

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## AUSTRALIAN NEWSLETTER

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This instalment of the Newsletter provides an update on various developments in Australian competition law and its administration since the Summer of 2003.

### Changes at the ACCC

Professor Allan Fels has left the Australian Competition and Consumer Commission ("ACCC") to become the first Dean of the Australian School of Government. In doing so, he cut short his appointment at the ACCC by one year. Professor Fels had been the Chairman of the ACCC and its predecessor, the TPC, since 1991. At the same time, Commissioner Ross Jones also left the ACCC to become Deputy Chairman of the Australian Prudential Regulation Authority.

Replacing Allan Fels is Graeme Samuel, a former businessman, merchant banker, lawyer and President of the National Competition Council. He has been appointed for five years. The appointment of Mr. Samuel has been a difficult process. Under the *Australian Trade Practices Act 1974*, a majority of the States and Territories have to agree to any appointment to the ACCC. In fact, while the Federal Government nominates and eventually appoints Commissioners, it does not have a "vote" on appointments. Initially, the Federal Government did

not get the necessary votes for Mr. Samuel and Mr. Samuel was appointed as Acting Chairman for 12 months. One of the States later dropped its opposition and Mr. Samuel was formally appointed on July 30, 2003.

After more than two years, a Deputy Chair has been appointed. It is Louise Sylvan, the former Executive Director of the Australian Consumers' Association.

The term of another Commissioner, Sitesh Bhojani, expired in November 2003 and the Federal Government is engaged in the appointments process with the States and Territories.

These appointments and departures will result in very substantial changes to the group that led the ACCC through the implementation of the National Competition Policy and the introduction of Australia's GST, where the ACCC had a critical role in relation to possible price exploitation. It is too early to assess what changes, if any, there will be to the ACCC's administration of the *Trade Practices Act*, but Mr. Samuel has indicated that there will be changes in emphasis from the high profile style of Allan Fels.

### The Dawson Committee Review into the Competition Provisions of the *Trade Practices Act*

Some of the outcomes of this review have been outlined in a previous Australian Newsletter but in brief the Committee recommended that:

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- The Act should provide a regime to provide a speedy process for exemption from the collective boycott provisions to enable small business to negotiate with big business.
- There should be no changes to the misuse of market power provisions.
- There should be a competition defence to primary boycotts/exclusionary provisions.
- The joint venture provisions of the Act should be liberalised.
- Intra-party transactions in a dual listed company should be exempt from sections 45 and 45A of the Act, and the aggregate size of a dual listed company should be recognised for the purpose of assessing market power.
- The process for obtaining merger approval should be amended. In particular, the Committee recommended that there should be a formal merger clearance process and that parties to a merger should be able to apply directly to the Australian Competition Tribunal for authorisation of mergers on public benefit grounds. Currently, such applications are made initially to the ACCC with a possible appeal to the Tribunal.
- The ACCC's administration of the Act should be subject to greater oversight. One of the proposed measures is the introduction of a Media Code of Conduct.
- Third line forcing should be subject to a competition test. This is currently a *per se* breach.
- The law should not be amended to specifically prohibit price discrimination.
- The ACCC should not be given cease and desist powers.

- Further consideration should be given to imposing criminal penalties in relation to serious cartels.
- Civil penalties should be increased, and should be based on a turnover formula.
- The ACCC's investigation powers should be strengthened in some regards and constrained in others.

The Government has accepted most of the recommendations and legislation is now being prepared for presentation to the Federal Parliament. However, there has now been a Senate Committee Report on some of the issues considered by the Dawson Committee and it differs in some significant ways. The Government will need to consider the Senate Report in the light of its proposed legislation. The next Australian Newsletter will examine the Senate Report.

Under the National Competition Policy, the States and Territories will have to pass complementary legislation. As yet, they have not agreed to what the Federal Government is proposing and are unlikely to, as they are all of a different political colour. In particular, they are likely to want a strengthening of the misuse of market power provisions.

Added to this is the fact that the Federal Government does not control the Senate. In fact, the Senate has established a Committee to look at the *Trade Practices Act* and small business, in particular the misuse of market power and unconscionable conduct provisions. Its report was recently made public.

The business reaction has been mixed, with big business generally pleased. Small business, while pleased with the recommendation on collective bargaining, is concerned about the failure to amend

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the misuse of market power provisions and some other aspects of the package.

The stage is being set for major debates on certain aspects of the *Trade Practices Act* and in particular, the issue of protection for small business in a highly concentrated market place.

### Misuse of Market Power

This has long been a controversial issue in Australia. As indicated, the Dawson Committee recommended that the law in this area should not be changed. This Newsletter has regularly reported on Australian developments in this regard. In recent times, there have been a number of misuse of market power cases in Australian Courts, including the High Court, and more are on the way to the High Court.

The Australian section states:

46(1): A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

- a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- b) preventing the entry of a person into that or any other market; or
- c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The critical issues have been:

- whether the business has a substantial degree of market power;
- whether it takes advantage of that power; and

- whether it was for one of the proscribed purposes. Purpose can be inferred from the surrounding circumstances.

Recent cases are:

*ACCC v. Boral*:

The ACCC commenced proceedings on March 6, 1998, alleging predatory pricing in the supply of concrete masonry products.

On September 22, 1999, the Court found that the companies had not contravened the Act and, in particular, the market was not the market for concrete pavers but a wider market. Consequently, the company did not have a substantial degree of market power in the wider market. The judge also accepted a recoupment requirement in relation to predatory pricing. The ACCC appealed.

On February 27, 2001, the Full Federal Court held that Boral had contravened the Act and in fact found that each of the elements of section 46 were proven by the ACCC. The respondents appealed.

On February 7, 2003, the High Court found that the respondent did not have a substantial degree of market power. It overturned the Full Court decision. The High Court agreed with the ACCC on market but not on the market power issue. It also considered recoupment as a likely element in predatory pricing. However, some judges cast doubts on whether the current law covers predatory pricing.

*ACCC v. Universal Music Australia Pty Limited* [2001] FCA 1800:

The ACCC alleged that Universal, a wholesaler of music CDs, in the latter half of 1998, had implemented

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a policy whereby it would review its trading policy with retailers if they stocked parallel imports (that is, CDs supplied by independent wholesalers from overseas sources). This included refusal to supply CDs in some instances.

The trial judgment handed down on December 14, 2001, found that although Universal Music did not have market power in the overall recorded music market, it did have “temporary” market power in the narrower chart music market. The judge went on to find that Universal Music had taken advantage of this market power for the purpose of preventing entry of another person into the market. In making this decision, the argument that the respondent’s purpose was not a proscribed purpose but rather was an attempt to prevent “free-riding” on its own promotional efforts was dismissed.

This decision was controversial, particularly with respect to market definition and market power. The decision was appealed to the Full Federal Court. The Full Federal Court overturned the trial judgment and found that Universal did not possess the necessary market power.

*ACCC v. Australian Safeway Stores Pty Limited* (No 2) [2001] FCA 1861, and on appeal to the Full Federal Court [2003] FCAFC 149:

The ACCC alleged that, between May 1994 and November 1995, Safeway engaged in a policy whereby it removed, or threatened to remove, brands of bread from its stores if the bread was being sold at a discount to independent stores who retailed the bread at a lower price, unless Safeway was offered the same discount. The ACCC contended that this conduct was taking advantage of market power for the purpose of damaging competitors or deterring or preventing competitive conduct.

The trial judgment handed down on August 21, 2001, held that there had been no contravention of section 46. Safeway was found to have market power as an acquirer of bread from bread manufacturers in Victoria. However, its actions were not seen to constitute taking advantage of market power, as it would have been able to engage in the same policy in an otherwise competitive market (as it could readily access alternative suppliers of bread).

The Full Federal Court judgment published on June 30, 2003, reversed the trial judgment. The Full Federal Court held that Safeway took advantage of its market power on four occasions, by refusing to purchase bread from plant bakers to stop them providing discounted bread to independent retailers, for the purpose of deterring or preventing both the plant bakers and the independent retailers from engaging in competitive conduct.

The decision has been appealed to the High Court.

*ACCC v. Rural Press Ltd* [2001] FCA 1065 and [2002] FCAFC 213:

The ACCC alleged that between July 1997 and May 1998, Rural Press took advantage of its market power in the market for the supply of regional newspapers in the Murray Bridge market for purpose of preventing entry of another person into the market and/or deterring or preventing competitive conduct.

It was alleged Rural Press threatened a competitor, which was expanding its coverage into the relevant market, with retaliatory entry into the competitor’s market.

The trial judgment handed down on March 1, 2001, found that Rural Press had contravened section 46. Rural Press accepted that it did possess market power in the relevant market but argued that it had not taken

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advantage of this market power for an anti-competitive purpose. Rather, it was “taking advantage” of its financial resources which allowed it to establish a new publication. The trial judge did not accept this argument and found that Rural Press’ financial resources were related to its market power. He found that its actions could be characterized as taking advantage of market power for a proscribed purpose.

On appeal, the Full Federal Court confirmed that Rural Press had market power in the Murray Bridge area, but it reversed the trial judgment because it found that Rural Press had not taken advantage of that power by threatening to expand its coverage into the Riverland area. The Full Federal Court allowed the appeal on the section 46 allegations.

The matter was appealed to the High Court where it was argued before the Court on August 12, 2003. The High Court supported the Full Federal Court decision on the misuse of market power but found other breaches of the Act.

The issue of what constitutes misuse of market power under Australian law is still in a state of flux and depends on the Courts and maybe the Parliament.

### Energy Market Reform

In its Report released in December 2002, the Parer Panel recommended the creation of a National Energy Regulator (NER). The Report states that the NER “would encompass the current roles of” the National Electricity Code Administrator (NECA) and “the energy specific roles” of the ACCC and State regulators. The Report also proposes that “the ACCC would remain responsible for administering the Trade Practices Act as it does for other industries (mergers, misuse of market power and so on)”.

The Report discusses, from a National Competition Policy perspective, the implications of the proposed transfer to the NER of functions the ACCC currently performs. The Parer Report does not define the “energy specific roles of ACCC”, but the key roles proposed for the NER make clear the extent to which the NER is intended to take over roles currently performed by the ACCC. The key roles of the NER are:

- approving changes to the National Electricity Code (at present changes to the Code are subject to authorisation by the ACCC);
- approving changes to the National Third Party Access Code for Natural Gas Pipeline Systems (Gas Code) and other energy market codes such as the future Western Australian Electricity Market Rules (the ACCC does not currently have a role in this process);
- deciding on pipeline coverage under the Gas Code (at present the National Competition Council and the Commonwealth Minister perform this role);
- administering the access regimes for electricity and gas transmission facilities (the ACCC and the Western Australian Regulator currently perform this role);
- administering distribution access regulation for electricity and gas currently dealt with by State-based Regulators; and
- providing other licensing and approvals currently provided by the various jurisdictional agencies.

The Federal and State Governments have agreed to a compromise position whereby there is to be a new Energy Regulator but with the ACCC keeping the competition policy role in the industry. Further, an

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ACCC Commissioner will be appointed to the Energy Regulator.

### The ACCC's Leniency Policy for Cartel Conduct

On June 30, 2003, the ACCC's new leniency policy for cartel conduct came into force. The policy aims to encourage corporations and executives to reveal anti-competitive collusion, including price-fixing, bid-rigging and market sharing arrangements. In announcing the policy, then ACCC Chairman, Professor Allan Fels, stated that "[t]he policy makes corporate lawbreakers and their executives an offer they should not refuse – cease the illegal conduct and report it to the ACCC in return for a clear, transparent and certain offer of leniency".

The policy provides that where the ACCC is unaware of a cartel, the first person (company or individual) to come forward will receive an offer of conditional immunity from ACCC-instituted court proceedings. Where the ACCC is aware of a cartel but has insufficient evidence to commence prosecutions, the first person (company or individual) to come forward will receive an offer of conditional immunity from pecuniary penalties.

Companies wishing to take advantage of the policy must meet a number of requirements:

- they must give full and frank disclosure of all relevant information and evidence concerning the cartel;
- they must cease their involvement in the cartel;
- the admissions and cooperation must be a truly corporate act;
- they must not have coerced other companies to participate in the cartel, and must not have been the clear leader in the cartel; and

- where possible, they must make restitution to injured parties.

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### EC COMPETITION LAW DEVELOPMENTS

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#### Commission Adopts "Modernization Package"

As reported in the previous issue of the *Record*, Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, adopted on December 16, 2002 ("Regulation 1/2003"), establishes the legal framework for radical changes in the enforcement of Articles 81 and 82. Regulation 1/2003 will enter into force on May 1, 2004. On March 30, 2004, the EC Commission adopted its so-called "Modernization Package" of measures designed to complement Regulation 1/2003. The Modernization Package comprises the following:

- (i) Regulation relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (the "Procedural Regulation");
- (ii) Notice on cooperation within the network of competition authorities (the "Network Notice");
- (iii) Notice on cooperation between the Commission and Courts of the EU Member States in the application of Articles 81 and 82 EC (the "Courts Notice");
- (iv) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (the "Complaints Notice");

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- (v) Notice on *informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)* (the “Novel Questions Notice”);
- (vi) *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (the “Effect on Trade Notice”); and
- (vii) *Guidelines on the application of Article 81(3) of the Treaty* (the “Article 81(3) Notice”).<sup>1</sup>

The Procedural Regulation will replace an existing Regulation that governs procedural matters relating to the enforcement of Articles 81 and 82. Similarly, the Courts Notice will replace an existing Notice on cooperation between the EC Commission and EU member states’ courts. However, given the changes that will be introduced by Regulation 1/2003, the Courts Notice differs in a number of significant respects from the current Notice.<sup>2</sup> The Network Notice, the Novel Questions Notice, the Complaints Notice, the Effect on Trade Notice and the Article 81(3) Notice are entirely new. The Effect on Trade Notice and the Article 81(3) Notice seek to codify the principles established by the Commission and the Court of First Instance and Court of Justice to determine whether an agreement affects trade between EU member states and whether an agreement is eligible for individual exemption under Article 81(3). The Complaints Notice, for the first time in the history of EC competition law, gives detailed guidance for companies wishing to complain to the Commission about anti-competitive agreements and conduct or to take action before the courts in relation to such agreements or conduct. The Network Notice also deals with matters not hitherto dealt with in any Commission guidelines and has considerable practical significance. It describes how the EC Commission and national

competition authorities in the EU Member States (25 with effect from May 1, 2004), will work together as a “network” to ensure the rigorous enforcement of Articles 81 and 82.<sup>3</sup> Among other matters, the Network Notice sets out principles for the allocation of cases among the Commission and EU member states’ competition authorities, the sharing of information among the members of the “network” and the steps that need to be taken by companies wishing to apply for leniency from fines under Article 81.<sup>4</sup>

### **New Merger Regulation**

On January 20, 2004, the Council of the EU adopted Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings (the “New Merger Regulation”) which, upon its entry into force on May 1, 2004, will replace Council Regulation (EEC) 4064/89 (the “Old Merger Regulation”). The New Merger Regulation introduces a number of important changes to EU merger review. The Commission has issued for consultation a package of related measures, including a new form of notification to be used when notifying mergers under the New Merger Regulation.

Among the changes to EU merger review are: (1) a revised substantive standard to determine whether proposed mergers will pass examination under EC competition law; (2) increased fines for failure to provide complete and accurate information, or for other acts of non-compliance with the law; (3) changes to the timetable for the review of mergers by the EC Commission (the “Commission”); and (4) changes to the rules for the allocation of merger review jurisdiction between the Commission and national competition authorities in the EC’s member states.

#### *The New Substantive Review Standard*

The Old Merger Regulation embodies the so-called “dominance test” which allows the Commission to

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prohibit transactions that “create or strengthen a dominant position as a result of which effective competition would be significantly impeded in all or a substantial part of the European Union.” The New Merger Regulation will replace the dominance test with a more broadly framed substantive standard based on the concept of a significant impediment to competition (the “Significant Impediment Test”).

The new standard incorporates, but is not limited to, the dominance test. Specifically, the Significant Impediment Test will allow the Commission to prohibit transactions that “significantly impede effective competition [in all or part of the EC], in particular as a result of the creation or strengthening of a dominant position.”<sup>5</sup> Adoption of the revised standard will bring EC law closer into line with the “substantial lessening of competition” test applied in Canada as well as the United States and the United Kingdom.

### *Increased Fines for Non-Compliance*

The New Merger Regulation will increase the penalties that the Commission may impose to punish non-compliance with the New Merger Regulation. The Commission will be able to impose lump sum fines of up to 1% of the aggregate turnover of undertakings that, among other types of non-compliance, intentionally or negligently, supply incorrect, misleading or incomplete information to the Commission. This is significantly higher than the limits prescribed under the Old Merger Regulation for these types of non-compliance, currently set at €1,000 - €50,000.

In addition to increasing the upper limits of lump sum fines, the New Merger Regulation will increase the level of daily penalties that may be imposed by the Commission.<sup>6</sup> The new upper limit will be 5% of the average daily group-wide turnover of the delinquent undertakings. This is significantly higher than the

equivalent limits in the Old Merger Regulation that, depending on the type of non-compliance, range from €25,000 per day to €100,000 per day.

The Commission can impose lump sum fines and daily penalties not only on the merging parties that fail to comply with their obligations under the New Merger Regulation, but also on third parties, such as customers, suppliers or competitors of merging parties that fail to submit timely, accurate and complete responses to requests for information sent by the Commission.<sup>7</sup>

The New Merger Regulation retains the Old Merger Regulation’s upper limit of 10% of aggregate turnover for lump sum fines to punish the most serious types of non-compliance, such as failure to notify transactions or to comply with the waiting period obligations or conditions subject to which the Commission has granted its approval of a transaction.

### *Changes to the Review Timetable*

The New Merger Regulation will introduce greater flexibility into the EC merger review timetable. First, the New Merger Regulation will give merging parties greater scope to determine when formally to file their notification (Form CO) with the Commission. The Old Merger Regulation requires the filing of the Form CO within one week of the execution of binding agreements to bring about the transaction, or in the case of public bids, within one week of announcement of the bid.<sup>8</sup> The New Merger Regulation abolishes the one-week rule and does not impose any specific deadline for parties to file their Form CO. Consequently, subject to complying with the waiting period/suspensory obligations imposed under the New Merger Regulation, merging parties will be free to determine when to file their Form CO. In addition, the New Merger Regulation does not require, as a pre condition to the formal filing of a Form CO, that

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definitive agreements have been signed or a bid officially announced. Under the New Merger Regulation, merging parties will be able to file the Form CO if they can demonstrate a good faith intention to conclude definitive agreements or have publicly announced an intention to make a bid. As a result of this change, merging parties will be able formally to commence the EC review process on the basis of a Memorandum of Understanding or Letter of Intent.

Second, the New Merger Regulation will afford merging parties more time during Phase II reviews to reach a settlement with the Commission on areas of substantive concern. The New Merger Regulation will introduce new rights for the Commission and merging parties to extend the ninety-working day Phase II review period by up to an additional twenty working days. Extension may occur either at the instigation of the merging parties or by mutual agreement among the merging parties and the Commission.

#### *Allocation of Merger Review Jurisdiction*

The New Merger Regulation will not change the thresholds set by the Old Merger Regulation (the "EC Thresholds") to determine whether a transaction falls within the merger review jurisdiction of the Commission and thereby preempting the jurisdiction of the member states. However, the New Merger Regulation will introduce a "streamlined referral procedure" between the Commission and member states comprising the following components:

- (i) parties to transactions that have cross-border effects but fall below the EC Thresholds will, for the first time, be able to request that the Commission take jurisdiction;
- (ii) parties to transactions that have localized effects within a member

state but exceed the EC Thresholds, will, for the first time, be able to request that the Commission refer the transaction to the relevant national competition authority;

- (iii) the Commission will have enhanced powers to refer transactions that exceed the EC Thresholds but have localized effects in a member state to the relevant national competition authority (so-called "Article 9 referrals"); and
- (iv) member states will be subject to detailed procedural rules, including a strict timetable, to refer to the Commission transactions that have cross-border effects but fall below the EC Thresholds (so-called "Article 22 referrals").

#### *Conclusion*

Adoption of the Significant Impediment Test will bring the EC's legal standard for appraising mergers closer into line with the review standard applied in other jurisdictions. There is, nonetheless, no guarantee that the Commission will apply the Significant Impediment Test in a manner consistent with other regulators. On the procedural side, the ability for merging parties formally to commence the EC review process before signing definitive agreements or formally announcing a bid will give merging parties greater flexibility on timing than is available under the Old Merger Regulation. By introducing rights to extend the Phase II review timetable, the New Merger Regulation will increase the time available to merging parties to formulate acceptable remedies to complex substantive issues. This should increase the opportunity for parties

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to address Commission concerns and secure approval of their transactions. The streamlined referral procedure will relax the rigidity of the current rules on allocation of jurisdiction and, therefore, should lead to more appropriate allocation of cases between the Commission and member states' antitrust authorities. On the negative side, however, the streamlined referral procedure will offer greater scope for Article 9 referral by the Commission to the member states, which could reduce the opportunities for transactions receiving "one-stop shop" review by the Commission. The increase in the upper limits for fines for noncompliance with the New Merger Regulation underscores the need for promptness and thoroughness on the part of merging parties when preparing documents to the Commission, and by all persons when responding to requests for information from the Commission.

Finally, the Commission has expressed the hope that the New Merger Regulation will improve its ability to deal with the increased demands that it is likely to face as a result of enlargement of the European Community on May 1 of this year to twenty-five member states.

### **Draft Block Exemption and Guidelines on Technology Licensing Agreements**

On September 25, 2003, the Commission published for consultation a draft Regulation *on the application of Article 81(3) of the Treaty to categories of technology transfer agreements* (the "Technology Transfer Regulation") and draft *Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements* (the "Technology Transfer Guidelines"). The Technology Transfer Regulation will replace the Commission's existing block exemption Regulation in relation to technology licensing agreements, Regulation 240/96<sup>9</sup>, and will provide safe harbour treatment for agreements under which a

licensor licenses its technology in order to enable the licensee to manufacture and/or market goods or services. In certain respects, the Technology Transfer Regulation is less complex than Regulation 240/96. It also reflects a different approach from Regulation 240/96 because it applies different rules depending on whether or not the licensing agreement at issue is made between competitors. In addition to these noteworthy changes, the Technology Transfer Regulation introduces market share thresholds (not embodied in Regulation 240/96) which must not be exceeded in order for the safe harbour treatment to be applicable. The thresholds are 20% (combined market share of the parties) in the case of technology licensing agreements between competitors and 30% (each party individually) in the case of technology licensing agreements between parties that are not competitors.

The Technology Transfer Guidelines represent a welcome innovation in the Commission's enforcement of Article 81. To date, the Commission has not issued comprehensive guidelines on the application of Article 81 to technology licensing agreements. The Technology Transfer Guidelines seek to remedy that shortcoming and provide detailed guidance on questions of interpretation of the Technology Transfer Regulation and on the methodology for analysing under Article 81 technology licensing agreements that do not satisfy the conditions for safe harbour treatment under the Technology Transfer Regulation.

The consultation period closed officially on November 26, 2003. Although industry bodies and other commentators were, in certain respects, critical of the draft Regulation and Guidelines, Commissioner Monti indicated in January of this year that the Commission is continuing to follow its original timetable. Accordingly, the new Regulation and Guidelines will take effect on May 1, 2004. In order to address certain of the criticisms of the drafts, Commissioner Monti

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indicated that the final versions of the Regulation and Guidelines would differ from the consultation drafts.<sup>10</sup>

### Commission Fines Members of Sorbates Cartel

The Commission has imposed fines totalling €134.4 million on four companies found to have participated in a price fixing and production limitation cartel relating to sorbates.<sup>11</sup> The individual fines are as follows:

Hoechst AG:	€99 million
Daicel Chemical Industries, Ltd:	€16.6 million
Ueno Fine Chemicals Industry, Ltd:	€12.3 million
The Nippon Synthetic Chemical Industry Co., Ltd:	€10.5 million

Another member of the cartel, Chisso, was granted full immunity from fines given that it had taken the initiative to voluntarily disclose significant information regarding the cartel and, for that reason, was able to benefit from the Commission's leniency policy.<sup>12</sup> This decision provides a further illustration of the Commission's readiness to fine non-EU companies that participate in cartel activity within the EU. Three of the four companies fined were of Japanese origin. In addition, the decision illustrates the value of a successful application for immunity from fines under the Commission's leniency policy.

#### Notes

<sup>1</sup> The Modernization Package can be accessed via [http://europa.eu.int/comm/competition/antitrust/legislation/#procedural\\_rules](http://europa.eu.int/comm/competition/antitrust/legislation/#procedural_rules).

<sup>2</sup> By granting national courts, for the first time, the power to rule on whether an agreement or concerted practice satisfies the conditions for individual exemption under Article 81(3), Regulation 1/2003 significantly expands the role of EU member states' courts in the enforcement of Article 81.

<sup>3</sup> It should be recalled that Regulation 1/2003, upon its entry into force on May 1, 2004, will give the competition authorities in each EU member state "parallel" jurisdiction to rule on agreements and conduct that violates EC competition law.

<sup>4</sup> See note 12 below.

<sup>5</sup> On December 16, 2003, the Commission adopted *Guidelines on the appraisal of mergers between competing firms*. These Guidelines describe comprehensively the Commission's analytical

methodology for applying the Significant Impediment Test to horizontal mergers. The Commission intends, in the future, to adopt similar guidelines describing how it will apply the Significant Impediment Test to vertical mergers and conglomerate mergers.

<sup>6</sup> Daily penalties may be imposed, among other reasons, to punish the types of non-compliance punishable by lump sum fines. In such cases, the daily penalties apply in addition to any lump sum fines imposed by the Commission.

<sup>7</sup> In July 2000, the Commission fined a company € 950,000 for failing to respond to a request for information sent by the Commission in the context of its investigation of a joint venture.

<sup>8</sup> In practice, the Commission often has waived the requirement to file within one week and has allowed merging parties longer time (sometimes several months) to file their Form CO.

<sup>9</sup> Commission Regulation (EEC) 240/96 *on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements* ("Regulation 240/96").

<sup>10</sup> "The New EU Competition Policy on Technology Transfer Agreements" speech by Commissioner Monti on January 16, 2004 at the Ecole Des Mines, Paris.

<sup>11</sup> Commission Press Release IP/03/1330 (October 1, 2003).

<sup>12</sup> The Commission's leniency policy is described in *Commission Notice on immunity from fines and reduction of fines in cartel cases*.

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## U.S. ANTITRUST LAW DEVELOPMENTS

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### TAKING STOCK OF MERGER ENFORCEMENT AND ANALYTICS

#### Introduction

The recent resurgence in merger activity in the U.S. in late 2003 and early 2004 has been accompanied by a wealth of reports and workshops from the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") about merger analysis and enforcement activity. These provide useful insights into the types of mergers that are likely to be the focus of investigation and, more importantly, potentially subject to challenge or not. The reports and particularly the recent workshop have also provided

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an opportunity for assessment of the efficacy and the relevance of the principles of the 1992 *Merger Guidelines* for enforcement activity. This article provides a brief summary of the highlights of these materials.

**Does Concentration Matter?**

One of the central parts of the 1992 *Guidelines* was the use of threshold levels of concentration and changes in concentration that would likely precipitate investigations and subsequent challenges. The reports on enforcement activity at the DOJ and the FTC indicate that the numerical standards for the Herfindahl-Hirschman Index (“HHI”) and changes in the HHI set out in the *Guidelines* for threshold levels of concentration and changes in concentration that are likely to warrant challenge are much lower than the levels that have actually precipitated challenges. While the *Guidelines* state that changes in excess of 100 in markets in which the HHI post-merger is in excess of 1800 are likely to warrant challenge, in practice, most of the challenged transactions have involved markets in which the concentration levels are in excess of 2400 and the changes are in excess of 500.<sup>1</sup> In addition, there were no transactions that were challenged outside of the banking industry in which the post-merger HHI was below 1800 and the change was less than 500. As a result, it would seem that HHI levels are at best a starting point for the likelihood of inquiry and investigation.

**If Not Concentration Levels, Then What is Driving Enforcement?**

The recent FTC report covering enforcement activity between 1996 and 2003 provides insight into the factors other than pure concentration levels that are driving enforcement trends. There are three: number of remaining competitors, customer complaints and “hot” documents. One of these major factors is directly

related to concentration – namely, the number of significant competitors. The FTC report shows that mergers that reduce the number of significant competitors from 3-2 or 2-1 are very likely to be challenged, and the threshold level appears to be either 6-5 or 5-4 where more investigations were terminated without challenge. Other distinguishing features of transactions that were challenged included the intensity of consumer complaints – where the merger was in a market with few significant competitors and there were strong customer complaints, virtually 100% of transactions were challenged. In contrast, absent strong customer complaints, similar levels of concentration or reduction in competitors yielded more mixed enforcement records. Similarly, while many of the court challenges have been accompanied by recitations of key “hot” documents, “hot” documents do not appear to have played that significant a role in enforcement activity, although the presence of such documents is correlated with enforcement activity.<sup>2</sup>

**What About the Other Parts of the Guidelines?**

While the foregoing would suggest that structural measures such as the number of competitors and accompanying customer complaints are driving enforcement activity, this paints too simplistic a picture of the analytical framework that has accompanied the enforcement activity. The challenges issued by the agencies have been premised on both coordinated effects and unilateral effects theories set forth in the *Guidelines*, with the former seeing somewhat of a resurgence in the recent year’s enforcement activity. While it is possible to document the empirical trends relatively simply – e.g., how many mergers of 3-2 were challenged – it is more difficult to summarize the developments in the analysis of coordinated and unilateral effects and their relevance to enforcement activity. In general, review of the reports show that there has been somewhat of a decline in the relevance

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of unilateral effects theories and a trend toward inclusion of coordinated effects theories in the last three years, with more than two thirds of the cases challenged being premised at least in part on a coordinated effects theory.<sup>3</sup> Increasingly, both unilateral and coordinated effects theories are spelled out in greater detail in both challenged cases and those in which the agency has decided not to challenge the transaction.<sup>4</sup>

### Where to Now?

Given that the recent reports suggest that the numerical standards of the *Guidelines* are not necessarily predictive of recent enforcement activity, does this imply that the *Guidelines* framework is no longer relevant or useful for predicting enforcement activity? A recent FTC/DOJ Joint Workshop on Merger Enforcement,<sup>5</sup> which focused on the analytical framework set out in the 1992 *Horizontal Merger Guidelines* and included an array of panels of experts, academics, and practitioners of antitrust law and economics, suggests that the answer is that the *Guidelines* remain very relevant particularly with respect to the analytics of market definition and the framework of competitive effects and efficiencies analysis. At the same time, the workshop reflects the fact that there remain important gaps in the framework – particularly in the lack of significant empirical evidence of the effects of mergers, which could inform future merger activity.<sup>6</sup> The wealth of papers presented at the workshop reveals the complexities of the economic analysis and the importance of empirical evidence that are part of the merger enforcement activity.<sup>7</sup>

### Conclusions

The recent reports and workshop reveal that merger review and enforcement is an intensely empirical

activity and very case-specific. At the same time, there are some clear themes as to the types of mergers that likely will be challenged (those in markets in which there are very few competitors and vocal customer complaints) and those that are likely to be on the cutting edge – ones with 4 or 5 major competitors and where empirical evidence and state-of the art economic analysis are able to demonstrate that the merger is unlikely to increase the likelihood of coordinated effects.

### Notes

<sup>1</sup> See, for example, review by John Kwoka <http://www.ftc.gov/bc/mergerenforce/presentations/040217kwoka.pdf> and the reports on merger activity.

<sup>2</sup> FTC/DOJ Mergers Challenges Data Fiscal Years 1999-2003, December 18, 2003 <http://www.ftc.gov/os/2003/12/mdp.pdf>. FTC, Horizontal Merger Investigation Data 1996-2003, February 2, 2004 <http://www.ftc.gov/os/2004/02/040202horizmergereffects.pdf>.

<sup>3</sup> *Ibid.*

<sup>4</sup> A useful summary of recent comments on transactions that were not challenged is set out in footnote 2 from the Prepared Remarks of Timothy J. Muris, "Workshop on Horizontal Merger Guidelines" (17 February 2004, [http://www.ftc.gov/speeches/muris/040217hmgwksp.htm#N\\_2](http://www.ftc.gov/speeches/muris/040217hmgwksp.htm#N_2)):

See, e.g., Statement of the Federal Trade Commission, *AmeriSource Health Corporation. Bergen Brunswig Corporation* (Aug. 24, 2001), available at [www.ftc.gov/os/2001/08/amerisourcestatement.pdf](http://www.ftc.gov/os/2001/08/amerisourcestatement.pdf); Concurring Statement of Commissioner Mozelle W. Thompson, *AmeriSource Health Corporation/Bergen Brunswig Corporation* (Aug. 24, 2001), available at [www.ftc.gov/os/2001/08/amerisourcethompsonstatement.pdf](http://www.ftc.gov/os/2001/08/amerisourcethompsonstatement.pdf); Statement of the Federal Trade Commission Concerning *Royal Caribbean Cruises, Ltd / P&O Princess Cruises plc* and *Carnival Corporation / P&O Princess Cruises plc* (Oct. 4, 2002), available at [www.ftc.gov/os/2002/10/cruisestatement.htm](http://www.ftc.gov/os/2002/10/cruisestatement.htm); Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, *Royal Caribbean/Princess and Carnival/Princess* (Oct. 4, 2002), available at [www.ftc.gov/os/](http://www.ftc.gov/os/)

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2002 10/ cruisedissent.htm; DOJ and FTC Merger Challenges Data, Fiscal Years 1999-2003 (Dec. 18, 2003), available at [www.ftc.gov/opa/2003/12/mergereffects.htm](http://www.ftc.gov/opa/2003/12/mergereffects.htm); Statement of the Commission, *Sunoco Inc./Coastal Eagle Point Oil Co.* (Dec. 29, 2003), available at [www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf](http://www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf); Statement of Chairman Timothy J. Muris, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), available at [www.ftc.gov/os/2004/01/murisgenzymestmt.pdf](http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf); Dissenting Statement of Commissioner Mozelle W. Thompson, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), available at [www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf](http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf); Statement of Commissioner Pamela Jones Harbour, *Genzyme Corporation/Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), available at [www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf](http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf); Statement of Federal Trade Commission, *Caremark Rx, Inc./AdvancePCS* (Feb. 11, 2001), available at [www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf](http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf).

<sup>5</sup> For an index of the presentations at the February 17-19, 2004 workshop see <http://www.ftc.gov/bc/mergerenforce/presentations/index.html>.

<sup>6</sup> There is one sector in which post-merger activity is being studied: there is an ongoing merger retrospective of US hospital mergers at the FTC, which may eventually culminate in a written report.

<sup>7</sup> See papers at <http://www.ftc.gov/bc/mergerenforce/presentations/index.html>.

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