/antitrust/acdosen_en.html.

[88] Text of decision *available at*: http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301D0462.html.

and its purpose is to put some distance between the Hearing Officer and DG COMP while giving the Hearing Officer more access to the Competition Commissioner.

With respect to the hearings, the decision provides that the Hearing Officer shall prepare a report of the hearing and the conclusions he draws from it. Article 14 of the decision provides that the Hearing Officer "may report on the objectivity of any inquiry conducted in order to assess the competition impact of commitments proposed in relation to any Commission competition proceeding." The Hearing Officer shall also prepare a final report, based upon the draft decision in the case; this final report shall be attached to the draft decision and submitted to the Competition Commissioner, the Director General, and the Member States. This final report will be part of the package that is submitted to the full Commission for its decision in the matter. Upon Commission adoption, the decision, including the Hearing Officer's final report, shall be addressed to the parties and published, along with the Commission's decision, in the Official Journal.

Only time and experience under the new regime and new Hearing Officers will tell what impact these revisions will have on the process and substance of Commission decisions - and the perception of business and its advisors on the credibility of the process. Some of the language in the decision suggests that the Hearing Officers' reports will be focused on procedural issues. Such issues can have substantive ramifications - for example, the entry and evaluation of a particular piece of evidence with respect to the analysis of the case and the conclusions to be drawn. It remains to be seen how the new Hearing Officers will interpret and apply their powers.

2. Appointment of new hearing officers[89]

On October 30, the Commission announced that it had appointed Serge Durande and Karen Williams - two long-time, high-ranking officials of the Competition Directorate - to serve as Hearing Officers. Mr. Durande had most recently served as Director of the Competition Directorate's units dealing with the Transport and Financial Services industries. Ms. Williams is one of the charter members of the Merger Task Force and had most recently served as a Case Manager in MTF.

IV. International Developments

The most significant events of the year in the EC's international competition policy relations were the conflict with the United States over the *GE/Honeywell* case, the launching of the International Competition Network (ICN), and the 'agreement' reached on trade and competition policy at the World Trade Organization's (WTO) Ministerial meeting in Doha.

A. Bilateral relations with the United States

[89] Commission names new Hearing Officer in competition policy area, IP/01/1529, 31 Oct. 2001, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/01/1529|0|AGED&lg=EN&type=PDF.

1. Overview

Based upon the sheer volume of verbiage uttered and published about the *GE/Honeywell* case and the intensity of its delivery, the handling of the *GE/Honeywell* case qualifies as the biggest conflict between the United States and the European Commission in the ten years since the signing of their bilateral antitrust enforcement cooperation agreement.[90] As U.S. and EC officials gathered for their annual formal bilateral consultations in Washington on September 24, the aftershocks of the Commission's July 3rd decision were muffled as agreement was reached to expand the work of the EC/U.S. Mergers Working Group, established in 1999, to take up issues - such as conglomerate merger theories - with the aim of better understanding each other's policies and approaches to merger analysis and with the hope of preventing conflicts like those that occurred in *GE/Honeywell*. Only several weeks later, feathers were ruffled again at an OECD global competition forum in which U.S. officials sharply criticized the analytical approaches taken by the European Commission in *GE/Honeywell*.[91] But, comity was restored by the time of Barry Hawk's annual gathering at Fordham in New York and on November 14, EC Commissioner Monti, Assistant Attorney General James, and FTC Chairman Muris shared an ABA-sponsored podium at which they gave their respective views of the state of the relationship.[92] Many conversations have taken place since among ranking officials of all three agencies as well as among their staffs; the work of the Mergers Working Group is underway; and, meanwhile, the agencies continue their cooperation in cases that come before them.

2. Cases besides *GE/Honeywell*

a. *Metso/Svedala*[93]

As noted earlier in section II.C.2. of this paper, the Commission cleared this merger subject to certain conditions involving divestitures. The FTC's investigation was coordinated with the EC's and its decision was built upon the EC's. In addition to the three lines of business required to be divested by the Commission's decision, the FTC decision required Metso to divest

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[90] Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995) (hereafter "1991 EC/US Agreement"), *available at*: http://www.usdoj.gov/atr/public/international/docs/ec.htm.

[91] Reuters, U.S., EU regulators exchange snipes, 17 Oct. 2001, *available at*: http://208.185.43.170/NASApp/cs/ContentServer?pagename=TheDeal/TDDArticle/StandardArticle&c=TDDArticle&cid=1003865154023.

[92] Mario Monti, Antitrust in the US and Europe: a History of Convergence, remarks before the General Counsel Roundtable, American Bar Association, Washington DC, 14 Nov. 2001, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/540|0|RAPID&lg=EN. Asst. Atty. Gen. James did not publish his remarks. FTC Chairman Timothy J. Muris revised and extended his remarks into a paper delivered before the Brookings Institution on Dec. 21, 2001, entitled "Merger Enforcement in a World of Multiple Arbiters," *available at*: http://www.ftc.gov/speeches/muris/brookings.pdf.

[93] *In the Matter of Metso Oyj and Svedala Industri AB*, FTC Dkt. No. C-4024, press release and documents related to the decision *available at*: http://www.ftc.gov/opa/2001/09/metso.htm.

its grinding mill business. The FTC's decision also specified the purchasers of these lines of business.

b. *CVC/Lenzing*[94]

There is little more to be said about the facts of this case beyond the description earlier in this paper at II.B.4. EC and FTC staff established contact very early in the process. The parties granted waivers of confidentiality that facilitated communications between EC and FTC staff. Their initial conversations focused on market definition, which is not at all unusual in cooperative efforts. As agreement was reached in this area, so too was the realization that this merger was problematic from whichever side of the Atlantic it was viewed. In the end, one might say that the FTC was able to "free ride" on the EC's efforts, as soon after the EC decision was announced, the parties abandoned the transaction and the FTC closed its investigation.

c. *Nestlé/Ralston Purina*[95]

Although pet food does not trade in a world market, most of the same players are present on each side of the Atlantic and there are similar characteristics in the separate geographic markets. Accordingly, it made sense for EC and FTC staff to share knowledge and analyses of this industry with each other in examining Nestlé's acquisition of Ralston Purina's pet food business. Aided, again, by waivers of confidentiality, EC and FTC staff communicated regularly and frequently. Ultimately, both authorities reached settlements with the parties.

d. *Diageo-Pernod/Seagram*[96]

This matter brought together again members of the EC and FTC teams that had worked on the case that led to the creation of Diageo - *Guinness/GrandMetropolitan*.[97] However, it was clear from discussions at the outset of their respective investigations that the proposed transactions would have different competitive effects in Europe and the United States. In Europe, a settlement was reached in first phase requiring the divestiture of the "Four Roses" brand to a third party as well as the separation of the distribution of Captain Morgan rum in

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[94] *CVC/Lenzing*, Case No COMP/M.2187, Comm. Decision of 17 Oct. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2187_en.pdf.

[95] *Nestlé/Ralston Purina*, Case No COMP/M.2337, Comm. Decision of 27 July 2001, *available* at: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2337_en.pdf. In the Matter of Nestle Holdings, Inc., and Ralston Purina Company, FTC Dkt. No. C-4028, press release and documents related to the decision *available at*: http://www.ftc.gov/opa/2001/12/nestleralston.htm.

[96] *Pernod Ricard/Diageo/Seagram Spirits*, Case No COMP/M.2268, Comm. Decision of 8 May 2001, *available at:* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2268_en.pdf; *In the Matter of Diageo PLC and Vivendi Universal S.A.*, FTC Dkt. No. C-4032, press release and documents related to the decision *available at*: http://www.ftc.gov/opa/2001/12/diageo.htm.

[97] *Guinness/GrandMetropolitan*, Case No IV/M.938, Comm. Decision 98/602 of 15 October 1997, [1998] CEC 2502; *Guinness PLC*, *et al.,* FTC Dkt. No. C-3801, Decision and Order, Apr. 17, 1998, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,359.

Iceland from the distribution of other Diageo brands. In the United States settlement was eventually reached - after the FTC authorized the staff to go to court to challenge the deal - that requires Diageo, within six months of the acquisition of Seagram, to divest the Malibu rum business worldwide to a Commission-approved buyer, and would agree not to obtain or use any commercially sensitive information regarding four other brands Pernod will acquire which compete directly with other brands marketed by Diageo in the United States.

e. *INA/FAG Kugelfischer*[98]

This hostile-turned-friendly takeover of one German bearings firm by another was reviewed by the EC and the FTC, who were also assisted in several respects by the German Federal Cartel Office, with whom the FTC has cooperated in the past on mergers in the auto parts industry. The Cartel Office not only provided insights as to the competitive analysis, it also assisted the FTC in understanding securities rules applicable to the take-over bid.

Although some mention was made of enhancement of INA's "portfolio" of products through the acquisition of FAG, neither the EC nor the FTC found major concerns. Ultimately, the EC cleared the transaction unconditionally, while the FTC cleared it subject to a settlement in the cartridge ball screw support bearing market.

3. Mergers Working Group

As mentioned above, it was agreed at the U.S./EC bilateral antitrust consultations on September 24 to re-start the Mergers Working Group. Established in 1999, the first topic it dealt with was remedies, a project which informed and influenced the Commission's Notice on Remedies, issued in December 2000.[99] As agreed, several sub-groups have been established to examine the following issues:

a. Procedure

Many officials, practitioners, and commentators have noted the catalogue of procedural differences between the EC and U.S. merger control regimes: The EC process is "front-loaded," while the U.S. process is "back-end" loaded; the EC has inflexible decision deadlines, while the U.S. does not; the U.S. will accept a notification based on a letter of intent, but the EC will not.

Nevertheless, there are numerous cases in which parties, along with EC and U.S. authorities, successfully coordinated concurrent reviews of a merger. One of the aims of the Procedure sub-group is to examine each other's procedures and their modes of cooperation to determine whether there are steps that could be taken to make synchronization of reviews more possible and more attractive to parties.

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[98] *INA/FAG*, Case No COMP/M.2608, Comm. Decision of 18 Oct. 2001, *available at*: http://europa.eu.int/comm/competition/mergers/cases/decisions/m2608_en.pdf; In the Matter of INA-Holding Schaeffler AG and FAG Kugelfischer Georg Schafer AG, FTC Dkt. No. C-4033, press release and documents related to the decision *available at*: http://www.ftc.gov/opa/2001/12/inafag.htm.

[99] Remedies Notice, *supra*, note 83.

b. Conglomerate Effects

The EC's decision in *GE/Honeywell* is not the only one to rely upon one or another of a variety of theories including range effects, portfolio power, financial power, etc., which are not among the theories found in current U.S. Guidelines and practice. Consistent with the goal of their cooperation to lessen the impact of differences in the application of their competition laws, it was mutually agreed to establish a sub-group to thoroughly examine these issues.

c. Substantive Standard

Some say that the EC's dominance standard and the U.S.'s SLC test are different. Some argue that they can be interpreted to come to the same result. Actual coordinated enforcement experience suggests that the two standards overlap significantly; but, as cases like *Boeing/McDonnell Douglas* and *GE/Honeywell* demonstrate, there appear to be areas that do not overlap. It was agreed to make a comparative assessment of the application of these two standards. As described earlier in this paper at III.A.2.b , the timing of this examination is especially appropriate as Germany's *Bundeskartellamt* recently issued a study of the topic, the United Kingdom proposed amendments to its merger control law that would adopt the SLC standard, and the Green Paper invites views on the topic.

d. Efficiencies

In connection with its invitation in the Green Paper for comment on the substantive standard, the Commission also included the topic of efficiencies within the scope of its inquiry and invitation - specifically, how efficiencies might be taken into account in an examination undertaken under the dominance standard. A sub-group will examine this issue as well.

e. Collective Dominance

Upon the establishment of the Mergers Working Group in 1999, it was decided that, after taking up the subject of remedies, the Working Group would examine the analysis of coordinated interaction under U.S. law and collective dominance under EC law with the thought of identifying common elements in the respective methods of analysis. It is intended to carry through with this plan, but, frankly, everyone seems to be waiting with baited breath for the CFI to decide the appeal of the Commission's Air Tours/First Choice decision.

B. Other bilateral relationships

1. Canada

The Commission's enforcement relations with Canada under the 1999 cooperation agreement are now reported in the Commission's annual report to the Council and Parliament on the application of its agreement with the United States.[100] As the past year's report notes, there have been several instances of three-way, US-EC-Canada, cooperation in cases.

[100] The annual report is available at: http://europa.eu.int/eur-lex/en/com/rpt/2002/com2002_0045en01.pdf.

2. Japan

As reported last year, On July 19, 2000, the European Commission and the Government of Japan announced that they had reached a mutual understanding on substantive elements of a bilateral co-operation agreement regarding the application of Community and Japanese competition laws. In the press release announcing this development,[101] the Commission stated that the "principles set out in the future EU/Japan agreement are modeled on those laid down in the agreements with the US and Canada." The agreement, however, has not been finalized.

C. Multilateral affairs

1. International Competition Network (ICN)

As noted in last year's paper, Joel Klein, in his valedictory address in September 2000, endorsed the proposal of the International Competition Policy Advisory Committee for a "Global Competition Initiative."[102] EC Competition Commissioner Monti soon after endorsed the proposal,[103] and, in early 2001, when it appeared that some enthusiastic members of the bar were taking the matter into their own hands, DG COMP Director General Alexander Schaub gave a speech describing the EC's vision of how the global competition initiative should be organized and operated.[104]

The EC remained an active member of the group of nations that came together and, on October 25, 2001, at the Fordham Corporate Law Institute, announced the establishment of the International Competition Network.

The ICN "will provide antitrust agencies from developed and developing countries with a more focused network for addressing practical antitrust enforcement and policy issues of common concern. It will facilitate procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project driven organization.. . . By enhancing convergence and cooperation, ICN will promote more efficient, effective antitrust

[101] European Commission Press Release IP/00/739, EU and Japan reach mutual understanding on substantial elements of an envisaged co-operation agreement in the competition field (19 July 2000), *available at:* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/00/739|0|AGED&lg=EN&type=PDF.

[102] Joel I. Klein, Time for a Global Competition Initiative?, EC Merger Control Tenth Anniversary Conference, Brussels, Belgium, Sept. 14, 2000, *available at:* http://www.usdoj.gov/atr/public/speeches/6486.htm.

[103] EU Competition Commissioner outlines ideas for an international forum to discuss competition policy issues, Commission press release IP/00/1230 (Oct. 27, 2000) *available at:* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/00/1230|0|RAPID&lg=EN

[104] Alexander Schaub, The Global Competition Forum: How it should be organized and operated," remarks before the European Policy Center, Brussels, 14 Mar. 2001, *available at*: http://europa.eu.int/comm/competition/speeches/text/sp2001_003_en.pdf.

enforcement worldwide. Consistency in enforcement policy and elimination of unnecessary or duplicative procedural burdens stands to benefit consumers and businesses around the globe."[105]

2. WTO - Doha understanding

As noted in last year's paper, the EC has recommended that negotiations be opened within the World Trade Organization (WTO) concerning competition policy and how it might be incorporated into the WTO framework.

EC Trade Commissioner Pascal Lamy and U.S. Trade Representative Robert Zoellick worked through much of last year to develop an acceptable set of topics for negotiation in a new round of trade talks hoped to be launched in Doha in November. Ultimately, they were successful as agreement was reached to launch a new round of trade negotiations.[106] The EC could claim some measure of victory in the area of competition policy, for the Doha Declaration included the following statement:

> Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

So, competition policy is still alive as an issue but, according to the language of the declaration, another decision must be taken by consensus at the next Ministerial meeting before negotiations can begin.

The Declaration went on to authorize the Working Group on the Interaction between Trade and Competition Policy to continue its work, focusing on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.[107]

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[105] For information concerning the establishment, membership, and operation of the ICN, visit its website at: http://www.internationalcompetitionnetwork.org/index.html.

[106] For materials concerning the agreement reached at Doha, visit the WTO's website at: http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[107] Doha Declaration, ¶¶ 23-25, *available at*: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction.

V. What to "stay tuned" for in 2002

A. CFI decision in *AirTours/First Choice*

The outcome of this case - specifically, as to the criteria for assessing collective dominance - will have an impact on another possible development in 2002, the issuance of:

B. Notice on collective dominance analysis

Commission officials have said that they would like to issue guidelines on collective dominance analysis - but, they would wait pending the outcome of the *AirTours* case in the CFI.

C. Departure and replacement of the Director General

In September 1999, as part of the reforms introduced with the new Commission, it was decided that Directors General would serve no longer than seven years in such a post. Alexander Schaub's time is up in 2002. The post does not have to go to a German anymore either. Speculation as to a replacement has focused on two Englishmen, Philip Lowe, the second Director of the Merger Task Force, and Jonathan Faull, who has held several high-ranking positions in the Competition Directorate.

D. More routine US/EC cooperation

Cases are pending even as we meet that may be discussed at this forum next year.

E. Green Paper followup

European Parliament elections - and, concurrently, the appointment and confirmation of a new Commission - occurs in 2004. The Commission will have to decide whether to try to obtain legislative amendments based upon Green Paper-inspired recommendations before then.

GLOSSARY OF TERMS

Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, is colloquially referred to as the EC's Merger Control Regulation (hereafter "MCR.") The formal title contains several terms in "Euro-English" that may need clarification:

• Although called a **Regulation**, it is equivalent to a Federal statute in the US. Council Regulations are proposed by the Commission, considered by the Parliament, and adopted by the Council of Ministers; changes to a Council Regulation must go through the same process.[108]

• **Concentration** is not a 1950s TV game show or a state of mind; it is a term that encompasses mergers, acquisitions of control,[109] or creation of joint ventures that "perform on a lasting basis all the functions of an autonomous economic entity."

• **Undertaking** has two meanings: The first is any entity carrying on an economic activity regardless of its legal status or the way it is financed (thus covering non-profits);[110] that is the meaning of the term as it is used in the MCR's title. The other meaning is a legally-enforceable commitment (*e.g.*, divestiture obligations in a consent agreement).

• **Turnover** is not a pastry; rather, it is the term used in the MCR to establish the jurisdictional thresholds; it is total sales minus sales- or value-added taxes (roughly the same meaning as "revenue").

• **Form CO** is the mandatory pre-merger notification form.

• **Proceedings** (often referred to as "**second phase**") is the term used for the series of events triggered by a finding that a proposed concentration raises "serious doubts" about its compatibility with the common market. Proceedings must be concluded within four months (*i.e.*, five months after notification); if the Commission fails to issue a decision within that deadline, the MCR grants clearance of the proposed concentration in the form notified. Proceedings include issuance of a **Statement of Objections**; a formal **hearing**; proposal of **undertakings** by the parties to settle the case; and consideration of the Commission's proposed decision by an **Advisory Committee** of representatives of Member State antitrust authorities.

• **MTF** is the acronym for the **Merger Task Force**, the unit of the European Commission's Competition Directorate (**DG COMP**) responsible for enforcement of the MCR. (Since the 1995 reorganization of DG COMP, the MTF is officially referred to as Directorate B.)

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108 The Commission may issue implementing regulations, such as those which created the premerger notification form (CO) and which provided details as to time limits and hearings.

109 The acquisition of a minority shareholding, therefore, is subject to the MCR only if it would establish control of the undertaking.

110 The term is used but not defined in the Treaty. For references to authoritative definitional sources, *see* C.S. Kearse, EEC Antitrust Procedure (3rd ed. 1994), at § 1.05.

- **“Referral” provision:** Under Article 9 of the Merger Regulation, the Commission may refer a merger case within its jurisdiction to the competition authorities of a Member State where the merger affects a distinct market in that Member State. This is sometimes still called the “German” clause, denoting the source of its origin in the Merger Regulation.

- **Qualified Majority Vote (QMV):** Some Council decisions still require unanimity among the 15 Member States; but, many decisions can be taken by a "qualified majority" - 62 out of 87 votes. The Member States are allocated votes as follow: Germany, France, Italy, and the UK each have 10; Spain has 8; Belgium, Greece, the Netherlands, and Portugal each have 5; Austria and Sweden each have 4; Denmark, Ireland and Finland each have 3; and, Luxembourg has 2 votes. Thus, three large states acting together or any combination of small states totaling 25 can block a proposal.

RECENT TRENDS AND DEVELOPMENTS IN ANTITRUST/COMPETITION LAW (MERGER CONTROL, ANTICARTEL ENFORCEMENT, AND INTELLECTUAL PROPERTY LICENSING).

By: Steven P. Reynolds, Senior Counsel – Law Dept., Texas Instruments Incorporated, s-reynolds1@ti.com ACCA National Conference (Program 503), October 22, 2002.

It has been a busy couple of years in the antitrust/competition law world since we last ran this program at the 2000 ACCA Meeting here in Washington DC. This memo sets out some of what I believe to be the most interesting developments from the 2001-2002 period in the three areas that we will be covered during our program. This necessarily excludes many of significant events involved other aspects of these laws, such as the Microsoft saga.

MERGER CONTROL

1. US raises pre-merger thresholds ($15 million to $50 million) but lots of action to strengthen process (e.g., tough action against those who fail to disclose required 4c documents) and selectively prosecute cases that fall below the thresholds.

The US reduced its merger pre-review caseload by raising the threshold from $15 million in assets or revenue to $50 million. Just in case companies took this to mean that anything goes below $50 million, the agencies have taken at least four actions against below threshold transactions. Parties and counselors must remember that the HSR thresholds refer only to transactions that required pre-closing notification, but does not limit the government's jurisdiction to challenge transactions even post-closing. Think you are safe if the "eggs are scrambled?" The US has now in two cases sought the remedy of disgorgement of profits in such cases. They have also continued the war against companies that try to game the HSR process by not providing the required 4c documents. A great illustration of some of these points is the matter of the Hearst Trust. In January 1998, Hearst's First Data Bank acquired its only competitor Medi-Span, Inc. and failed to include key documents as required by section 4c of HSR. Following the transaction, Hearst increased prices for its database products and customers complained to the government. In two actions filed in 2001, the government has gone to war. First, Hearst was forced to refile its HSR documents and then fined $4 million. Second, the FTC is asking the district court to order Hearst to create a viable new competitor to replace Medi-Span and seeking a disgorgement order to forfeit Hearst's post-closing profits. FTC statements (a divided set of commissioners) note that they would seek the latter remedy only in exceptional cases – such as exist here with merger to monopoly, significant post-closing price increases, and 4c violation.

2. The number of countries with merger control regimes continues to grow; but with trend to conform regimes to more standard model.

The volume increases as more and more countries join the list. Fortunately, however, there is a trend toward greater harmonization on certain models for pre-closing notification regimes. Ireland, for example, used to have an unusual set of thresholds that theoretically caught almost every transaction but moderated this by providing for a short form option. Effective January 1, 2003, Ireland moves to a new regime that is turnover/revenue based and requires some business activity in Ireland by both parties. This conforms more to the dominant European model.

3. Hot on the heals of the controversial *General Electric* and *Schneider* decisions, which angered parties in US and France respectively, the EU commences a review of its 12 year old merger control regime.

Commission adopted Green Paper on the review of the Merger Regulation in December 2001. Comments were taken through March 2002, which are now being analyzed with a view towards creating proposals for amendment of the Merger Regulation by the end of this year. It is not clear how much change in substantive law will result (or that frankly in practice is needed), but likely outcomes are Commission guidelines to help better explain the analysis process and reform of some procedural aspects of the Regulation. The most urgently needed is a solution to the problem of no means of timely judicial review of Commission decisions. See http://europa.eu.int/comm/competition/mergers/review/. (green paper, submissions and press releases on topic).

4. Too late to matter, but the European courts for the first time strike down a Commission decision opposing a merger transaction.

In the EU system, the Commission serves as both prosecutor and, in effect, court of first instance/trial court. It is an administrative process not requiring the Commission to seek judicial relief to prevent a transaction. Parties may appeal Commission decisions to the European courts, where issues go to the Court of First Instance (somewhat inappropriately named) and then perhaps to the Court of Justice. Since decisions can take years, this mechanism amounts to a useless remedy in merger transactions. Nevertheless, some parties press forward with appeals. In 2002, for the first time in the 12-year history of the Merger Regulation, the European court has struck down a decision of the Commission. The Commission had rejected the Airtours merger. While the decision comes far too late to salvage the 1999 transaction in question, it shines a spotlight on some shortfalls of current Commission case handling and comes at an opportune time given the ongoing review of the Merger Regulation. See case at http://europa.eu.int/cj/en/jurisp/index.htm (search for Airtours or Case T-342/99) and Commission's press release at. http://europa.eu.int/rapid/start/cgi/guesten.ksh (search for Airtours).

5. Canada and US both wrestle with "efficiencies" defense.

Since the early 1990s, both the US and Canada have published guidelines on merger control enforcement. See http://www.ftc.gov/bc/docs/horizmer.htm and http://strategis.ic.gc/SSG/cto/026e.html. Each contains sections on the efficiencies affirmative defense (in Canada) or factor in analysis (in US) (i.e. that benefits to economy from the transaction may overcome its anticompetitive effects). In 2001, the defense saw judicial tests in both jurisdictions. In the US, the D.C. Circuit Court of Appeals agreed with the FTC, reversing a lower court decision that had accepted an efficiencies defense justified Heinz's acquisition of the Beech-Nut baby food business. A key takeaway is to emphasize the government's point that efficiencies must be passed on to purchasers or outweigh the anticompetitive effects of a transaction. Canada's guidelines appeared to create a much easier standard for companies claiming efficiencies, but an appellate decision in Superior Propane has moved Canada's view closer to the US in considering the effect on purchasers. See http://decisions.fct-cf.gc.ca/fct/2000/2001fca104.html.

ANTICARTEL ENFORCEMENT

1. Other countries follow US model by creating leniency programs.

The highly successful US model of granting leniency to those parties turning in cartels has gone global. The EU adopted its new Leniency Program in February 2002 (updated an earlier one from 1996), joining a diverse set of countries from different corners of the globe (including Brazil, Czech Republic, New Zealand and several EU member states). The EU policy now provides complete immunity from fines to the first member of a price-fixing cartel to enable the Commission to bust an undetected cartel. See http://europa.eu.int/comm/competition/antitrust/leniency/.

2. EU gets tough on cartels

In 2001 the Commission imposed fines of 1.8 billion Euros on some 60 companies, including the high profile international vitamin, food additives, and graphite electrode cartels. The 2001 total was greater then the cumulative history of fines since establishment of the EU. Mario Monti was quoted as saying, in reaction to the vitamins cartel, that he regretted that jail was not a possibility. A key objective of the Commission push to decentralize enforcement is to increase focus on international cartel busting. The graphite electrodes case, for example, involved companies from US, Japan and Germany and faced prosecution by authorities in US, EU and Canada.

3. US continues the heat

The US has been tough for years in this area, but it is said that the late 90s *ADM* case took it to an entirely new level. This trend continues. Prison time is getting longer – a New York City area executive received 63 months in prison in November 2001 for big rigging. See http://www.usdoj.gov/opa/pr/2001/November/01_at_585.htm. Since 1997, 30 senior executives (eight foreign nationals) have gone to prison. Fines are now routinely north of $100 million in international cartel cases. The range of industries being investigated is broadening – witness the recent investigation into allegations of price fixing in the DRAM market.

4. UK considers adding prison time to its arsenal – a new trend?

Only a handful of countries provide jail time as a possible penalty, among a relatively small group that even considers antitrust violations as criminal matters. Outside of the US, Canada is believed to be the only country that has imposed such a sentence. The Blair government has proposed the UK criminalize certain competition law violations and provide for prison sentences for cartel behavior. Despite opposition, this measure is expected to become law by year-end.

INTELLECTUAL PROPERTY LICENSING

1. Both US and EU in study mode - FTC/DOJ hearings on intellectual property and antitrust and EU review of the technology transfer block exemption (TTBE).

In 1995, after hearings and studies on the issues, the FTC and DOJ issued guidelines on IP licensing and antitrust law. In 2002, the agencies have kicked-off a new round of hearings revisiting these issues, expanding the scope to cover IP more broadly, and added new issues (such as standard-setting activity) to the mix. The agencies have thoughtfully provided extensive materials from the hearings on a dedicated website. http://www.ftc.gov/opp/intellect/index.htm or http://www.usdoj.gov/atr/hearing.htm. A report is expected sometime later this year.

The EU is also in study mode, having put out in December 2001 an evaluation paper on its technology transfer block exemption (TTBE) regulation (no. 240/76). See http://europa.eu.int/comm/competition/antitrust/technology_transfer/. Significant changes in both structure (e.g., expansion of TTBE to cover a broader range of licenses and elimination of the grey clause procedures) and substance (e.g., a reduction of the black list clauses consistent with economic learning and the changes in Commission vertical restraints practice) are likely.

2. <u>US affirms its position on right of patent holder to exclude (*CSU v. Xerox*), while EU continues trend to force licensing in exceptional cases (*IMS Health*).</u>

The most significant difference in US and EU practice with regard to refusals to license by IP holders is that US law has continued to uphold such a right, while the EU has in exceptional cases imposed a duty to license. The Federal Circuit continued this trend by upholding Xerox's right to refuse to license copier service providers to IP-protected Xerox parts. The U.S. Supreme Court refused cert on the case in spring 2001. The Commission found yet another exceptional case and imposed a duty to license on IMS Health, a US company that produces pharmaceutical databases.

3. <u>US continues enforcement actions against both cartel behavior masked by licensing (*Wind River Systems*) and behavior in the standards arena (*Rambus*).</u>

Since enforcement against IP licensing practices began again, after a couple decade hiatus, in the 90s the agencies have focused attention on situations where parties enter into a cartel-type arrangement (usually market allocation and non-competes) using IP licensing as cover. These cases seem to fit into two categories: (a) those where the IP itself is non-existent or weak ("sham" IP cases) and (b) those where the license is used to cover a withdrawal from the market of a competitor's product. This year, the FTC continued that traditional with action against Wind River Systems and Math Works in a type b case. See http://www.usdoj.gov/opa/pr/2002/June/02_at_365.htm. (press release). A more recent development has been a focus on the activity of IP holders participating in standards activities. Again in 2002, the FTC has filed suit against Rambus alleging misconduct through withholding of critical information about issued patents and applications. See http://www.ftc.gov/opa/2002/06/rambus.htm (press release).

MERGER CONTROL LAWS: GETTING A DEAL THROUGH MULTI-JURISDICTIONAL REVIEW

A paper supplementing a program to be held on October 16, 2001 at the American Corporate Counsel Association (ACCA) national conference in San Diego, California USA.

By: Steven P. Reynolds

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SUMMARY

The global merger control environment is a mixed situation.

- Good News. Convergence in substance is happening, in no small measure due to communication between agencies. Decisions are more likely to be based on "competition-only" reasons, non-discriminatory treatment, and greater transparency in substance and process.

- Bad News. As more countries add pre-merger notification requirements, including many jurisdictions that may lack the resources and expertise of first tier agencies, the potential complexity of managing the process increases. The volume is increasing and therefore the costs.[1]

This paper, and the program that it accompanies, presents an overview of the global merger control environment, and presents practical strategies for in-house counsel to navigate in this environment.

CONVERGENCE IN SUBSTANCE?

A. Substantive merger control regimes can be classified into three categories:

1. Those that prohibit or control anticompetitive mergers - "competition only" jurisdictions
2. Those that prohibit or control mergers that enhance dominance – "competition only" jurisdictions
3. Those that prohibit or control mergers either 1 or 2 unless there are other advantages to the country – "other factors " jurisdictions

[1] The author credits Barry Hawk of Skadden, Arps, for his description of the problem as one of "volume", not differences. See ICPA hearings, Nov. 3, 1998, http://www.usdoj.gov/atr/icpac/2252-b.htm

The US, Canada and Australia are good examples of Category 1; the EU and most of its member states of Category 2; and France of Category 3.[2]

Additionally, merger control laws develop as a part of different legal systems and in countries in differing stages of economic development.

With different starting points, one can imagine that very different substantive rules have developed. This divergence has led many commentators and organizations to argue for common standards perhaps within the framework of an international organization.

In response to calls from various quarters for formal international competition structures, Joel Klein, then assistant attorney general running DOJ's Antitrust Division, argued that a preferable approach is "soft" harmonization through communication and cooperation between agencies.

B. One of the best illustrations, and the most critical in practice, is the evolving US-EU relationship.

1. The EU and US have different starting points of emphasis, although both are clearly in the "competition only" camp.[3] The US emphasis is on preventing anticompetitive transactions, with a primary focus on collaborative effects (i.e., increased industry concentration may increase risk of reduced competition on price, quality and innovation between participants). The EU starting point is trying to prevent dominance. This leads the EU to focus primarily on single firm/unilateral effects (i.e., attempts by a dominant firm to abuse its position to detriment of customers and competitors).

Many of the differences between US and EU merger practice can be traced to these different starting points:

a. Focusing on preventing abuse by dominant players leads the EU to find dominance at lower market share thresholds. Market shares can drive strong presumptions. Dominance is often found at 50%, in some cases maybe even 40%. The US uses a broader approach since it is more concerned with overall market concentration. US authorities tend to find dominance only at much higher market share levels. The respective positions taken by the agencies in evaluating the Boeing-McDonnell

[2] The distinction is frequently blurred when viewing government policy as a whole. The US, for example, provides for dual agency review in a number of important economic sectors. Decisions by agencies like the FCC, the FERC, the National Surface Transportation Board, etc., may not be motivated by "competition only" factors.

[3] I am using the phrase "competition only" to mean that the agencies evaluate a transaction based on whether it is anticompetitive or enhances a dominant position and do not include considerations such as national industrial policy (e.g., creating national champions), preserving jobs, or other such factors. Of course, even in "competition only" jurisdictions there may be exceptions, such as national defense. These exceptions can be part of the competition law, or found in separate statutes. In the U.S. the Exon-Florio act permits Congress to prohibit an acquisition of a US company by a foreign acquirer, where the deal would threaten national security interests. A recent example is SVG-ASM where the US considered intervening against a proposed acquisition of a semiconductor equipment supplier.

Douglas merger is a good example of how these views can result in differing analysis. Boeing acquired its US competitor with impacts on both the commercial and military aviation markets. There was consensus on market definition, including a common view that the proper geographic market was global. Concentration levels likely concerned US authorities (in commercial aviation, three competitors becoming two), but not the likelihood of Boeing becoming dominant (because Boeing faced a strong global competitor in Airbus), and found that other factors justified the transaction. In one market, Boeing's market share would increase from 64% to 70%. The EU was far more troubled with 70%. The transaction ended up going through, but only after Boeing made concessions to the EU Commission.

b. The US agencies focus heavily on the effect of a transaction on consumer interest and reject a belief that competition laws should protect competitors. It can more readily accept companies holding sizable market shares, so long as there is not a strong likelihood of concerted effects. The Boeing example again illustrates this thinking. As long as the market structure suggested that Boeing and Airbus would tend to compete vigorously, and thus benefit consumers of their products, and not act in concert to reduce competitive pressures, then in this situation a two-company market with a market leader was acceptable. The EU, and even more so the national competition laws in Europe, maintain a partial focus on market opportunities for remaining firms. This flows from and helps to reinforce a view that preventing abuse of dominance is critical. This difference in emphasis also explains the relative influence of competitor inputs in merger analysis. A "consumer focus" emphasis naturally treats the views of competitors as inherently suspect (i.e., they have an incentive to lie in order to prevent transactions that would increase competitive pressures in the markets that they operate in). A "market opportunities focus" emphasis would tend to treat competitor's inputs as at worst neutral inputs. If so, then this tendency explains why many observers feel that competitors get more influence in Europe than US.

A related factor, or perhaps really a variation on the "other factors" jurisdictions model of merger control review, is whether an agency considers the impact of a transaction on small and medium sized businesses.[4] US agencies do not consider this relevant. Although the EU includes special considerations for small and medium sized business in many of its policies, it is not a factor in merger review.

2. These differences are, however, being mitigated in practice as the US and EU move towards "soft" convergence.

a. Market definition

Both agencies share a common methodology for analyzing proper product and geographic market definition. The test is a demand substitutability

[4] South Africa, for example, expressly includes a concern for impact of small and medium sized businesses in its statute.

analysis, looking to see what products and from what areas consumers would turn in the event of a small but significant nontransitory and small price increase (SSNIP).[5] The US Horizontal Merger Guidelines talk in terms of a 5 to 10% price increase. The more recent EU Market Definition Notice is remarkably similar to the US document.[6] This generally means that first tier agencies will reach similar opinions on market definitions, particularly if they can communicate with each other during the process.[7]

b. Concerted vs. unilateral effects

Both parties have increasingly grown to appreciate the starting point concern of the other and, in fact, recognize the legitimacy of these concerns in terms of their own competition mission. Without changes in legislation, US agencies have moved towards consideration of unilateral effects analysis (EU's historical focus on single-firm dominance); likewise, the EU Commission has moved towards review of collective dominance issues (US's historical emphasis on post-merger coordinated effects).

c. Coordination on process and remedies

The most important area of "soft" convergence between the US and EU has been in the area of formal and informal coordination between agencies both generally and specifically during merger reviews and an effort by agencies from both jurisdictions to work together to coordinate appropriate remedies.

C. A US/EU convergence should drive global "soft" convergence

Add Canada, another jurisdiction applying the evolving global substantive analysis and whose agency actively cooperates with US and EU authorities, and the great bulk of cross-border investment flows take place under this umbrella. These evangelist jurisdictions are expanding the umbrella: the NAFTA brought Mexico into modern antitrust consensus and is influencing trends in South America; and the EU merger regime led first its member states to enact national schemes[8], but now also is influencing compatible systems in countries aspiring to membership.

What is the evolving substance of merger control law? The head of an important competition law enforcement agency has presented the following 7 steps for merger analysis:

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[5] DOJ-FTC Horizontal Merger Guidelines (1992) (revised 1997) (http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html)

[6] EU Market Definition Notice (1997) (web link) The notice is virtually identical in adapting the US HMG's demand substitutability standard, even specifically the HMG's hypothetical monopolist 5-10% price increase test. It also moves closer to the HMG in downplaying the importance of supply substitutability.

[7] Exceptions will always exist. A particularly likely area is in defining product market definitions for technology products – given the inherent complexity.

[8] At the time the EU introduced merger review (1990), there were only two merger review regimes (a mandatory filing scheme in Germany, and a voluntary filing scheme in France) among member states. Today, 14 of the 15 EU member states have merger review regimes, with the vast majority including mandatory filings.

1. Define the relevant market (geographic and product)
2. Identify the market participants
3. Define the market structure
4. Identify the conditions of entry
5. Determine if there are presumptions of anticompetitive effects
6. Assign efficiencies
7. Test any failing firm argument

This list comes not from US or EU officials, but the head of Brazil's Administrative Council for Economic Defense (CADE).[9]

D. Differences, while fading, remain

The best illustration is probably the Boeing case introduced earlier. Like a mirror, Boeing reflected back a vision unique to the contemplator: Press and politicians on both sides of the Atlantic saw faulty government logic on the other side, company officials (both Boeing and Airbus) saw politics and its competitor's undue influence, scholars saw substantive differences (most notably the EU's starting focus as dominance and unilateral effects) explaining different results, and agency officials saw their common bond strengthened.[10]

In the post-Boeing era, the US and EU move substantively closer, but differences remain among jurisdictions.[11]

- Competition-only versus other factors

  The evolving global consensus agrees that merger control should be based on "competition only" analysis. As noted above, historically many jurisdictions based their merger control regimes on a broader "other factors" basis. Some are giving way as globalization forces conformance, e.g., the UK recently shifted from a "public interest" standard to one like the EU.

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[9] Lucia Helen Salgado "Doing Business in Brazil with the new Competition Law Framework", available on CADE website. Compare to the section titles in the US guidelines: (1) market definition, measurement and concentration (covers 1-3); (2) potential adverse competition effects (covers 5); (3) entry analysis (covers 4); (4) efficiencies (covers 6; added to US guidelines in 1997 revision); and (5) failing and exiting assets (covers 7).

[10] The ICPAC report (see discussion infra pages 12-13) contains an excellent summary of the Boeing saga, including differing views on the case.

[11] This year's failed General Electric – Honeywell transaction illustrates that US-EU differences will still occur. Like with Boeing, political commentators (including unfortunately some high-level US officials outside of the antitrust community) tried to argue that the EU was acting out of non-competition law concerns. Tellingly, Jack Welsh, CEO of GE, has in interviews rejected these arguments while maintaining that he thinks the Commission's analysis was mistaken.

- Industrial policy plus other factors

  Even in "competition only" regimes, there remains a risk that other government agencies will interfere, trying to support "national champions", preserve jobs, etc., even though the competition agency would not otherwise consider these factors. Where judicial review is weak or non-existent, this could be a very serious concern.

- Role of judiciary

  The judiciary plays a larger role in US, then in EU or generally elsewhere. Procedurally, the US agencies must file suit to enjoin a transaction, while the EU Commission has its owns internal powers to do so. Judicial review of Commission decisions is rare and in practice comes too late. Judiciaries are not a direct player in "soft" harmonization and could sabotage the result.

- Resources and expertise of agencies in emerging markets

  Applying the emerging consensus requires an agency to be relatively sophisticated and have adequate resources. Resource poor agencies pose a threat in two dimensions: they may tend to be captive to national industrial influences or other government agencies (perhaps with motives that differ from competition analysis); and they may prove difficult to deal with – failing to work under deadlines, wasting time and resources on insignificant data inquiries, and failing to understand sophisticated arguments.

- Differences on "defenses" like the impact of efficiencies and failing firm arguments

  All "competition only" regimes would agree with CADE's first 5 steps, but differences remain on numbers 6 and 7. The EU tends to reject efficiency arguments. The US introduced efficiency concerns to its guidelines in 1997 and very rarely would entertain a failing firm defense. Canada, by contrast, expressly acknowledges efficiencies in its statue and has recently accepted efficiency arguments in an important case.

- "Experimental" cases from first tier agencies make it hard for the rest to keep pace

  While the "first tier" agencies have made significant contributions towards driving an emerging consensus and assisting agencies in "newer" jurisdictions, there is one area in which the sophisticated, resource rich, agencies can complicate the problems faced by less endowed agencies. An inherent danger of sophisticated agencies is that they have a tendency to explore the limits of competition law theory and attempt to convert recent economic thinking into legal practice. This is in part a natural effect of keeping competition law flexible and adaptable and also a natural human tendency on the parts of the talented and dedicated staffers of these agencies to want to explore new horizons. Some recent examples from the US camp include the definition and focus on innovation markets, and a case like Staples-Office Depot where the FTC in essence skipped the step of market definition.

CONVERGENCE IN PROCESS?

A. Seventy different jurisdictions[12]; 70 different sets of procedural rules – thresholds, forms, filing fees and waiting periods. They can, at least, be categorized as follows:

1. pre-notification and/or post-notification systems

   Some countries require notification only after a transaction has been completed, but most have created pre-closing filing requirements.[13] Most pre-closing filings prohibit closing of the transaction pending review. Certain jurisdictions require pre-closing filings for more significant transactions and only post-closing filings are smaller transactions.

2. mandatory or voluntary filings

   The vast majority of the systems require parties to make filings if the threshold requirements for jurisdiction are met. Some notable examples of voluntary systems include the UK and Australia.

3. short or long forms

   The length and content required by the differing notification forms varies considerably. Some forms are relatively simple, while others are long and complex. Compare the lengthy EU form CO to the relatively simple US HSR form. There are often very good reasons for differing form requirements. The US agencies review thousands of transactions per year and so cannot afford to ask for more then basic information at the initial filing. Where there are potential issues, or just the need for more information, the US agencies will contact the parties' counsel and try to gather supplemental information prior to the conclusion of the waiting period. This is sometimes called the one and a half phase request. If the agencies decide to investigate, then the much more extensive second phase information requests will create enormous information disclosure obligations. The EU, by contrast, reviews only a couple hundred transactions per year. The Commission can afford to review more extensive data on each filing; especially since the filing thresholds mean that only significant (at least in size) transactions qualify.

   Canada uses an intermediate system

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[12]. Estimate of current number of jurisdictions maintaining merger control regimes by FTC's Randy Tritell, February 27, 2001. Mr. Tritell also notes that the number was 20 a decade ago and that dozens of additional countries have legislation in process.

[13] Some jurisdictions offer hybrids. Brazil does not technically require pre-closing filings. It requires filing within 15 business days closing a signing of document that shifts relationship of competitors to cooperation. Given the vagueness of this provision, most companies file within 15 days of signing definitive agreements, making it in most cases a pre-closing filing.

Canada uses alternately short or long form filings. Parties may, and almost always do, elect to file a short form. This form is more detailed than the HSR form (industry, for example, top 20 customer/supplier contact information and a list of foreign filings on the deal), but does not require filing of documents like under HSR 4(c). Canadian authorities can before expiration of the 14 days waiting period, require the parties to submit a long form – which is more along the lines of the EU's form CO and, additionally, requires document production that is more expansive then HSR 4(c) requirements (but far less onerous then a US second request). To avoid the risk of having to file a long form, parties will in many cases file briefs and supplemental information along with their short form filing. This type of short form "plus" can be seen as roughly equivalent to the increasingly frequent "one and a half" phase review in the US.

4. forms that require parties to take legal positions and those that require only objective information

   Some jurisdictions require parties to supply only objective information, such as identification of the parties, a description of the transaction, and revenue or asset figures. Others require the parties to state their views on critical legal positions, such as the definition of relevant product and geographic markets. One can again contrast the US (objective) and EU (objective and subjective) positions. The majority of jurisdictions, especially those in Europe, follow the EU model. The latter requires parties to make strategic decisions on approach at the time of filing and certainly requires parties to coordinate their filings in different jurisdictions so as to avoid inconsistencies.

5. what documents have to be included with the forms

   Most forms require only basic additional documents, such as company financial statements, while others require additional documents. The US approach of a simple form is supplemented by the requirement that parties include copies of certain documents prepared by or for company officers discussing market impacts of the transaction. In jurisdictions like the US, counsel need to prioritize early stressing the importance of careful drafting so that ugly documents do not complicate review.[14]

6. thresholds that cast expansive nets or those that aim to look only potentially significant transactions

   Most jurisdictions maintain an "effects" jurisdiction, meaning that selling to customers located in the country is sufficient even absent existence of a subsidiary or other physical presence in the country. Combined with low sales

[14] The US second request creates consideration document intensity and production burden on the parties akin to US-style litigation pre-trial discovery. Foreign attorneys find the practice shocking. US agencies can make second request demands on their own initiative, by contrast of Canadian agencies, for example, must seek a court order to expand "discovery" beyond that required in a long form filing.

thresholds, or purely worldwide sales thresholds, "effects" jurisdiction can cast a very wide net catching many clearly insignificant transactions.[15]

The pre-February US rules[16] and the German rules, for example, caught lots of transactions. The EU merger regulation catches only very large deals. Many regimes use two tests – one designed to ensure that significant transactions are caught and the other to reduce filings by eliminating transactions that are not likely to have much impact on the country. The Swiss law, for example, contains a test, which focuses on the worldwide sales of the parties and sales of the parties in Switzerland. The worldwide sales test catches transactions involving large companies that operate in Switzerland. The Swiss' sales test then fails to catch transactions where there are insufficient sales in Switzerland. Other jurisdictions, like the US, have exemptions for foreign transactions under only minor impact in country. Some jurisdictions try to "miss" insignificant transactions by requiring a market share threshold. In some the older versions, such as that of Belgium, the test is sales and market share (the former catching large deals and the latter avoided those that do not effect a large share of a relevant market). Some newer versions, like that of the recent revisions to Poland's law, use three tests (global sales, sales in Poland, and market share), adding market share thresholds as an additional way to exclude minor transactions.

7. clear thresholds standards versus those requiring market share estimate

   Many countries initially adopted market share thresholds. The concept was to eliminate filings in transactions that do not pose a threat to competition.[17] However, well intentioned, countries that use market share thresholds create inherent uncertainties. Where market definition is not clear this can raise issues of whether parties should file or not. This can be burdensome and neither choice is safe. Do the parties file based on a perhaps too narrow market definition for fear that if not they may be subject to fines for non-compliance, or do parties choose not to file, based perhaps on a too broad market definition, for fear that declaring the more narrow market definition will handicap them in the substantive analysis/review of the transaction.

8. filing fee or not

   Many countries have no filing fee, but the success of the U.S. system in providing funding for its agencies is having an influence as more countries add fees. At least 12 countries now impose fees. Some fees are fixed, or like the post-

[15] Countries using effects jurisdiction still face practical enforcement difficulties in imposing penalties or remedies against companies lacking physical presence in their jurisdiction.
[16] Effective February 2001, the US increased its thresholds in an effort to reduce the number of filings. The clearest example was the increase in the size of transactions test from $15 million to $50 million. FTC staff estimate that the threshold increases will reduce filings by 50%.
[17] The practice was very common in Central and Eastern Europe, and some EU countries like Belgium and Greece. Some trace this emphasis to Section VII of the EU's form CO which focus attention on markets where share thresholds are exceeded. (see Attachment A).

February U.S. rules tiered based on deal value,[18] while others "float" depending on the agency's subsequent estimate of the workload burden.[19]

9. timing rules that aim to clear easy cases within 30 days and on a timely basis address complex ones

   Most systems follow a model of an initial phase, generally 30 days, during which most transactions will be quickly reviewed.[20] In situations where the agency subsequently decides to investigate, the notification process moves to an investigative phase. Even with these jurisdictions, there can be differences. The EU's investigative phase is subject to strict deadlines – it must be completed within four months of the initial filing. The US investigative phase, by contrast, is subject to much looser requirements. Some jurisdictions retain older systems containing a unitary review, often with no firm deadlines. The emerging consensus (global soft convergence) has made inroads here, as agencies have in many jurisdictions made great strides in improving review periods.[21]

10. fixed deadlines for fixing or flexible requirements

   The US regime is flexible – parties may file based on preliminary documents like a letter of intent[22] and do not impose a deadline of filing timing. A party, for example, might choose to file after signing of LOI or alternatively might choose to wait weeks (or more) after signing definite agreements. Other regimes impose rigid rules. The EU requires filing within 7 days of signing of a definitive agreement and will not accept filings based on preliminary documents.[23]

B. There have been numerous effects to seek convergence in process among jurisdictions, but with only limited success. Germany, France and the United Kingdom agreed on a common merger filing form that parties could use to notify transactions in all three countries, while retaining their original forms. There has been little to no use of the new procedure, although in part this might be because only the German regime requires filing.[24] The OECD issued a model merger filing form, but to date has seen no takers although this and other efforts of the OECD to converge merger control processes have influenced some regimes.

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[18] The pre-February 2001 U.S. rules contained a fixed $45K fee. Today, the rules call for three tiers of fees based on deal values. Beginning in 2005, these fees will increase per an inflation factor.

[19] The German Bundeskartellamt determines the required fee after the transaction is complete and then sends a "bill" to the parties. The agency sets the fees based on the amount of work put into the transaction.

[20] US waiting period is 30 days, shortened by early termination to 21 days or 15 if tender offer. Canada is 14 days (if short form) or 42 days (if long form). EU is 30 days.

[21] Brazil, for example, as shifted to a two-stage process and claims to have reduced mean process and claims to have reduced mean process times from 20 months to 2.4 months. ICPAC hearings 11-2-98.

[22] Canada and Germany also allow filing based on LOI.

[23] Most European jurisdictions follow the EU lead and require filing with one to two weeks of definitive agreement.

[24] The normal German form is also simpler.

C. Robert Pitofsky, former head of the FTC, has stated that he once believed that convergence in process would be relatively easy and that convergence in substance was far more difficult, but that he today believes that the opposite is true. The facts certainly support that conclusion. While substantive differences can be driven by differences in statutory language, in practice agencies can evolve their analysis toward convergence within the flexible bounds of the statutory text. The evolving consensus between US and EU agencies in substantive analysis, despite different statutory language and historical emphasis, is an excellent example. Statutory direction in the process area is generally far more specific. Where one statute says the initial review period is 30 days and another says 60 days, the only practical way to converge is for the "60 day" jurisdiction to adopt internally a "30 day" rule of practice. Filing fees, whether notification is mandatory or not, whether the analysis is subject to judicial review or not, and thresholds are far more complex problems to "converge" given differing statutory dictates. Additionally, may procedural differences reflect profound differences in legal process and culture. The document intensity of a US second request shocks foreign practitioners, but it, in fact, flows logically from a system where the agencies must go to court to block transactions and, in general, from a litigious, "document obsessed" culture.

D. Despite the substantial differences, there has been some progress particularly as many first tier regimes have amended their systems to reduce filings or remove uncertainty. The US has increased its size of transaction thresholds, an action that should reduce significantly filings. Germany, and several other countries whose systems closely mirrored Germany's, have reduced the breadth of its reach by clarifying that its sales and asset threshold tests look to transaction-related assets. Finally, several countries have eliminated confusing market share thresholds.[25] Still the volume is bound to increase as more and more countries add regimes.

ORGANIZED EFFORTS TOWARDS CONVERGENCE IN SUBSTANCE AND PROCESS

There have been a variety of efforts, under different auspices, to formalize this effort to continue "soft" convergence in substance and process. I will discuss three such efforts in more detail.

A. Organization for Economic Co-Operation and Development (OECD)

Beginning with initial efforts years ago to encourage OECD members to enact and enforce competition laws, including merger control regimes, the 30-member OECD has been a leading actor in the search for convergence. In 1967, OECD's Competition Law Policy Committee issued a recommendation that members cooperate with each other in antitrust enforcement. This effort accelerated with the Whish-Woods report in 1994, which studied nine examples of multi-jurisdictional transactions within OECD member states.[26] OECD has subsequently issued voluntary guidelines that it recommends all OECD member states follow with regard

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[25] For example, Hungary eliminated its market share threshold in 1997. Most of the EU aspirants are moving in this direction.
[26] OECD, Merger Cases in the Real World: A Study of Merger Control Procedures (1994).

to their merger control systems and issued a proposed common merger filing document.[27]

OECD's actions have provided a useful framework, but its membership is limited[28] and its recommendations are non-binding.

B. World Trade Organization (WTO)

Some countries believe that a move to a "hard" system of convergence is needed and have proposed use of the WTO as the logical home for this effort. The EU, Canada, Japan and Korea have all endorsed this effort, but it has faced serious opposition from the US. US officials consider these proposals to be at best "utopian".

Some believe that a WTO based solution is necessary as the only way to prevent enormous costs on business as merger control regimes proliferate.[29] Others fear that even if possible, such a move might risk harmonizing bad law.[30]

C. International Competition Policy Advisory Committee (ICPAC)

In part as a response to the push for WTO involvement, the US agencies created a study group called ICPAC in 1997. This group completed work and issued a report in 2000, which called for creation of an international advisory organization to help continue the drive for "soft" harmonization, and made specific recommendations for countries to follow in enacting and enforcing merger control regimes. The recommendations are:

1. Agencies should facilitate greater transparency by making more information available to the public.[31]

2. Agencies should impose certain disciplines on their own processes:

    a. non-discriminating manner (i.e., do not consider national origin of parties)
    b. consider competition factors only ("other factors" jurisdictions should at least be transparent in application of non-competition factors)
    c. maintain political independence of agency
    d. focus on consumer interest
    e. coordinate with other jurisdictions on remedies

3. Agencies should cooperate with other jurisdictions, while protecting the rights of the parties (such as protecting confidential information)

[27] OECD, Report on Notification of Transnational Mergers (1999) (insert web cite)
[28] Many developing countries consider OECD to be a "rich man's club".
[29] Eleanor Fox at ICPAC, http://www.usdoj.gov/atr/icpac/1a.htm
[30] Barry Hawk at ICPAC: "I would rather live with different firm deadlines than a world-mushy deadline or a world-form CO or a world second request. If you're going to harmonize, don't harmonize bad law.
[31] Based on the proliferation of agency websites, and the rapid improvement in quality, this recommendation seems to have been taken seriously.

4. Agencies should consider work-sharing arrangements with other jurisdictions

The ICPAC report is an excellent reference and readers are advised to invest the time reading the document.[32]

HOW REAL IS THE PROBLEM FOR INHOUSE PRACTITIONERS? (Subtitle – Why should you be reading this paper?)

How frequent are the transactions requiring multiple agency approvals? The late Joseph Griffin, a leading practitioner, in a 1999 article wrote that "it is now relatively common for a multinational merger transaction to require notification in five separate jurisdictions."[33] Undoubtedly the late Mr. Griffin's impressions are true at the level of the private antitrust bar elite, but statistics are hard to come by.

Cross-border investment is clearly on the rise – creating an inherent stress on the system.[34] Still many deals have international aspects but do not require a filing outside the home country. Some data points:

1. In a 1999 article, Andrew White, Assistant Director of the UK's Office of Fair Trading provided data from that agency for the last six months of 1998: they looked at 115 mergers, 21 of which were notified in other countries. Of that 21, 11 were notified in one other country, three in 2 other countries, one in 3 other countries, 3 in four other countries, and 2 transactions were notified in the UK plus more than 4 other jurisdictions. The most frequent jurisdictions were the US (21), Germany (12), Belgium (4), Ireland (3), Italy (3), France (3).[35]

2. OECD data shows that the same five countries control more than 50% of total global inward and outward investment – US, UK, Germany, France and Canada. Filings in these countries (or the EU) would seem most frequent, both accepting that not all have mandatory filing requirements.[36]

3. The author took a representative sample of transactions done by his company over the past five years, selecting a dozen transactions evenly split between acquisitions and divestitures. I used a cut-off of $50 million deal value to conform to the new size of transaction test of under the US Hart-Scott-Rodino (HSR) merger notification law. The list is not exhaustive of our company's experience, but is representative and a fair sampling. The twelve transactions divide by deal

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[32] http://www.usdoj.gov/atr/icpac More ambitious readers may want to tackle the hearing transcripts.

[33] Joseph P. Griffin, "What Business People Want From a World Antitrust Code", New Eng. L. Rev. 39 (1999)

[34] OECD estimates that cross-border M&A's grew six-fold in 1991-1998. DOJ estimates that since 1990, the amount of international business in there case load has gone from 2-3% to 40%. ICPAC hearings 11/2/98.

[35] Andrew White "Is There Too Much Regulation of Mergers" in Policy Directions for Global Merger Review, p. 134-135, 1999. Some other jurisdictions report higher percentage figures. Brazil's CADE reports that almost 40%of its cases have been analyzed by other jurisdictions. ICPAC hearings 11/2/98.

[36] Add other EU countries and the figures approach 70%. See Kang and Johanson, "Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalization", 2000 (available on OECD website).

value as follows: 2 transactions over $1 billion; 3 transactions between $500 million and $1 billion; 4 transactions from $100 million to $499 million; and 3 transactions below $100 million. In ten of twelve transactions, the business involved (i.e., the specific business acquired or divested) had a physical presence in a country other then the US. These presences ran the gambit from subsidiaries used to house small sales operations, to manufacturing operations, to foreign headquartered companies. All twelve transactions qualified for required notification under the HSR rules in the US. Of these 12, we saw the need to file in additional jurisdictions in all but four transactions. (67%). In 5 transactions, we filed in two countries (usually the US and Germany); once in three countries; once in four countries; and for one transaction in five countries. In some cases, however, some of these notifications were post-closing filings only. By jurisdiction, we saw 12 filings in the US, zero under the EU Merger Control Regulation, 7 with Germany's Bundeskartellamt, 2 in Brazil, and one each with five other jurisdictions.

4. A good Internet source for information on global transactions is www.global-competition.com. Under highlights, this source provides quick listings on a bi-monthly basis of significant deals. The author reviewed all of the year 2000 postings to provide some examples of multi-jurisdictional transactions. The listing illustrates that transactions involving more than five notifications are reality and not uncommon for the leading private practice experts in the field.

   Some examples include:

   Lafarge (Fr.) acquired Blue Circle Industries (UK). Notified at least in EU, US and Canada.

   Nestle (Switz.) acquired Ralston Purina (US). Notified at least in EU, US and Canada.

   Seagram (Canada) selling its drinks business to joint bid from Diageo (UK) and Pernod-Ricard (Fr.). Notified at least in EU, US and Canada.

   Smith Kline Beecham (UK) acquiring Block Drug (US). Notified in US, EU, Canada, Australia, Poland, Romania and Turkey.

   Georgia-Pacific (US) acquiring Fort James (US). Notified in US, Canada, Ireland, Germany, Italy and Finland.

   International Paper (US) acquiring Champion International (US). Notified in US, Canada, Brazil, Germany, Austria, Greece, UK, and perhaps other jurisdictions.

   Computer Associates (US) acquiring Sterling Software (US). Notified in US, Portugal, Turkey and Brazil.

   AOL (US) acquiring Time Warner (US). Notified in US, EU, Australia, Brazil, Canada, Japan, Poland, South Africa and perhaps other jurisdictions.

   Air Liquide (Fr.) acquiring BOC (UK). Notified in US, EU, Canada, New Zealand, and Australia.

Linde (Ger.) acquiring AGA (Ger.). Notified in EU, US, Poland and Hungary.

The author draws the following conclusions from the data points set forth above: (1) for most in-house practitioners filing in more than two jurisdictions is not a common occurrence; (2) many substantial US companies have never had to fill out a Form CO, but a filing with Bundeskartellamt or another European national agency is increasingly common; (3) there is a regular flow of large value deals involving notifications in 3 to 7 countries; (4) the record is thought to be 20 different filings (Exxon-Mobil), but that is bound to be broken as the number of jurisdictions requiring filings increases[37]; (5) US, EU and Canada filings seem common in big value global transactions; (6) German filing is most likely where EU Merger Regulation thresholds are not met in deals having effects in Europe[38]; and (7) Brazil is leading developing country for filings. Readers may draw different or additional conclusions from the data.

PRACTICAL GUIDE

Here are some key points from the author's perspective on managing the process.[39]

1. The first step to successfully managing the process is to bring competition law analysis into the deal as early as possible. The author calls this "viability" analysis. In the properly aligned world, in-house counsel kill more anticompetitive mergers in the concept stage then merger control authorities ever have to investigate. Do it early! The longer the process goes, the more resources are expended, management infatuation deepens, other opportunities are missed, and momentum builds. Especially where your company is relatively new to the M&A game, plan on plenty of client education to help smooth this process.

   Apply the 7 steps consensus at the concept stage, whether your company is a prospective buyer or seller. Even early in the game, with very incomplete information, try to run the traps – assess effected countries, construct possible product and geographic markets, look at pre and post market structures; etc. There are two goals – (1) avoid wasting shareholders resources on deals that will not fly and (2) going "eyes open" and prepared on those that will or at least should, or that your board wants to gamble on, because the risk-return (including possible remedies or undertakings) appears worthwhile.

2. Consider competition law issues in deal planning and strategy. As a starting point, build the process into the deal timetable. In most deals, you add D + 30

[37] J. William Rowley of McMillan Birch (Canada) commented during ICPAC hearings that he was working on a deal that might involve 43 filings.

[38] My survey data is biased by Germany's important position in electronics markets. It also is because of relatively "easy to trip" thresholds, particularly prior to amendments to the law in 1999.

[39] For an excellent step-by-step guide with a practical checklist, the author recommends an article by Adam Frederickson entitled "A Strategic Approach to Multi-jurisdictional Filings," European Counsel (1/12/1999). The Frederickson article also contains a "merger matrix" containing detailed information on the merger control rules of any significant jurisdictions. Mr. Frederickson based the article on interviews with leading practitioners. It can be found in the ACCA virtual library.

days and close. In truth, assume D + 35 to get your filings done as simultaneous deal announcement and filings are possible but in practice challenging. With third-party assignment consents, permits, other government filings, or tender offers to manage, D + 35 just gets folded into the interim (signing to closing) period. Be prepared for the logistics of multiple filings even in the simple – no competitive impact – case.

Go beyond D + 40 and competition law takes center stage – tender offers get extended, arbitrage players start betting on deal viability and, competitors start to circle your customers and your employees. Everyone gets edgy.

For an example of timing options in US and EU review, see Attachment A.

3. Build in some risk management planning. If you are a seller, do you include direct competitors where you have other viable options? What price premium do you assign to the competition law "challenged" bidder to compensate you for the added uncertainty of closing? How do you gain assurances that a competitor is not just conducting corporate intelligence gathering, knowing full well it cannot get to closing? You can only truly begin to adequately scope these issues if you have done the initial viability assessment.

4. Educate your team. Communication on competition law aspects of doing deals, such as in the US warning of not creating foolish 4c documentation, should be part of any process,[40] but awareness should be heightened in higher risk deals.

5. Plan for remedies. Some deals will raise competition problems and wise parties plan early for possible remedies and undertakings rather then blindly rolling the dice and hoping that government inertia[41] (i.e., maybe they will be too busy to really focus on my filing)[42] or clever lawyering (i.e., client to lawyer – just convince them that the market is X) will save the day.

6. Think about the deal documents. The merger control clause need not be boilerplate, especially in higher risk or multi-jurisdictional deals.

7. D-20 Preparing the filings. With any complex filings, get the process rolling at least a couple of weeks before signing/announcing. An earlier up-front assessment puts you in position to implement quickly – gather necessary market data, make decisions of the role of retained counsel and other advisors

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[40] 4c documentation refers to those documents that must be submitted along with the HSR filing in the US. 4c refers to the section of the form that requires submittal of the documents. It covers: "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document".

[41] For an interesting article on this issue, see Mark Maremont, "For Plastic Hangers, You Almost Need to Go to Tyco International", Wall Street Journal 2/15/00.

[42] With the US filing thresholds having risen, and M&A volumes down due to weak macroeconomic and market conditions, enforcers will have more time to focus on your deal than they did last year. FTC staff have said that at its peak, they could only assign one person per file.

(economists, translators, etc.). You need to start drafting documents, especially those like Form CO, which are complex and require taking legal positions. See list of required information on Form CO in Attachment D.

Make a determination on the need to file in different jurisdictions. Some examples of thresholds follow:[43]

US - transaction effects commerce and

a. deal value is $50 million or higher (size of transaction test) and

b. (a) deal value is $200 million or higher, then no need to qualify under size of parties test or (b) deal value is less than $200 million, then one party must be $100 million in US sales or assets and another must be $10 million in US sales or assets.

EU transaction effects commerce within the EU and

a. parties have combined worldwide revenues of EUR 5 billion and at least two of the parties have individual revenues of EUR 250 million in the EU; or

b. parties have combined worldwide revenues of more than EUR 2.5 billion and in each of at least three member states combined revenues of more than EUR 100 million, with each of at least two parties having more than EUR 25 million in each of the three member states and each of at least two parties having combined community-wide revenues of more than EUR 100 million; and

c. in either (a) or (b) the Merger Control Regulation does not apply if the parties derive two-thirds or more of their revenues in a single member state.

Canada transaction effects commerce within Canada, parties have

a. assets in Canada or annual sales in, from or into Canada in excess of Cdn $400 million; and

b. if asset acquisition, value of Canadian assets acquired or annual sales in or from Canada generated by those assets is greater than Cdn $35 million; or if share acquisition, values of Canadian assets or sales in or from Canada must be greater than Cdn $35 million.

Brazil effects commerce in Brazil and

a. 20% market share of the combined entity; or

b. any of the parties has worldwide sales of R $400 million.

[43] There are many sources of compilations, some of which are included in the program course materials.

Include voluntary filing jurisdictions, such as UK and Australia, in calculations but reserve decision on whether to make voluntary filings. Should you? Most advisors would recommend that you do so, particularly if there is a physical presence in the country or the deal has high probability of raising regulators' attention. Most companies prefer to minimize filings and my experience says most companies only make voluntary filings in the exceptional case.

8. Assess possible outcomes in each jurisdiction where filings will be made. Market impacts may differ by country so that even identical substantive analysis can result in custom results in each jurisdiction. Painful as this can be to explain to management, this result often makes sense. Perhaps the best illustration of this point is the Kimberly Clark – Scott Paper case. This transaction witnessed virtually identical product and geographic market analysis from authorities in US, EU, Canada, Mexico and Australia: all finding national markets and similar product markets. However, the party's position in those differing national markets led to country-by-country decisions and remedies.[44] See Attachment C for detailed case study.

9. Make sure that consistent and realistic positions are taken globally. If good reasons require local deviation, at least do so knowingly. Some practitioners recommend creating a white paper containing key practical information and legal positions which is shared with local counsel in all jurisdictions. This not only helps with consistency, but should reduce the complexity of creating different filings. Remember – the agencies talk to each other.

   Many countries now have formal cooperation agreements. The US has signed cooperation agreements with eight jurisdictions: Australia, Brazil, Canada, EU, Germany, Israel, Japan and Mexico. The EU has agreements with the Canada, EU, Israel, Switzerland, and 16 countries in Mediterranean/Central-Eastern Europe which aspire to EU membership. The Mercosur countries have signed a convention agreeing to cooperate in competition law matters. Others include Canada-Mexico, Australia-New Zealand, and France-Germany.

   Be credible here – agencies are not naïve, or at least most are not. Even if you think the agencies can be misled into looking at an overly broad market, remember that your customers or competitors may be educating them.

10. Decide if a pre-filing meeting(s) makes sense. It will not work in Washington, but my experience is that it can be very useful in Brussels, and, I understand, in other jurisdictions such as Canada.

11. Anticipate who your friends and enemies are and how they will react. What will your customer tell the agencies? Will anyone (customer, competitor, or third party) actively work to defeat your transaction?

[44] Such results are to be expected. As James Atwood of Covington & Burling said during ICPAC hearings: "It is still the role of the Justice Department and the FTC to figure out what the impact of the transaction will be in the United States, taking into account whatever international factors bear on that inquiry. But that is fundamentally what has to be the inquiry for the US agency, and similarly in Europe and in Canada and in Japan and Australia and what have you".

12. Where serious review and likely remedies/undertakings appear inevitable consider options. Planning for this possibility should be done early in the process as it could significantly impact on deal valuations. Some options:

    a. Consider permitting, through confidentiality waivers, the agencies to share confidential information.[45] You can go even further and let the agencies formally cooperate or even in some cases have one agency take the lead.[46] For the perspective from the FTC, see article by Richard G. Parker on the agency's experience and the role of parties in facilitating his process.[47] Many practitioners fear leakage to competitors of parties' confidential information, but there appears to be little evidence to confirm these apprehensions at least when information is handled by top tier agencies.[48]

    b. In EU consider Phase I undertakings. The EU process, since last year, permits parties to propose undertakings at the conclusion of the 30-day Phase I, and temporarily suspends Phase II review while the parties and the Commission seeks to work it out. This can avoid the lengthy (4 months) and detailed Phase II investigation. Several companies have elected this option. A good example is the acquisition of Amoco by BP. According to press reports, the Commission focused late in the initial 30 day period on a single product market overlap, which BP did not consider deal critical. By quickly working out remedies/undertakings, BP was able to avoid significant delay in closing the transaction.

    c. In US try to avoid a second request through active participation in "one and one half" phase process. If this fails, work with agencies to narrow the scope of second request to streamline the process and focus on the relevant area(s) of concern. Similar techniques can work to reduce the burden of second phase investigations in other jurisdictions as well. Fortunately, few transactions ever go beyond first phase reviews.[49]

    d. Some jurisdictions may permit you to do the transaction, but keep the national subsidiaries separate until completion of local review. This may be the answer to avoid having a single and peripheral country hold up a deal. The author has used this technique successfully with a European jurisdiction,

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[45] The rules on confidentiality of information differ between jurisdiction.

[46] MCI-Worldcom is often referenced as a leading example of US–EU cooperation. Here the agencies, the parties, and significant third parties worked together both in investigation and settlement discussions. Other notable examples include ABB-Elsaq Bailey (1999) and Astra-Zeneca (1999). Federal Mogul-T&N is a groundbreaking example of cooperation between national agencies. The parties notified the deal in six jurisdictions – Belgium, France, Germany, Italy, UK and US. Belgium cleared transaction in initial 30-day period, but the other agencies coordinated, with parties' assistance, on investigative phase. The US FTC took the lead, but crafted remedies that accommodated a specific concern of Germany's Bundeskartellomt.

[47] http://www.ftc.gov/speeches/other/barcelona.htm - See also discussions in the annual competition policy reports of the EU Commission (e.g., XXIXth Report on Competition Policy 1999, section 150 – http://europa.eu.int/comm/competition/annual_reports/1999/en.pdf

[48] See discussion on subject in ICPAC report.

[49] In 1999, 3% of HSR filings resulted in 2d request investigations.

and understands that it can work with jurisdictions such as Mexico and Brazil as well.

CONCLUSION

Despite substantial efforts towards convergence, a multi-jurisdictional transaction can pose significant challenges to counsel. This paper has surveying the environment and provided some practical examples and tips. I hope that the material in this paper, and the program that it accompanies, is useful to you. To keep up with this field, I recommend the sources listed in Attachment D.

ATTACHMENT A

The following chart presents the timing “option” on a transaction filed in EU and US:

D-30+	Letter of intent signed	_	HRS forms can be filed at any time
D-20	Preparation begins for Form CO		
D (no later then)	Definitive agreement signed		
D+30/37	Initial period passes in EU (30 days from filing date)	_	HRS waiting period passes 30 days (21 days if early termination requested) (from date of filing.
D+150/157	If investigated (2d phase) EU Commission must issue decision	_	If investigated, US authorities must file suit or not within 20 days of parties’ completing responses to agencies’ inquiries. No fixed duration to process, so is no D+150/157 certainty.

Options – A party could attempt to push a deal through serial review by filing after LOI in US, letting waiting period lapse before the deadline to file in EU. Alternatively, another serial review strategy is to file Form CO within the required seven days after signing of definitive agreements, but hold the HSR filing (since there is no deadline) until after the 30-day initial period has passed on EU review. Conversely, filings can also be coordinated to ensure parallel agency review. Serial review strategies are increasingly unlikely to be successful where a transaction raises serious competition issues.

Timetables can become even more complex when multiple jurisdictions are involved.

ATTACHMENT B

CHECKLIST OF SUPPORTING DOCUMENTATION AND OTHER INFORMATION REQUIRED BY FORM CO[50]

I. Information on the Parties to the Concentration

- Name and address (Sections 1.1.1 and 1.2.1)
- Nature of business (Sections 1.1.2 and 1.2.2)
- Contact persons (Sections 1.1.3 and 1.2.3)
- Address for service (Section 1.3)
- Proof of authorization to sign (Section 1.4)
- Details of joint representative, if any (Sections 1.4.1 to 1.4.4)

II. Information on the Concentration

- Brief description (Section 2.1)
- Economic sectors involved (Section 2.2)
- Economic and financial details (Section 2.3)

III. Financial Information on the Parties[51]

- Turnover: Worldwide
  EC-wide
  EFTA-wide
  By Member State
  By EFTA State

  (Sections 2.3.1 to 2.3.5)
- Member State, if any, in which more than two-thirds of Community-wide turnover is achieved (Section 2.3.6)
- EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved (Section 2.3.7)

[50] This checklist summarizes the kind of information required by Form CO. For complete details of all the information requested under each heading, please refer to Form CO.
[51] For the last financial year.

IV. Ownership and Control

- Members of the groups to which the notifying parties belong, specifying the nature and means of control (normally by ownership of a majority of outstanding shares) (Sections 3.1 and 3.2).

V. Personal and Financial Links and Previous Acquisitions

- Minority shareholdings (in excess of 10%) of the groups to which the notifying parties belong of companies active in the affected markets (Section 4.1).
- Directors of any group member who are also directors of any other company that is active in the affected markets, stating the name of the other company and the position held (Section 4.2).
- Details of acquisitions in the affected markets during the last three years (Section 4.3).

VI. Supporting Documentation

- Copies of all agreements
- Copies of annual reports and accounts
- Copies of analyses, reports, studies and surveys prepared for the purpose of the concentration (Sections 5.1 to 5.4)

VII. Market Definitions

- Description of each affected market, defined as product markets in the EEA territory, the EC, the EFTA States, any Member State or any EFTA State, where two or more parties to the concentration are active and their combined market share is 15% or more (horizontal relationships) or where one or more parties are active in an upstream or downstream market and their individual or combined shares are 25% or more (vertical relationships) (Section 6.1).
- Description of other product and geographic markets concerned by the concentration, including upstream, downstream and horizontal neighboring markets, where two or more parties to the concentration are active (Section 6.2).

VIII. Market Information

- Value and volume of the market (Section 7.1)[52]
- Group sales in value and volume (Section 7.2)[3]

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[52] This information must be provided for the affected market as a whole and for each product group for the last three financial years, broken down to show information for the EEA Territory, the EC, the EFTA States and each Member State and EFTA State.

- Group market share in value and volume (Section 7.2)[3]

- Competitors (market share[3], name, address and telephone number) Section 7.3)

- Information on imports (Section 7.4)[3]

  - Value, volume and source of imports from outside the EEA
  - Proportion of imports deriving from the groups to which the notifying parties belong
  - Effect on imports of quotas, tariffs and non-tariff barriers
  - Effect on imports of transportation and other costs

- Effect on trade among States within EEA territory of:

  - Transportation and other costs; and
  - Other non-tariff barriers (Section 7.5)

- The manner of production and sale by the groups to which the notifying parties belong (Section 7.6).

- Comparison of prices charged by the groups to which the notifying parties belong, in each Member State and EFTA State and other areas where the products are produced Section 7.7)[3.]

- Nature and extent of vertical integration of the notifying parties compared to their largest competitors (Section 7.8).

IX. <u>Conditions in Affected Markets</u>

- Five largest suppliers (names, addresses, contacts and share of purchases) (Section 8.1).

- Description of distribution and service channels, including the relative importance of different channels and the parties' use of third party or captive distribution systems (Section 8.2).

- Estimate of total EC-wide and EFTA-wide capacity, capacity of the notifying parties and rates of capacity utilization for the last three years (Section 8.3).

- Discussion of any other supply-side considerations considered relevant (Section 8.4).

- Five largest customers (names, addresses, contacts and share of sales) (Section 8.5).

- Structure of demand, including the phases of the market, the importance of customer preferences, the degree of concentration of the customers, the segmentation of customers, the importance of exclusive distribution or long-term supply contracts, and the participation of public authorities as sources of demand (Section 8.6).

- Names and market shares of entrants in the last five years (Section 8.7).

- Information on potential entrants and likelihood of new entry (Sections 8.8).

- Factors influencing entry, including costs, legal or regulatory barriers, licensing and intellectual property rights, economics of scale, and access to sources of supply (Section 8.9).

- Importance of research and development, including the ratio of research and development expenditures to turnover for the notifying parties and the industry as a whole, the course of technology development, major innovations, the cycle of innovation and the extent to which the parties are licensees or licensors of intellectual property rights (Section 8.10).

- Cooperative agreements, including the importance of cooperative agreements in the market and cooperative agreements of the parties (Sections 8.11 and 8.12).

- Trade associations (names and addresses) (Section 8.13).

X. General Matters

- Description of product markets that are not concerned by the concentration in which the groups to which the notifying parties belong have a market share of 25% or more (Section 9.1).

- Value of the market and market share of each of the groups to which the notifying parties belong for each such market for the last financial year for the EEA territory, the EC, the EFTA States, and each Member State and EFTA State (Section 9.2).

- Worldwide context of the concentration (Section 9.3).

- Effect of the concentration on consumers and technical progress (Section 9.4).

XI. Cooperative Effects of a Joint Venture

Not applicable for an acquisition.

XII. General Matters

- Ancillary restraints, including non-competition clauses, license agreements, and supply and service agreements (Section 11.1).

ATTACHMENT C

CASE STUDY

KIMBERLY-CLARK – SCOTT PAPER

Kimberly-Clark and Scott Paper were both US headquartered companies with long histories and worldwide operations. The companies announced a merger on July 17, 1995. At least four agencies investigated the transaction in-depth with a remarkable similarity in market definition, yet differences due to differing national market impacts.

	Product Markets	Geographic Markets	Market Share
US	1. facial tissues 2. baby wipes	US	60% >55%
EU	1. toilet paper 2. kitchen towels 3. paper handkerchiefs (includes facial tissues)	UK/Ireland UK/Ireland UK/Ireland	50-60% 40-50% 40-50%
Canada	1. baby wipes 2. facial tissues 3. paper napkins	Canada	
Mexico	1. facial tissues 2. kitchen towels 3. paper napkins 4. notebook paper 5. baby wipes	Mexico	98% 63% 12% 86% 38%
Australia	No need to analyze as only KC participated in market		

* higher 70/60/60 if looking only at branded products

Product Market

All four agencies found a relevant product market for facial tissues. Each found distinct consumer demand for specific derivative products of tissue paper, while recognizing that there may be some substitution between the products. Three of four of them were concerned about the impact on the market for baby wipes.

The EU decision called attention to considerations of the value of branded products and innovation competition.

Geographic Market

All four agencies focused on national markets, although the EU combined the markets of two countries into a single market.[53] This provides an excellent illustration that just because a business may be global, even using specific brands in all countries (like KC's Kleenex brand facial tissues), it does not mean the geographic market is global. Agencies may find national geographic markets. This is especially likely to be the case for consumer products.

Market Impacts

The share estimates above tell only part of the story, but do help illustrate some aspects of agency analysis. All of these decisions shall be considered in light of an industry that is highly concentrated. An example is the Mexican market for paper towels, which Mexico's Federal Competition Commission found to be post-merger: 63% KC-S, 22% - Procter & Gamble; and 15% - others.

The US agencies apply its HHI (Hirsch-Herfendhl Index) as a starting point. This test focuses on industry concentration levels (i.e., concerted effects) and the increase in these levels caused by the transaction. Assume a strong market position for KC's chief rival, P&G, and you can easily see how this transaction triggered a detailed investigation. The secondary concern from unilateral effects is perhaps borderline here with market share no higher than 60% and a strong competitor in P&G.[54]

The EU starting point is to look at single firm dominance (i.e., unilateral effects). In the UK/Ireland market shares were lower than some other countries (e.g., facial tissues at 40-50% vs. 60% in US and almost 100% in Mexico). Nicholas Levy, a partner with Cleary Gottlieb in Brussels, in his excellent article analyzing the Commission's decision[55] explains Commission precedents as follows: <25% presumed not dominant[56]; <40% - assumed not dominant; 40-74% - assumed dominant position; and >74% - presumed dominant position.[57] While the Commission's concern with KC's position in facial tissues is possible even under a 40%+ standard (a level in itself unlikely to draw similar findings of dominance in US), this decision most likely reflects Commission emphasis on the power of branded products (increases market share to 60% if focus is narrowed to branded products) and consideration of concerted effects.

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[53] The commission worked with UK and Irish agencies in light of particular impact in those countries. See Simen Holmes. A New Approach in Competition Cases European Counsel (Jan/Feb 1997)

[54] There are a few merger challenges on unilateral effects theory where market share is less than 40 percent.

[55] Nicholas Levy, Kimberly-Clark/Scott and the Power of Brands, 17 ECLR 403 (Oct. 1996)

[56] An Argument can be made that US rules provide a similar presumption. US guidelines presume no anticompetitive effect where post-merger HHI is less than 1000. Assuming multiple market participants, with <25% share holder as leader, one is unlikely to see a 1000 HHI.

[57] See also Nicholas Levy, Competition Law of the European Community, Chapter 8, Section 8.07[3] (2000). Here Mr. Levy refines his categories above 40%. He argues that >40 to 50% can be found dominant and merit review; >50 to 60% raise a presumption of dominance; >60% generally challenged by the Commission.

The Canadian analysis was very similar to that of US and, in fact, the Canadian agency piggy-backed on the US investigation, crafting in coordination then a remedy to also address Canadian markets.

The Mexican review illustrates how different national impacts can be even for "global" brands. Compare the respective positions for facial tissue in the different markets. We also see a new product market – notebook paper – which was not a concern elsewhere but where the company's market position in Mexico was extremely high. The lessons – do not assume that agencies will look at global geographic markets and recognize that national impacts can differ even with "global" brands. Australia's definition illustrates this point – only the KC "global" brands were sold downunder.

Other Factors

1. Role of Competitor
   Various commentators suggest that KC's primary rival, Procter & Gamble, played an active role in assisting reviewing agencies.

2, Role of Customers and Other Third Parties
   In the UK , several consumer organizations lobbied against the transaction.

Remedies

The agencies showed similarity in thinking about remedies, each agency agreed to clear the transaction after asset divestures and other remedies. These generally involved the sale of tissue production plants in all the effected jurisdictions and abandonment or licensing of brands in these markets.

Timetable

Given the inherent complexities, the parties and agencies completed the tasks in a reasonable period.

07-07-95 Announced deal
? HRS filed
07- ? -95 Form CO filed
09-05-95 EU Commission's inquiry begins
12-12-95 Deal closes, consent decree with US, EU and Canada
01-17-96 EU Commission issues decision*
04-18-96 KC announces that it will divest Scott's Canadian subsidiary
05-24-96 KC sells US and Canadian's baby wipes assets to P&G
Summer–96 KC sells UK and Irish assets to SCA Mölnlycke

* The EU lifted the suspension on the transaction to permit the December 1995 closing (in light of the consent decree) despite not having completed its decision.

Cooperation

The case also illustrates agency cooperation. Canada, for example piggybacked on US investigation and let US authorities craft a remedy that took into account both US and Canadian concerns.

ATTACHMENT D

RESOURCES

In an outstanding step towards transparency, the number and quality of agency websites has increased dramatically in recent months and years. Some of the leading include:

(1) US - www.ftc.gov/ftel/antitrust; www.usdoj.gov/atr/index.html;

(2) EU - http://www.europa.eu.int/comm./competition;

(3) Canada – http://strategis.ic.gc.ca/SSG/ct01250e.html

(4) Germany – http://www.bundeskartellamt.de;

(5) Mexico – http://www.cfc.gob.mx

(6) Brazil – http://www.mj.gov.br

(7) Italy – http://www.agcm.it/eng/index.htm

DOJ's site includes a useful set of links to various sites.
www.usdoj.gov/atr/contact/athoratr.htm

Some useful "original" web references include: OECD Competition Policy Committee www.oecd.org/daf/clbl, the APEC Competition Policy database www.epeccp.org.tw ; and Free Trade Area of the Americas (FTAA) www.ftaa_alca.org/alca_e.asp.

A couple private print sources include J. William Rowley and Donald Baker, International Mergers: The Antitrust Process (1996); Howard Adler, Lynda Martin Alegi and David A. Clanton, The Global Merger Notification Handbook (1999); Getting the Deal Through: The International Regulation of Mergers and Joint Ventures, Global Competition Review (2000).

It is hard to find specific third party opinion on the agencies. One effort to gather this information is Global Competition Review's Rating the Regulators survey that provided ratings and comments on 24 jurisdictions. http://www.global_competition.com/rating/rating.htm.

COMPETITION LAWAND IP: US and EU Developments

June 24, 2002 Versailles, France

GCCA 2002 Annual Meeting

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Existence vs. Exercise

- EU law speaks of distinction between Existence and Exercise. Existence of IP rights is lawful and separate from competition law concerns. The exercise of rights are subject to competition law limits.

Existence

- US law differs to a degree on this distinction. Part of the "existence" set of rights is the absolute right to exclude. Competition law, therefore, cannot intrude on this right, but must focus on "exercise" meaning restrictions in licenses, patent pools/cross-licensing, etc.

Existence - US and EU difference

- US law says absolute right to exclude; EU in unusual cases may create obligation to license.
- Part of this is a legal/construction issue. US Constitution contains patent clause and authorized patent act, so competition statutes must "fit" with the Constitutional provision. In EU both IP and Competition Law come from articles to foundational treaty.
- Does it also reflect views on value of strong IP protection?

Exercise

- EU and US agree that competition law sets limits on parties' freedom to exercise rights through licensing agreements, etc.
- US position has fluctuated over time, sometimes quite radically, but since 1980s a consistent view reflected in the 1995 Guidelines for the Licensing of Intellectual Property.

Exercise

- Guidelines reflect view that IP is no different than other property, no presumption of market power for existence of IP, and licensing restrictions subject to rule of reason analysis. Retains prohibitions on cartel conduct, tying and fraud on patent office.
- 1990s cases filed by government focused on issue of "sham" licenses – i.e., parties using IP licenses on nonexistent or weak IP to cover for cartel behavior.

Exercise

- EU addressed IP licensing through block exemption and individual notification.
- Detailed set of black list and grey list clauses created more rigid environment for licensing transactions.

Exercise

- Commission has proposed modifications to the tech transfer block exemption which would conform the regulation towards the "new learning" now reflected in the vertical restraints block exemption.
- Still a regulatory process, but fewer black list provisions increases flexibility.

Exercise

- Examples of some provisions

- Price Restrictions
- Grantbacks
- Tying

New Developments

- In the US, the focus is now on "next generation" competition law – IP issues.

- Participation in Standards Organizations (Dell and Rambus cases)
- Patent Pools (VISX, DVD and MPEG)

New Developments

- FTC conducting hearings this year on IP-competition law. Expect to complete sometime in fall.
- Alternative views of IP (strength of IP holder) emerging from different concerns around the globe.

DEPARTMENT OF JUSTICE

Antitrust Compliance Programs:
The Government Perspective

Address by

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Before
Before the Corporate Compliance 2002 Conference
Practising Law Institute (PLI)
San Francisco, CA

July 12, 2002

Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practicing Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

I. The Antitrust Division's Criminal Enforcement Program

As I've said in other speeches,(2) investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels **--** whether in the form of price fixing, output restrictions, bid rigging, or market division **--** raise prices and restrict supply**,** enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly $2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels.(3) This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program.(4) Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.

II. Common Characteristics of Multinational Cartels

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

A. Brazen Nature of Cartels

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- *i.e.* facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company's rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particulary true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel's so-called "masters," *i.e.*, the senior decision-makers for the cartel members, held a series of secret, conspiratorial, "unofficial" meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a "combination of cover and convenience" for the citric acid cartel. As he explained it, ECAMA provided "cover" because it gave the citric acid conspirators "good cause" to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an "unofficial capacity" for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. Audits And The Use Of Scoresheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line.

H. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term "over budget" and "under budget" in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for "compensation."

J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

K. The Structure of Cartels

We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed,(5) cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated "If colluders push prices too high, defectors and new entrants will set things right." Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division's many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite electrodes, the victims included every major steel producer in the world. It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s.

III. Designing an Effective Compliance Program

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of *respondeat superior*. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. Minimum requirements for an effective compliance program

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation.(6) These are:

* Clearly established compliance standards;

* Assigning overall responsibility to oversee compliance to high-level executives within the company;
* Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
* Taking reasonable steps to communicate standards and procedures effectively to all employees;
* Taking reasonable steps to achieve compliance with standards;

* Consistent enforcement of standards through appropriate disciplinary mechanisms; and
* Taking reasonable steps when an offense occurs to respond and to present future violations.

It's important to stress that these are minimum requirements. To be truly effective, a compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.

a. Effective communication. Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than $1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

b. Steps to achieve compliance. While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

c. Enforcement of standards through appropriate discipline. It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

d. Reasonable steps to respond to violations. When the worst happens and you discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sale force, for example, to have an incentive to sell more, not less at a higher price.

IV. Important Red Flags

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

Trade association activity. Look to see 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 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.(7)

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.

V. Conclusion

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. I hope my remarks today will serve their intended purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

FOOTNOTES

1. Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.

2. *See, e.g., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y., January 25, 2002, at http://www.usdoj.gov/atr/public/speeches/9848.htm.

3. U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy, at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

4. The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.

5. *See* Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, pp. 44-61 (1964).

6. U.S. Sentencing Guidelines, Chapter 8 (effective Nov. 1, 1991).

7. *See, e.g.,* U.S. International Trade Commission, *Report to the President on Global Steel Trade: Structural Problems and Future Solutions* 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).

2002 EU AND UK ANTICARTEL ACTIVITY

GCCA 2002 Conference
Giuseppe Sanna
General Counsel
Europe, Middle East, Africa, India
GE Lighting

EU STEPPING UP EFFORTS TO CRACK DOWN CARTELS

Very substantial fines:

Vitamin case, 850MM Euro, by far larger than any previously imposed by the Commission

Carbonless paper, 313 MM Euro

Full leniency:

In both cases, the Commission provided 100% reduction to first to co-operate and provided decisive evidence

10 largest cartel fines: Total amount per case		
Year	**Case**	**Total amount (million Euro)**
2001	Vitamins	855.23
2001	Carbonless paper	313.7
1998	TACA	272.940
2001	Graphite Electrodes	218.8
2001	Citric Acid	135.22
1994	Cartonboard	117.08
2000	Amino acids	109.990
1994	Cement	109.335
2001	German Banks	100.8
1998	Pre-insulated pipes	82.210

Carbonless paper, 2001

Contacts through professional body

Belgian Brewers, 2001

CEO's and top management regularly met to initiate and monitors arrangements

Fine increased by 50% for one participant (Danone) who took part in similar antitrust infringement twice before

Citric Acid Cartel, 2001

Exchange of specific customer information.

Concerted action to regain clients lost to Chinese manufacturers who had increased their share in the EU as a result of the raise in price during the time the cartel operated

Luxembourg brewers, 2001

Restriction on passive sales

OFT:"BRITISH BUSINESSES ARE ENGAGED IN PRICE FIXING ON A FAR WIDER SCALE THAN PREVIOUSLY ENVISAGED"

One new cartel a month similar to U.S. rate UK considering whether to follow US approach and make cartel activity a crime with prison terms for individuals convicted of participating in cartels

26 Dawn raids between Oct.2000 and May.2002, the OFT plans to conduct 2 dawn raids a month

DG IV: NEW POWERS?

DG IV conducts raids when an alleged infraction is "of a serious nature" and the EU believes key evidence is being concealed and could be destroyed

EU Investigators Powers are limited to searching corporate offices for evidence of price fixing and abuse of market power

Investigators often obtain a search warrant before they go in but the national court issuing it does not have the authority to question the justification or "to receive the veracity and relevance of investigators requests for warranties" (ECJ).

U.S., GERMANY, BELGIUM, THE UK AND IRELAND

Memo and E-mails from in-house counsel are deemed confidential and can't be used as evidence

BUT

EU Laws and regulations supersede those of member starts

HUMAN RIGHTS IMPLICATIONS?

Under the new proposed scheme, Commission raids could extend to executives homes, officials could interrogate employees without guarantee they would be entitled to consult a lawyer or the right to remain silent

Interrogations could be wide-ranging rather than being limited to asking only technical questions about documents, such as clarifying dates and names

2002 UK ENTERPRISE BILL-OFT: NEW POWERS

- **Anyone working for a company suspected of anti-competitive behaviour could be secretly followed and have their email internet and telephone records monitored. Surveillance Powers will apply to both civil and criminal investigations.**
- **The 2002 Enterprise Bill will allow the chairman of the OFT to authorise the planting of bugs in executives homes and cars, hotel rooms and other "residential premises"; any executives caught as a result will face up to five years in jail - the intrusive surveillance is designed for criminal behaviour only (Hardcore Cartel activity)**
- **OFT can request the Courts to disqualify Directors for up to 15 years if they were unaware their company was breaking competition rules but "ought to have known" about it.**
- **These new powers will give the competition authorities a formidable array of weapons……"going to shoot competition law right up the Boardroom Agenda"**
- **Most Cartels and abuse of dominant position will still rate as a civil offence, punishable by fine.**

This Power would put the OFT on a par with a number of other public bobies.

QUESTION:

Should breaches of competition law merit the same surveillance fire power as tax evasion?

MAYBE

BUT

If a tax inspector is investigating someone on a civil matter…..can't they sit outside the house and conduct surveillance?

PROBABLY NOT!

TAKEAWAYS

Best Practices

Importance of roll out and implementation of Best Practices to avoid engaging in prohibited conduct and avoid even the appearance of participation

Particularly important in Europe where competitors may have less rigorous compliance culture than in the U.S.

DAWN RAID GUIDELINES

- To make sure your business in Europe has a manual and is familiar with procedure
- To provide the businesses with a common base document to avoid inconsistency
- Updated to reflect current practice
- On-going roll-out and training

- Manual should contain
  - Receptionist instruction sheet
  - Senior business person checklist (if necessary)
  - Quick reference legal checklist
  - Detailed guidelines
  - Annex of contact persons