FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

A WORD FROM EUROPE: FRANCISCO ENRIQUE GONZALEZ-DIAZ ON THE *GENERAL ELECTRIC/HONEYWELL* CASE

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In North America we have been hearing a great deal about the European Commission's decision in *General Electric/Honeywell*, frequently from the perspective of the merging parties. Canadian and U.S. antitrust practitioners had the opportunity to hear the other side's version when Francisco Enrique Gonzalez-Diaz, Head of the Merger Task Force Unit, Directorate General for Competition of the European Commission was the keynote speaker at Charles River Associates' *Current Topics in Merger and Antitrust Enforcement* conference held in Washington, D.C. on October 23, 2001.

While Mr. Gonzalez-Diaz noted that he was unable to speak to the specifics of the *General Electric/ Honeywell* transaction given that it is under appeal to the European Court of Justice, he used his keynote address to correct what he felt were mischaracterizations and misconceptions about the Commission's decision. He began by stating that it is a "gross mischaracterization" to say that the Commission is "pro-competitor", or that it is against efficiencies. According to Mr. Gonzalez-Diaz, the merging parties never alleged significant, quantifiable, merger-specific efficiencies before the Commission, and hence the case should not be characterized as one that turned on efficiencies.[1] At the same time, the Commission was concerned that the transaction would lead to a substantial lessening of competition in the long run through vertical foreclosure of competing aircraft parts suppliers.

Mr. Gonzalez-Diaz explained that there were three parts to the Commission's analysis: (i) traditional horizontal analysis; (ii) traditional vertical foreclosure analysis; (iii) vertical effects leveraging analysis (sometimes referred to as the "portfolio effects" analysis). While the Commission found that there was minimal horizontal overlap between the two firms, in the second and third parts of the analysis, the Commission had serious concerns.[2] In a later panel in the afternoon, Mr. Gonzalez-Diaz stated that these concerns were that the transaction would likely lead to anti-competitive tying and predatory conduct. Mr. Gonzalez-Diaz viewed the U.S. approach to tying as one that requires "forced tying" while in Europe this is not required and hence when Mr. Gonzalez-Diaz speaks of tying he is also referring to the use of mixed bundling at attractive price levels. To be anti-competitive, such low prices must eventually result in weakened competitors or their possible exit and hence higher prices in the long term.

Throughout his address, Mr. Gonzalez-Diaz emphasized that the Commission was applying valid economic theories.[3] Instead, the main disagreement with the U.S. enforcement agency's decision, according to Mr. Gonzalez-Diaz, was the application of the leveraging theory to the facts of the case. Mr. Gonzalez-Diaz explained that the rift between Europe and the U.S. on the case also stems from different legal frameworks.

In this regard, two points were made.

First, U.S. enforcement agencies do not believe that leveraging theories work in practice. This results from the well-known economic axiom that a firm can only extract a monopoly rent once. Hence, once a dominant position is held there is little reason to engage in complicated systems of tying or leveraging since they would not allow the dominant firm to extract greater rents from consumers (consumers are already paying the price that maximizes the dominant firm's profits).[4] Such a dominant firm would only be interested in this type of tying or leveraging if it is enjoined from charging supra-competitive prices by regulation. In Europe, Article 82 of the *Treaty of Rome* does enjoin abusive pricing. As a result, it is Mr. Gonzalez-Diaz' contention that the incentives to engage in tying and other forms of leveraging are much greater in Europe than in North America since tying is used as a means of extracting monopoly rents that cannot be extracted through high prices.[5] This explains why the Commission has more leveraging cases than in the U.S., and why tying concerns are witnessed in North America in regulated industries.

Mr. Gonzalez-Diaz' second point of difference between Europe and the U.S. was in respect of remedies. He noted that U.S. enforcement agencies can wait for any anti-competitive effects from leveraging to manifest themselves post-merger and use section 2 of the *Sherman Act* to deal with such abuses. This strategy is less appealing in Europe according to Mr. Gonzalez-Diaz. When faced with a choice of dealing with leveraging concerns *ex ante* or *ex post*, Europe will choose to deal with the structure of the market at the merger review stage. According to Mr. Gonzalez-Diaz, the Commission has no discretion to postpone relief. He noted that the wording of the merger regulation requires the Commission to act now if the merger is likely to increase market power. Since the Commission has exclusive jurisdiction once it is seized of a matter, there is no other body that might correct an anti-competitive transaction later, unlike in the U.S. where state and private actions may follow the federal enforcement agencies. As well, the remedies available to the Commission in the event that it postpones action are not equivalent to those available at the time of merger review, nor are they equivalent to those available in North America after the fact. There is no precedent in Europe of divestiture as a remedy under the abuse of dominance provisions. (Mr. Gonzalez-Diaz noted that there is some debate over introducing these types of remedies in Europe right now.) Once the Commission clears a transaction, it probably does not have the power to undo the merger or impose structural remedies later under the abuse of dominance provisions (where the harm is essentially the result of the merger).

In concluding his remarks, Mr. Gonzalez-Diaz stated that it was a combination of these legal differences as well as differences of opinion in respect of each agency's assessment of the facts that led to the different conclusions by the Commission and the U.S. Department of Justice's Antitrust Division. Mr. Gonzalez-Diaz reiterated his view that there was never any disagreement between the U.S. and Europe on the theories to be applied. The Commission was applying standard industrial organization economic theories. Mr. Gonzalez-Diaz looks forward to discussing the factual elements of the Commission's decision and defending the decision during the appeal.

Notes

[1] During later discussions, it was mentioned that it is possible efficiencies were never advanced by the parties because they feared that they would be regarded unfavourably.

[2] There have been many critics of the Commission's decision. For example, at the October 23, 2001 conference, Dr. Gregory S. Vistnes, Vice President, Charles River

Associates, presented "The General Electric/Honeywell Deal: Is Europe Raising the Yellow Flag on Efficiencies?" which was critical of the Commission's economic reasoning as well as the Commission's application of the facts to the underlying theory. Dr. Vistnes was one of the economic experts retained by General Electric. As well, William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, was very critical of the Commission's decision during the afternoon panel. Mr. Kolasky stated that this was not a case of a merger facilitating anti-competitive tying but instead the case was one of a merger leading to efficient bundling that may lead to some foreclosure of less efficient firms.

[3] While not going through the economic theory in detail, he referred in passing to the academic writings of Michael Whinston. For example, see M. Whinston, "Tying, Foreclosure, and Exclusion" (1990) 14 American Economic Review 522-530.

[4] Note that this transaction was a vertical merger. If, pre-merger, one of the parties has market power, we would expect that firm to charge supra-competitive prices for those products or services for which it has market power. Vertically integrating downstream or upstream into a competitive market does not enhance the firm's ability to price supra-competitively in the product over which it already has market power.

[5] Extracting monopoly rents through tying would suggest raising price on the tied product in order to extract the rent on the tying product.

AUSTRALIAN NEWSLETTER

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Misuse of Market Power – Further Australian Developments

A number of important decisions of the High Court and the Federal Court in 2001 will have a direct impact on the interpretation of section 46 of the Australian *Trade Practices Act 1974* ("TPA"), which prohibits the misuse of market power.[1] The relevant cases are: *Melway Publishing Pty Ltd.* v. *Robert Hicks Pty Ltd.*[2]; *ACCC* v. *Boral Besser Masonry Limited*[3] and *ACCC* v. *Rural Press Pty Ltd.*[4]. The High Court has now granted leave to appeal in the *Boral* case and will hear the matter as an expedited matter in May of this year. This acceleration of the timetable reflects the proposed review of the TPA which is discussed in the next paragraph of this article. In addition to the cases discussed in this note, there have been two other very recent decisions in this area which have endorsed, to a large extent, the views expressed in *Boral* in particular. These are *Australian Competition & Consumer Commission* v. *Universal Music Pty Limited*[5] and *Australian Competition & Consumer Commission* v. *Safeway Pty Ltd. No. 2*[6].

Most importantly, the Federal Government has announced there will be a review of the TPA this year. This will consider, amongst other things, whether section 46 of the TPA needs to be amended to deal with the issues which are being raised not only by the Australian Competition and Consumer Commission (the "ACCC") but also by the public. Amongst the issues being considered is whether the section should contain a reverse onus of proof on the question of purpose, whether an effects test should be introduced into the section (either in place of or in addition to the purpose test which it now contains), and whether, as a remedy for a breach of section 46, the ACCC should be able to seek divestiture in the courts. These matters will be addressed in a later Newsletter.

These developments are particularly relevant in the context of corporations that have a strong position in one or more markets – what the TPA refers to as a 'substantial degree of market power' – in assessing how they deal with competitors, potential competitors, customers and suppliers in the relevant markets. Specifically, the decisions deal with questions such as refusals to supply products (either at a wholesale or retail level) and how suppliers price their products, especially when faced with new competitors.

The ACCC is likely to take an active role in investigating complaints against powerful corporations allegedly misusing their market power. The ACCC is empowered to take court action on behalf of those complainants that do not have the resources to take legal action themselves. The ACCC has already indicated publicly its intention to be more active in its pursuit of possible contraventions of section 46 of the TPA.

The current section reads:

> A corporation that has a substantial degree of market power shall not take advantage of that power for the purpose of:
>
> (a) eliminating or substantially damaging a competitor;
>
> (b) preventing the entry of a person into that market or any other market;
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

'Purpose' can be inferred by conduct, and need not be the sole purpose of the conduct, but merely a substantial purpose of the conduct.

To determine whether a corporation has contravened section 46 three elements must therefore be established: whether the corporation has a 'substantial degree of market power'; whether it has taken advantage of that market power; and whether this has been done for one of the proscribed purposes mentioned above.

The Market and Market Power (Boral)

In determining whether a corporation has substantial market power, the definition of the relevant market is critical. The decisions of the Federal Court in *Boral* and *Rural Press* illustrate that Australian courts are prepared to define a market narrowly. This has the effect of bringing section 46 into operation more frequently. In *Rural Press*, the Court held that there was a market for newspaper publication in a small area of rural South Australia. In *Boral*, the Full Federal Court rejected the trial judge's wide market definition, namely that the relevant product market was materials used in the construction of walls and paving, in favour of the ACCC's argument that the relevant product market was concrete masonry building products, one type of walling and paving material. The Court thought these were the only products in respect of which there was 'close' competition. This is an issue that may well be challenged in the High Court of Australia.

In the *Boral* case, the ACCC claimed that Boral Besser Masonry Limited ("BBM"), a manufacturer and supplier of concrete masonry products ("CMP"), used its power in the Melbourne market for CMP for the purpose of damaging the business of a new entrant into the market, C & M Bricks Melb Pty Ltd. ("C&M"), in contravention of section 46. It was alleged that BBM attempted to achieve this result by selling CMP below average variable cost, in the context of a price war and at a time of substantial excess capacity in the market. BBM's own strategic documents disclosed that the purpose of this conduct was to drive out weaker competitors to return the market to stability.

Boral was dismissed at trial, the Court having found no substantial degree of market power. On appeal by the ACCC, the Full Federal Court overturned the decision of the trial judge, and found that Boral had a substantial degree of market power, notwithstanding that there were other strong competitors in what was a vigorously competitive market. The Full Court observed that the legislation was not to be restricted, in effect, to the activities of monopolists. It held that the factors which indicated that BBM enjoyed substantial market power were:

- BBM's significant market share (it had 28% of the market other competitors had market shares of 26% (Pioneer), 27% (Rocla) and C&M had a market share of 11%);
- BBM's reputation for good service;
- the fact that BBM was well-funded, that is, it had 'deep pockets' which it could use to subsidise its price cutting and to increase its production in a market where there was already excess capacity; and
- its vertical integration with Boral, which allowed the corporate group to cross-subsidise BBM's losses.

The Full Court considered that where a corporation has 'deep pockets' and is prepared to price below avoidable cost, this will constitute a strategic barrier to entry. Where one corporation is prepared to price below avoidable cost, it will force others to do so. This results in a situation where the entire market is pricing below cost, creating a disincentive for those in the market to remain there, and deterring potential competitors from entering. It can also deter entry by signalling to potential competitors that corporations already operating in the market are prepared to price aggressively to keep new entrants out.

The decision in *Boral* makes a court's finding of the purpose behind the aggressive business strategies of a large corporation in an oligopolistic market of paramount importance. If a particular strategy is found to have one of the purposes proscribed by section 46, the Full Federal Court would suggest that this of itself may facilitate a finding of substantial market power in that corporation, even if the strategy has one or more legal purposes (such as recapturing market share or returning stability to a market with substantial excess capacity). In the absence of a rigorous analysis of the 'take advantage' element (see the *Melway* case, below, on this point), a contravention of section 46 would be constituted.

Predatory Pricing

The *Boral* case is also important because it is one of the few times an Australian court has examined in detail how predatory pricing may lead to a contravention of section 46. In *Boral*, the claims of predatory pricing were critical to the allegation that Boral had misused its market power. The trial judge regarded the relevant test as pricing below average variable cost with the intention of recouping any losses after the competitive threat has been removed from the market. After the Full Federal Court decision in *Boral*, this test is not definitive in Australia.

The Full Federal Court held that because intent is at the heart of the contravention there is no need to have recourse to a test such as 'selling below cost plus recoupment'. The Court held that predatory pricing is no more than a price set at a level designed to eliminate a competitor or keep a potential competitor from the market. To this end, Finkelstein J. held that if a corporation persistently prices its goods below average total cost, predatory intent may be inferred, and that such an inference is much stronger if the price is set at below average variable cost. In this latter case, the onus would lie on the corporation to show that there was a legitimate purpose for its conduct.

Melway and Justified Refusals to Deal

Misuse of market power in contravention of section 46 is not confined to predatory pricing, but may include refusal to deal with particular persons for anti-competitive purposes. The *Melway* decision relates to the situation where a corporation which is a market leader with a highly successful product, decides not to supply that product to a particular distributor in order to protect the integrity of an efficient distribution system.

Melway occupied a dominant position in the Melbourne street directory market. It refused to supply its product to Hicks, a former distributor of Melway, because Hicks would have competed against distributors within a distribution system that Melway had used for many years. Under the Melway distribution system, the retail market had been divided into a number of segments and distributors assigned to operate exclusively in each segment. Hicks had been terminated as a distributor and responded by placing a very large order with Melway. Hicks indicated that it intended to supply retailers already being supplied by existing distributors and only hoped to acquire new customers. Melway believed that it was the intention of Hicks to sell to Melway's existing retail customers without regard to the market segments in which the various distributors operated.

At first instance the Federal Court held that by refusing to supply Hicks, Melway had taken advantage of its market power for the purpose of preventing Hicks from competing with Melway's existing distributors. The Full Federal Court in a 2 to 1 decision upheld the initial judgment. After Melway obtained leave to appeal to the High Court, the High Court in a 4 to 1 decision reversed the decisions of the lower Courts.

The only element of section 46 at issue before the High Court was whether Melway had 'taken advantage' of its market power to achieve its purpose. Melway had a 'substantial degree of power' in the relevant 'market', namely, the wholesale and retail sale of street directories in Melbourne. The trial judge found, as was unanimously confirmed in the Full Federal Court, that Melway's 'purpose', in refusing to supply the product to Hicks, was the proscribed 'purpose' of preventing Hicks from engaging in competitive conduct in the specified market.

The High Court emphasised, however, the need to show that all elements of section 46 are satisfied.

> [T]here are cases in which it is dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage ... Where distributorship arrangements are concerned, an intent to give a particular distributor exclusivity may constitute a very insecure basis for concluding that there had been a taking advantage of market power. (at para. 31)

The High Court held that Melway's refusal to supply Hicks was consistent with maintaining its distribution system, such that Melway's conduct must be viewed as a whole.

> To describe the conduct of Melway simply as a refusal to supply [Hicks] involves an element of over-simplification. Section 46 aims to promote competition, not the private interests of particular persons or corporations. If Melway was otherwise entitled to maintain its distribution system without contravention of the Act, it is not the purpose of section 46 to dictate to Melway how to choose its distributors. (at para. 17)

The High Court held that Melway's distribution system was commercially legitimate. The system had been used by Melway for many years, in particular prior to Melway obtaining market power. The High Court therefore held that because Melway would have refused to supply Hicks (to maintain the integrity of its distribution system), even in the absence of its market power, Melway had not 'taken advantage' of its market power.

Following the High Court decision the appropriate test to determine whether the corporation has 'taken

advantage' of its market power is therefore whether the corporation would have engaged in the conduct in the actual circumstances but hypothetically subject to some nature of competitive constraint.

The *Melway* decision has recently been applied in *NT Power Generation Pty Ltd.* v. *Power & Water Authority*[7]. NT Power acquired a power generating plant, and wished to generate and sell the power to consumers within the Northern Territory. Electricity infrastructure in the Northern Territory is owned by the Power & Water Authority ("PAWA"), a statutory authority with the responsibility for the generation, reticulation and supply of electricity in the Northern Territory. PAWA refused NT Power access to those infrastructure facilities. On the basis of this refusal, NT Power brought an action against PAWA alleging a misuse of market power.

A single judge of the Federal Court held that NT Power's action failed for other reasons, however his comments on the strength of the claim under section 46 (in the absence of these impediments) are particularly interesting. Having distinguished this case from recent cases, where the relevant exercise of power was held to be an exercise of regulatory power and not market power, his Honour went on to consider whether PAWA had taken advantage of its market power for a proscribed purpose. His Honour applied *Melway* and held that PAWA had 'taken advantage' of its substantial market power because, in a competitive market for the supply of access services, PAWA could not, in a commercial sense, have refused access to the infrastructure. This seems to be an unduly narrow application of the High Court's decision in *Melway*.

As for the existence of an anti-competitive purpose, his Honour held that despite the fact that PAWA's conduct may have been motivated by its desire to achieve an ideal competitive Electricity Supply Market, by refusing access until the government put an access regime in place, a substantial purpose of the refusal to grant access was to deter or prevent NT Power from participating in the market until the government introduced an access regime. The ease with which the Court was able to infer a proscribed purpose, despite benevolent intentions in this case, illustrates the importance of the Court's finding on whether the corporation has taken advantage of its market power.

The decision of the Federal Court in *Rural Press* (handed down before the *Melway* decision) is arguably another case in which a narrow approach to the 'taking advantage' requirement precipitated a seemingly anomalous result. The Court, in *Rural Press*, held that Rural Press had taken advantage of its substantial market power in the relevant market, because of its financial strength, to force a competing newspaper to cease publishing in that particular area. Rural Press had achieved this withdrawal by threatening to introduce a rival newspaper in the competitor's prime circulation area. Arguably, Rural Press would have made such a threat even if it had been subject to competition in the relevant market, as it had plenty to gain and nothing to lose from merely making the threat. It would not have been until it actually carried out the threat that it might have been relying on its market power (i.e. using its financial resources to absorb any losses upon entry into the new market).

Conclusions

The court decisions outlined in this article have illustrated the difficulty in distinguishing between misuse of market power on the one hand and legitimate competition on the other. The decision of the Full Federal Court in *Boral* has, unless it is overturned on appeal by the High Court, made it significantly easier for courts to attribute substantial market power to a large player in an oligopolistic market. The High Court decision in

Melway, however, has clarified the position of a corporation which does have market power but wishes not to appoint distributors or only to appoint a limited number of persons to act as its distributors. Such action will not by itself risk contravening the TPA. The High Court in *Melway* also emphasised the importance of the 'take advantage' test as one of the three elements required to establish a contravention of section 46. In particular, the High Court set down the test as whether the corporation would have engaged in the relevant conduct in the actual circumstances but hypothetically subject to some nature of competitive constraint (i.e. after considering the economic implications of its conduct). This rigorous approach to the 'take advantage' element is in contrast to the approach of the Full Federal Court in *Boral* where the court merely assessed whether in a competitive market, it would have been possible for the corporation to engage in the relevant conduct. After the decision of the High Court in *Melway*, the legitimacy of the conduct requires consideration of its broader commercial rationale rather than simply whether the specific conduct was possible under competitive conditions, in light of the purpose underlying it. The Federal Court decisions in *Rural Press* and *NT Power* also demonstrate that a consistent judicial approach to section 46 remains elusive.

Notes

[1] This article provides an update on the cases discussed in a previous Australian Newsletter, "Misuse of Market Power - Some Recent Australian Developments" (2000) 20:2 Can. Comp. Rec. 26.

[2] (2001) ATPR 41-805 [hereinafter *Melway*].

[3] (2001) ATPR 41-803 [hereinafter *Boral*].

[4] (2001) ATPR 41-804 [hereinafter *Rural Press*].

[5] [2001] FCA 1800.

[6] [2001] FCA 1861.

[7] [2001] FCA 334 (3 April 2001) [hereinafter *NT Power*].

EC COMPETITION LAW DEVELOPMENTS

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Summarized below are some of the noteworthy developments in European Community ("EC") competition law that have taken place since mid-2001.

Legislation

Notice on Ancillary Restraints

Article 8(2) of the EC Merger Regulation (Council Regulation (EEC) 4064/89 (the "ECMR")) provides that a decision pursuant to the ECMR declaring a concentration (i.e., merger, acquisition or full function joint venture) compatible with the common market "shall also cover restrictions directly related and necessary to the implementation of the concentration". This has meant that restrictive provisions contained in the constitutive documents of transactions approved under the ECMR which satisfy the test of being "directly related and necessary to" the transaction (so-called "ancillary restrictions") have also been approved in the decision rendered with respect to the overall transaction. The practical effect of such a ruling is to shield restrictions found to be "ancillary" from attack under Articles 81 and 82 of the EC Treaty.

On June 27, 2001, the Commission adopted a new Notice dealing with the treatment of ancillary restrictions. The Notice, which came into force on July 4, 2001, reflects the ongoing process of simplification and modernization of EC competition rules. It heralds a significant change in the Commission's practice in enforcing the ECMR by indicating that the Commission will no longer assess and rule upon ancillary restrictions in its decisions under the ECMR. It is now for companies to self-assess whether restrictive agreements concluded in the context of ECMR

transactions can be considered as "ancillary" to the main transaction and, accordingly, benefit from the presumption of compatibility with EC competition law.

In addition to setting out a general description of the Commission's policy on ancillary restrictions, the Notice summarises the Commission's thinking on when certain types of restrictive arrangements (such as non-compete obligations and purchase and supply obligations) will qualify as being "ancillary":

- non-compete obligations occurring in the context of acquisitions are generally to be regarded as "ancillary" for periods up to three years when the business sold involves goodwill and know-how, and for up to two years when the business sold comprises goodwill but not know-how;
- non-compete obligations occurring in the context of joint ventures are to be regarded as "ancillary" for up to five years;
- purchase and supply obligations aimed at providing continuity of sales or of supply of raw materials following the change of control of part of a hitherto integrated undertaking are generally seen as justifiable. However, to be "ancillary", they must be limited in time (generally no more than three years). Moreover, the Notice makes clear that exclusive purchase or supply obligations will qualify as being "ancillary" only in exceptional circumstances.

Agreements that do not satisfy the conditions described in the Notice are not eligible to be considered as "ancillary". However, such agreements are not automatically unlawful. Rather, their lawfulness (and, hence, their validity) falls to be assessed pursuant to Articles 81 and 82 of the EC Treaty.

De minimis Notice

One of the first steps in analyzing the compatibility of most types of agreement with Article 81 is to determine whether the agreement "appreciably" restricts competition. In the absence of an "appreciable" restriction of competition, the agreement will be treated as being *de minimis*.[1] On January 7, 2002, the Commission adopted a Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (the "De Minimis Notice"). The De Minimis Notice replaces the previous de minimis Notice and ensures that the de minimis rules under Article 81 conform to the recently revised rules on the treatment of vertical agreements and horizontal agreements under Article 81 (as reported in (2001) 20:3 Can. Comp. Rec. 37).

Four key principles are reflected in the De Minimis Notice:

1. the *de minimis* market share thresholds are raised. For agreements between actual or potential competitors, the *de minimis* threshold is raised to 10% (previously, it was 5%); for agreements between parties that are not actual or potential competitors, the *de minimis* threshold is raised to 15% (previously, it was 10%);
2. in cases where it is difficult to classify an agreement as being between actual or potential competitors, the 10% threshold applies;
3. where, in an affected relevant market, competition is restricted by the cumulative effect of parallel networks of agreements, the *de minimis* threshold is set at 5%; and
4. agreements containing "hardcore" restrictions, such as price fixing, market sharing, fixed or minimum resale price maintenance and certain territorial restraints, cannot benefit from the *de minimis* thresholds.

The Notice states that where companies assume in good faith that an agreement is below the relevant *de minimis* threshold, the Commission will not impose fines. Although the Notice does not have the binding force of legislation, it can be regarded as an authoritative source of guidance for courts and competition authorities in the EU Member States.

Leniency Notice

In order to become more effective in uncovering and suppressing hard-core cartels, on February 14, 2002, the European Commission adopted a new leniency policy aimed at providing incentives for companies which submit information and evidence on a cartel to the Commission. The new notice replaces the previous 1996 notice and provides a more transparent system of immunities to first companies which come forward with information.

Under the new policy, the Commission will grant total immunity from any fine:

1. to the first member of a cartel which provides sufficient information for the Commission to launch an investigation under Article 14(3) of Regulation 17/1962; or

2. to the first member of a cartel to provide evidence which enables the Commission to find an infringement of Article 81(1), on condition that no other member of the cartel has already qualified for immunity under (1) above.

In common with the previous Notice on leniency, the new Notice provides for reduction of fines for companies that are ineligible to benefit from total immunity, but provide "added value" evidence in the course of the investigation. The reduction can be of 30-50% for the first company to submit information, 20-30% for the second company and up to 20% for all subsequent members fulfilling these conditions.

The new Notice offers a more transparent system compared to the 1996 notice, which granted full immunity only to companies that provided "decisive" evidence to the Commission and had not been considered instigators of the cartel or played a major role therein.

Amendments to the Notice are also aimed at improving certainty and transparency of the procedure. Upon receipt of the relevant information, the Commission will send a letter to the applicant acknowledging that immunity will be granted if the conditions set out in the Notice are fulfilled.

Merger Cases

General Electric/Honeywell

On July 3, 2001, the Commission prohibited the acquisition by General Electric Company ("GE") of Honeywell Inc. (Case No. COMP/M.2220 – *General Electric/Honeywell*).[2] The Commission's investigation concluded that GE has a dominant position in the markets for jet engines, large commercial aircraft and large regional aircraft, and that its high market shares are further strengthened by GE's financial strength (through its subsidiary GE Capital), and by vertical integration into aircraft leasing, through GE Capital Aviation Services (GECAS).

The Commission's investigation focused not only on horizontal overlaps between the two companies, but also on the effects deriving from vertical integration and conglomerate aspects such as product bundling.

The Commission concluded that the merger would have strengthened GE's existing dominant position in the supply of jet engines for large commercial and large

regional jets. Furthermore, given GE's strength in the aero-engine industry and Honeywell's strength in avionics and non-avionics products, the merger would have encouraged the bundling of engines with avionics and non-avionics technology. The merged entity would have had the opportunity to take advantage of GE Capital and GECAS's influence in order to cross-subsidize discounts across the products comprised in package deals offered to its customers. This would have led to the creation of a dominant position in the markets for avionics, non-avionics and corporate jet engines. The Commission's analysis is noteworthy because of the prominence it gave to so-called "range effects" (i.e., product bundling).

GE submitted a package of undertakings intended to address the competition concerns identified by the Commission. The package comprised structural undertakings relating to avionics and non-avionics products, engine starters, small marine gas turbines and large regional jet engines; it also comprised behavioral undertakings concerning corporate jet engines and GECAS, as well as the commitment not to engage in bundling practices.

However, these undertakings were regarded by the Commission as inadequate. Consequently, the Commission prohibited the transaction.

GE and Honeywell have lodged an appeal against the Commission's Decision. The appeal, which seeks annulment of the prohibition Decision, is unlikely to reach a conclusion for at least nine months.

Article 81 Investigations

On November 21, 2001, the European Commission concluded an investigation opened in May 1999 concerning a cartel affecting vitamin products. The Commission imposed heavy fines on eight companies involved from 1989 to 1999 in fixing prices and sharing the markets for vitamin A, B1, B2, B5, B6, C, D3, E, Biotin (H), Folic Acid (M), Beta Carotene and carotinoids.

The total fine amounted to Euro 855.22 million. Swiss based company Hoffman-La Roche, which had been the instigator of many of the cartels and had participated in all of the cartels, was given the highest cumulative fine ever imposed by the Commission (Euro 462 million). Other companies on which fines have been imposed are BASF AG, Aventis SA, Solvay Pharmaceuticals BV, Merck KgaA, Daiichi Pharmaceutical Co Ltd, Eisai Co Ltd and Takeda Chemical Industries.

Such high fines have been imposed in light of the seriously anticompetitive behaviour of the companies and the long duration of such conduct. The participants fixed prices for the vitamins, allocated sales quotas, exchanged detailed marketing information on a regular basis and set compensation agreements to maintain stable market shares.

Another point of interest is that for the first time the Commission granted full immunity under the 1996 Leniency Notice to a company (Aventis) as it was the first company to co-operate with the Commission and provided evidence on the vitamin A and E cartels[3]. This decision appears to be consistent with the Commission's attitude, further fostered by the new Leniency Notice of February 2002 (see above), of awarding full immunity to co-operating companies.

Court

Mannesmannröhren v. *EC Commission*

In *Mannesmannröhren-Werke AG* v. *Commission of the European Communities* (T-112-98), the CFI reviewed the extent of the right against self-incrimination in the context of investigations by the

Commission of suspected breach of Articles 81 and 82.

The Court held that it had no jurisdiction to apply the European Convention of Human Rights ("ECHR") when dealing with investigations under EC competition law, since the EC is not a party to the ECHR. Mannesmannröhren-Werke AG, the subject of a Commission investigation into a suspected cartel involving producers of seamless tubes, had alleged that on the basis of Article 6(1) of the ECHR it could lawfully refrain from any positive action that would compel it to give evidence directly against itself. The Court stated that although Article 6(1) of the ECHR could not be directly invoked in the context of Article 81/82 proceedings, EC law recognizes as fundamental principles the right of defense and the right of legal process. As such, EC law offers, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the ECHR.

Based on this finding, recipients of information requests sent by the Commission during an investigation of alleged infringement of EC competition law are entitled to confine themselves to answering questions of a purely factual nature, and to refrain from answering questions to the extent that the answer would lead to self-incrimination.

Courage Ltd. v. *Crehan*

In Case C-453/99, *Courage Ltd.* v. *Crehan* (20 September 2001), the ECJ rendered an important judgment on the application of Article 81 of the EC Treaty.

The English Court of Appeal referred to the ECJ the question of whether a party to a contract that infringes Article 81 could rely on the breach of that provision before a national court to obtain relief from the other contracting party. The Court of Appeal also asked the ECJ to rule on whether, as a matter of EC law, a claimant could obtain compensation for loss alleged to result from his compliance with a contractual provision found to be contrary to Article 81. Specifically, the Court of Appeal asked whether Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions, such as being party to an agreement that infringes Article 81, to obtain damages (as English law does).

These questions arose in the context of a case brought by the brewer, Courage Ltd., against Mr. Crehan, a publican, for breach of a lease agreement, and in particular for breach of the exclusive purchase obligation included in the lease agreement (the so-called "beer tie"). Mr. Crehan contested this action, arguing that the beer tie was contrary to Article 81 of the EC Treaty (and therefore void). In addition to claiming not to be bound by the beer tie, Mr. Crehan counter-claimed for damages to compensate him for the "loss" he had suffered as a result of purchasing beer exclusively from Courage. The "loss" equated to the difference between the price he had paid to Courage for beer and the price at which he could have obtained the beer from sources cheaper than Courage.

The ECJ stated that, as a matter of EC law (which overrides inconsistent rules of national law):

1. a party to a contract liable to restrict or distort competition within the meaning of Article 81 can rely on the breach of that provision to obtain relief from the other contracting party; and

2. Article 81 precludes a rule of national law under which a party to a contract that infringes Article 81 is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party

> to that contract. However, EC law does not preclude a rule of national law barring a party to a contract that infringes Article 81 from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion or competition occasioned by that agreement.

This finding potentially has far-reaching consequences. It opens the way in the United Kingdom for parties to standard form agreements imposed by their co-contractor, without any realistic possibility for negotiation, and which infringe Article 81, to claim damages for losses suffered as a result of their past compliance with the provision(s) held to infringe Article 81. In order to succeed in any such action, the claimant would need to prove infringement of Article 81 or Article 82, lack of significant responsibility for that infringement (i.e., lack of opportunity to negotiate the amendment of the infringing provision(s)), loss and a causal link between the infringement and the loss.

Notes

[1] The *de minimis* rule does not apply to "hard-core" restrictions such as price fixing, market sharing and output limitation, which are presumed always to violate Article 81.

[2] For additional discussion of the *General Electric Honeywell* case, see the article by Margaret Sanderson in this issue of the Record.

[3] A fine was imposed on Aventis due to its participation in the vitamin D3 cartel.

U.S. ANTITRUST LAW DEVELOPMENTS

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As 2002 commences with a number of enforcement actions at the antitrust agencies,[1] this article takes a look back at some significant developments in U.S. antitrust enforcement, particularly in the merger area, in the later part of 2001.[2] The merger enforcement decisions at the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") are noteworthy since they reflect the results of the new administration's approach to the review of transactions under the *Horizontal Merger Guidelines*.[3] The second half of 2001 (and early 2002) was also marked by substantive developments and changes in antitrust process. This article considers three areas of interest: (1) merger enforcement decisions; (2) substantive changes in antitrust process; and (3) developments in analytics or industry studies from recent or pending agency hearings that are useful for antitrust practictioners.

Selected Merger Actions

Actual enforcement actions provide direct insight into the types of issues that raise substantive competitive concerns for the federal agencies. In any year, however, only a modest proportion of merger filings are challenged by the federal agencies and, of those challenged, some are abandoned or resolved through divestiture.[4] In addition, merger analysis and review tends to be fact-intensive and it may be difficult to extrapolate from specific actions to general policies. There were a number of actions that were taken by the U.S. federal agencies in the second half of 2001 that provide insights into a range of issues raised in the merger enforcement area. The following provides a selected and not exhaustive summary of some of the interesting developments. The first considers enforcement actions related to regulatory requirements imposed by the Hart-Scott-Rodino ("HSR") Act. The second then addresses a number of cases considered by the FTC. Within a short period of time, the case mix included challenges, closure of investigations with detailed summation of the reasons for closure that provide insight into competitive effects and efficiencies analyses, and mergers resolved through divestitures. The third provides a brief summary of a DOJ matter

that proceeded from challenge through litigation to decision.

HSR-Related Actions

In general, merger enforcement actions occur as the result of alleged anticompetitive effects from the proposed merger in relevant market(s). Less frequently, there are actions brought that relate to alleged violations of the regulatory requirements surrounding merger filings and review periods; two that occurred in 2001 are mentioned here to highlight this aspect of the merger review process in the U.S. The enforcement actions related to specific requirements imposed on merger filings under the HSR Act. In September, the DOJ filed a "gun-jumping" claim against Computer Associates International, Inc. and Platinum Technology International, Inc. The claim, with related civil penalties, alleged that the companies had violated the pre-merger mandatory waiting period, by allegedly placing business restrictions on Platinum's ability to offer certain discounts to customers during the waiting period. The second action, an October case against Hearst Corporation (taken on behalf of the FTC by the DOJ), alleged that Hearst failed to produce certain documents with its pre-merger notification in its proposed acquisition of Medi-Span. Hearst agreed to pay a US$4 million civil penalty to settle the charges.

FTC Merger Actions

A number of merger-related actions were taken in the second half of 2001 by either the DOJ or FTC. This section focuses on the FTC and the following addresses one specific matter brought by the DOJ. The FTC decided a number of merger cases between the summer and late fall, with a mix of decisions including decisions to terminate investigations without challenge (e.g., Amerisource,[5] Tosco,[6] Pepsi,[7] Pillsbury[8]) or to challenge transactions or to require divestitures (e.g., CB&I,[9] MSC, Ultramar,[10] Purina,[11] and acquisition of Seagram Spirit and Wine by Diageo PLC and Pernod Ricard S.A.[12]). Unlike the DOJ, the FTC provides more extensive commentary on the results of its decisions not to challenge particular transactions. In several of these matters, there were split decisions with extensive commentary.

The Amerisource matter is of interest because the Commission, in voting to terminate the investigation, provided commentary on the differences between this merger and earlier mergers reviewed in the industry (which were challenged by the FTC). Of interest in the letter closing the investigation were the Commission's findings that there were likely merger-specific efficiencies from the transaction and that the merger would allow the combined firms to achieve "sufficient scale so that it can become cost-competitive with the two leading firms and can invest in value-added services desired by customers" and that the merger would accomplish "cognizable merger-specific" efficiency.[13]

Two merger matters (Pepsi and Pillsbury) are particularly of interest to those involved in analysis of transactions in branded consumer goods. The matters involved issues of empirical analysis and sufficiency of evidence as well as interesting issues related to proposed settlements or monitoring of an industry in which a transaction is approved. In general, these decisions show that there are considerable differences in perspective on such cases and particularly on the evidence presented in such matters.

The proposed merger of PepsiCo and Quaker Oats involved a split vote whether to challenge the acquisition (2-2) and then a 4-0 decision to close the investigation.

The commentary on the decision is found principally in the Statement of Commissioners Leary and Swindle and the Statement of Commissioners Anthony and Thompson. Commissioners Leary and Swindle concluded that there was insufficient evidence to conclude that there would be adverse competitive effects from the specific transaction and that there were fundamental differences between the Commissioners in their assessment of the role of Gatorade as a "significant third competitive force in the marketplace." In contrast, Commissioners Anthony and Thompson viewed the evidence as demonstrating that price competition and innovation would be reduced in the marketplace.[14] Where there appeared to be common ground was concern over concentration in the soft drink industry and the role played by two major players; interestingly, the Commissioners opposing a challenge nonetheless recommended that the FTC continue to assess current and future practices of the industry.

A matter that involved FTC votes on both a consent order and a challenge, and that resulted in neither, was the proposed acquisition by General Mills, Inc. of The Pillsbury Company from Diageo plc. At issue, according to the statement filed by Commissioners Leary and Swindle, were certain of the products of the two companies such as baking mixes, frosting, and pancake mixes, which collectively accounted for about 8% of the acquired assets. The Commission first addressed the issue of whether the staff should develop a consent order that would include commitments that the merging parties were willing to make to address possible competitive concerns. The Commission split 2-2 on this and, as a result, no consent order was forthcoming. The Commission then further considered whether to authorize a preliminary injunction, which resulted in a 2-2 vote (and as a result, no authorization was provided to staff to seek an injunction). Detailed statements were provided by Commissioners Leary, Swindle, Anthony and Thompson, which provide substantial insight into both the alleged competitive effects of the proposed transaction and substantially different views on the efficacy of proposed commitments by the parties.[15] The statements of Commissioners Leary and Swindle indicate that they considered the parties' commitments as sufficient to alleviate concerns and that the proposed relief would be undertaken voluntarily, while those of Commissioners Anthony and Thompson indicated concerns both about competitive effects and the efficacy of the relief. The Statements are of interest to those assessing issues in branded consumer goods and the efficacy of divestitures involving brands.

The MSC and CB&I challenges are of interest because they involve already consummated mergers. The MSC case, which involved the acquisition by MSC of two software firms was not subject to HSR filings, while the CB&I transaction had been reported and the HSR waiting period had expired before the acquisition was consummated.

DOJ Matters: SunGard-Comdisco

One DOJ transaction is worthwhile to note in some greater detail since it went from review through litigation during 2001.[16] The SunGard-Comdisco transaction was reviewed by the DOJ during the summer and fall of 2001. On July 16, Comdisco filed a voluntary Chapter 11 bankruptcy petition. SunGard won a court-ordered auction for the assets, which was held on October 12. Hewlett-Packard also bid for the assets. On October 23, after completion of its merger review, the DOJ filed suit in federal district court in Washington, D.C. in an attempt to block SunGard Data Systems, Inc. from acquiring the computer disaster recovery services assets of Comdisco, Inc. The Department specifically alleged that the proposed acquisition would likely reduce

competition in "the provision of shared hot-site disaster recovery services for large scale enterprises computer processing centers in North America." Expedited discovery and trial followed the enforcement decision, with much of the focus in the case on product market definition.

By way of background on the case, the materials indicated that a disaster recovery hot-site is a computer facility that enables computer users to restore computer operations at a remote site within a relatively short period of time. The government alleged that computer users using outside vendors for hot-site services are limited to only three major suppliers of the service. The defendants argued that the government's market was artificially narrow and did not reflect market realities, where most computer disaster recovery is accomplished without using an outside vendor. The government argued that shared hot-site services were not as costly as when the service was provided internally, which it said demonstrated that customers of shared hot-site services would not switch to an internally provided service. In addition to disputing the government's representation about internal supply, the defendants also argued that most customers had other close options to hot-site services, ranging from "high availability" data storage and computer processing at the fast end of the recovery continuum to quick-ship and mobile options at the slower end.

A decision was rendered in the case. On November 14, Judge Huvelle ruled that the proposed acquisition was not likely to harm competition. On November 15, the parties closed the transaction after the Court of Appeals denied the Department's motion for an injuncion pending appeal. The DOJ ultimately decided not to appeal that decision.

Substantive Changes in Process

The above cases represent the initial enforcement activity by the new administration. While the *Horizontal Merger Guidelines* are a relative constant now in merger review in the U.S., changes in administration and the mix of cases can result in substantive changes in both emphasis and process.[17] There have been a number of changes proposed, and in some cases, implemented at the agencies. All are of particular interest to those with merger transactions before the U.S. agencies. This section addresses four: (1) new procedures and organization at the DOJ; (2) possible reform of the allocation of industries and (3) the use of hearings or workshops at the FTC (or jointly with the DOJ) to provide in-depth review of specific antitrust issues and changes in the merger review process at the DOJ (and potentially at both agencies).

New Merger Review Procedures at the DOJ

In October, the DOJ announced new merger review procedures, entitled "Merger Review Process Initiative".[18] The process is a voluntary one, requiring the cooperation of both the staff and the parties to the transaction, and essentially conveys no new rights to either side. These procedures will work within the HSR timelines, and are intended to provide opportunities to focus investigations and staff investigative plans on key issues and evidence. The new procedures may provide for prompter resolution of issues or closure of investigations of mergers that raise no substantive concerns. The central elements to the new process are potential quicker focus on key issues, and the ability of the parties and the staff to negotiate a plan and dates for decisions for transactions that get beyond the Second Request. If the process works as envisioned, the staff has the authority to commit itself to a particular investigative plan to focus both on specific issues and types of information.

The merger review initiative has two stages that coincide with the HSR periods, specifically the time before and after the Second Request date.[19] One major potential change that the initiative could bring is the "negotiated framework" during the Second Request phase. Where a transaction in this phase has been identified by the Division as a candidate for a negotiated framework, there is the prospect of negotiating specific commitments with respect to issues that will be the subject of the investigation, dates by which certain discussions or decisions will be made or announced and exchange of information or data between the parties and the staff. It will be interesting to watch the application of the process to specific cases, particularly as to the breadth of the exchange of actual information and data gathered or analyzed by the agencies. Counsel will have to consider the strategic advantages of negotiated frameworks, since voluntary commitments would be made concerning interviews, testimony, depositions, or other evidentiary steps.

DOJ Reorganization

In late 2001, the DOJ also announced a substantial reorganization of its legal sections to address merger and non-merger enforcement activities.[20] The reorganization was presented as a means to better allocate resources for enforcement actions and commodities to sections and to take into account substantive changes in industries. The overall changes included renaming of Litigation I to expressly account for its responsibilities for national criminal enforcement, the explicit allocation of merger and non-merger enforcement activities for certain industries to Litigation Sections I, II, and III, and the creation of a new permanent section to cover telecommunications and media enforcement. In addition, the Computers and Finance Section was broadened and renamed to become Networks and Technology Enforcement and the task force that handled health care issues was disbanded and its responsibilities reallocated among other sections. These changes largely consolidate commodities into fewer sections at the DOJ but do not change the allocation of commodities between the FTC and the DOJ.

Possible Changes in the Clearance Process

Major changes in the agency that handles a particular transaction or investigation may be in the works as the federal agencies announced in January and then cancelled a press conference to announce substantive changes in the clearance process for merger review.[21] Currently, there is overlap in expertise at the federal agencies in various industries (e.g., healthcare) and the need to allocate particular matters to a single agency for review. The process of allocation, called the clearance process, has been criticized at points for the time that may be incurred after filing of an HSR before a particular agency is assigned the matter. The proposed changes would have permanently allocated certain commodities, such as telecommunications and media, to the DOJ, while allocating others permanently to the FTC (e.g., electricity and healthcare) and were stated as an effort to take into account changes in industries and the imperatives of prompt review. The results of any such agreement on commodities will be of interest to all working in industries that may have had overlapping expertise at the agencies.

Workshops and Hearings

A final area to note is the extensive use of the workshop format for developing substantial records on particular industries or issues and for identifying questions or analyses in which the agencies are particularly interested.[22] The workshop/hearing format has been used primarily by the FTC (or in some cases, jointly with the DOJ) to examine in depth certain key antitrust issues. The transcripts from the proceedings and, in

many cases, the written submissions of participants, are available at the FTC website. These, and in some cases, follow-on FTC staff reports, are recommended as both up-to-date resource materials on key issues and perspective into possible agency approaches to issues. Of interest are workshops on prices of refined petroleum products in the late summer and a planned additional workshop on the oil and gas industry in May 2002.[23] FTC staff also issued an extensive report on retail competition in the electric utility industry, which includes discussion of retail and wholesale competition issues, transmission, generation, and pricing issues. Included in the report are analyses of 12 states.[24]

Two hearings are mentioned here as particularly relevant to either substantive merger analysis or assessment of issues involving intellectual property. With respect to merger analysis, three areas of considerable attention in recent cases have been competitive effects in branded consumer goods, the use of empirical analysis (particularly unilateral effects), and efficiencies. On September 11, 2001, the FTC held a workshop of renowned economists to address the issues as to what is known and not known in economic theory and empirical research. The hearing transcript provides, for example, a detailed discussion of the limitations both in current research pertaining to dynamic efficiencies and empirical analysis of competitive effects using scanner data.[25] The latter point is set out in greater detail in a proposed agenda at the FTC for an inquiry into scanner data and its usefulness in assessing retail price effects from mergers.[26]

Second, FTC Chairman Muris announced that the FTC and the DOJ will jointly hold hearings commencing early in 2002 on intellectual property law and competition policy. The hearings, which commenced in February, will span a number of days and include panels and written commentary from a wide array of participants, including business, government, consumer, attorneys, economists and academicians. According to Chairman Muris: "The hearings will consider the implications of competition and intellectual property law and policy for innovation and other aspects of consumer welfare." The hearings provide an opportunity to address broad issues outside of specific case applications or enforcement activity. Chairman Muris indicated that "[w]e will explore primarily the interrelationships between competition and patent policy, with some attention to other intellectual property issues as they arise in particular contexts. Standard-setting, cross-licensing and patent pools, unilateral refusals to deal, other business practices, the proliferation of patents, the changing scope of patents, and the role of the Federal Circuit will be among the topics on the agenda".[27] These hearings should provide substantive insights into contemporary practices and issues raised in a number of industries.

Notes

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[1] See, for example, action filed by the Federal Trade Commission in January 2002 alleging adverse competitive effects in soda-lime glassware from the proposed acquisition by Libbey of Anchor Hocking from Newell Rubbermaid (http://www.ftc.gov/os/2002/01/libbycmp.pdf).

[2] There were also recent developments with court decisions (involving prior government action in non-merger areas), including, for example, Microsoft (*United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (en banc), cert denied, 70 U.S.L.W. 3107 (U.S. 2001) (No. 01-236) and *United States* v. *Visa USA*, 2001-2 Trade Cas. (CCH) 74,440 (S.D.N.Y. Oct 9, 2001)).

[3] The second half of 2001 included a number of actions taken by the FTC, with Timothy Muris as Chair, and DOJ, with Charles James as Assistant Attorney General for Antitrust. (AAG Charles James was recused on the SunGard-Comdisco merger and Chairman Timothy Muris was recused on some of the FTC actions.)

[4] Table 1 of a recent speech by Commissioner Thomas Leary provides an historical listing of enforcement actions between 1981 and 2000 for DOJ and FTC and related numbers of filings and investigations. T. B. Leary, "The Essential

Stability of Merger Policy in the United States" (Prepared Remarks at *Guidelines for Merger Remedies: Prospects and Principles, Joint U.S./E.U. Conference* Sponsored by the University of California at Berkeley School of Law, Berkeley Center for Law & Technology and Ecole Nationale Supérieure des Mines de Paris, Paris, France, 17 January 2002). See also workload statistics for DOJ at http://www.usdoj.gov/atr/public/7344.htm.

[5] http://www.ftc.gov/os/2001/08/amerisourcestatement.pdf

[6] http://www.ftc.gov/os/2001/09/phillipstoscostmt.htm

[7] http://www.ftc.gov/opa/2001/08/pepsi.htm; http://www.ftc.gov/os/2001/08/swindlelearypepsistatment.htm

[8] http://www.ftc.gov/opa/2001/10/pillsbury.htm; http://www.ftc.gov/os/2001/10/gmstmtswinleary.htm

[9] The CB&I case involved an already consummated merger that had been reviewed under the HSR Act. The FTC issued an administrative challenge to address alleged competitive concerns in four areas, including specialty tanks such as LNG, from the February 2001 acquisition by Chicago Bridge & Iron Company N.V. (CB&I) of the Water Division and Engineered Construction Division of Pitt-Des Moines, Inc. (PDM). http://www.ftc.gov/opa/2001/10/chicagobridge.htm

[10] http://www.ftc.gov/opa/2001/12/valero.htm

[11] http://www.ftc.gov/opa/2001/12/nestleralston.htm

[12] http://www.ftc.gov/opa/2001/12/diageo.htm

[13] *Supra* note 5.

[14] As discussed in greater detail in the following section, subsequent to this decision, the Bureau of Economics held a September hearing on economic theory and empirical studies and issued a list of questions that will be addressed by the FTC economists with respect to scanner data. Scanner data has historically been used by the agencies and merging parties to attempt to predict expected changes in prices due to mergers in consumer goods.

[15] *Supra* note 8.

[16] There were other DOJ actions in 2001. For example, the DOJ indicated that it would challenge the proposed acquisition of Newport News Shipbuilding by General Dynamics Corporation. Details of the DOJ decision and the related case filings are provided at www.usdoj.gov/atr/public/press_releases/200109366

[17] The recent speech by Commissioner Leary, *supra* note 4, provides a thorough and interesting overview of the changes – but more importantly, the similarities – among merger review and enforcement regimes between the 1970s and the present.

[18] http://www.usdoj.gov/atr/public/9300.htm

[19] During the initial 15-30 day waiting period after the filing of an HSR, the focus of the new process is the voluntary exchange of information and focusing of the inquiry on the key questions or issues involved in the transaction. Consultation between the staff and the parties during this period is designed to identify and discuss the key issues on which the competitive analysis turns and evidence or information pertaining to such issues. The goals of the process during this first period include resolution of the matter prior to Second Request, narrowing of the scope of issues for a Second Request or the scope of the information sought, or possible discussion of a framework of analysis of key issues during the Second Request period.

[20] http://www.usdoj.gov/atr/public/press_releases/2002/9773.htm lists reorganization of the Division.

[21] http://www.ftc.gov/opa/2002/01/ftcdojmt.htm; http://www.ftc.gov/opa/2002/01/ftcdojsa.htm; http://www.ftc.gov/opa/2002/01/ftcdojostl.htm

[22] The workshop approach is not new to the current administration and has been used extensively in the past to address issues such as the treatment of efficiencies and to develop a detailed study of the development and antitrust implications of B2Bs.

[23] The May 6-9, 2002 conference is the second conference held by the FTC on refined petroleum product pricing; the preliminary conference was held on August 2, 2001. (www.ftc.gov/opa/2001/12/gasconf.htm) Transcripts from the first conference are available at www.ftc.gov/bc/gasconf/index.htm. The second conference invites commentary on a wide range of issues, including crude oil supply and transportation, crude oil pricing, refining (including capacity and costs), pipelines and marine bulk transport, distribution and marketing, and industry structure issues (concentration, vertical integration, joint ventures and related arrangements) as well as demand side issues.

[24] The report on retail electricity is at www.ftc.gov/reports/elec/electricityreport.

[25] http://www.ftc.gov/be/empiricalioroundtable transcript.pdf

[26] http://www.ftc.gov/be/econometrics.htm

[27] http://www.ftc.gov/opa/2001/11/iprelease.htm