

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

A PROGRESS REPORT ON THE INTERNATIONAL COMPETITION NETWORK

By: Sheridan Scott
Commissioner of Competition

The Competition Bureau has been asked by the *Record* for an update on its involvement in the International Competition Network's (ICN) cartel activities, and I am pleased to respond. Since the launch of the ICN, the Competition Bureau has recognized the importance of establishing a project-driven network of competition agencies and has been an influential partner in its evolution and leadership. The former Commissioner was the inaugural Chair, and I am very pleased to participate as a Vice-chair of the ICN Steering Group and as Co-chair of a new Working Group on the Telecom Services Sector. In addition, Bureau staff chair important ICN sub-groups on cartels and consumer interface. The Bureau also plays a pivotal role in organizational aspects of the ICN by co-chairing a working group responsible for the operational framework of the organization and by undertaking many secretariat-type functions.

During the first three Annual Conferences in Italy, Mexico and Korea, important progress was made in the adoption of recommendations and valuable work products. And at the 2005 Annual Conference in Bonn, Germany, the ICN has continued to advance through working groups on Mergers, Competition Policy Implementation, Antitrust Enforcement in Regulated Sectors and Cartels (based on the efforts of a working

group which was created at the 2004 Annual Conference in Seoul).

In addition to providing an in-depth discussion on cartel activities, I also want to take this opportunity to highlight the Bureau's involvement in the important work the ICN is undertaking with respect to mergers and competition policy implementation and in new initiatives that were adopted during the last Annual Conference.

Cartels

Hard-core cartels directed at price fixing, bid rigging, market sharing and market allocations are inherently harmful to competition and transcend geographic boundaries. Competition authorities recognize the importance of international cooperation in developing and sharing new detection and investigative approaches and in cooperating in the investigation and prosecution of this behaviour. Consequently, ICN Members established the Cartel Working Group at the 3rd Annual Conference in Seoul, Korea in 2004.

The ICN Cartel Working Group, co-led by the European Commission Directorate General for Competition and the Hungarian Competition Authority, expands the opportunities for sharing anti-cartel enforcement expertise, experiences and good practices. The Cartel Working Group also enhances the coherence and quality of the ICN's Annual Cartel Workshops, ensuring the Workshops address the needs of all ICN members.

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I should note that the involvement of Non-governmental Advisers (NGAs) in the Cartel Working Group is limited given the sensitive nature of the topics considered. In fact, the Mandate of the Cartel Working Group, adopted by ICN Members at the Seoul Annual Conference, calls for member-only participation. However, in the absence of confidentiality concerns, NGAs may be invited to participate in selected projects and to discuss work products of the Cartel Working Group during the ICN's Annual Conferences.

The Working Group comprises a General Framework Subgroup (Subgroup 1) and an Enforcement Techniques Subgroup (Subgroup 2). Its multi-year workplan is aimed at establishing and enhancing international anti-cartel enforcement in developed and developing member jurisdictions.

The General Framework Subgroup 1, co-led by the United States Department of Justice, Antitrust Division (US DOJ) and the Brazilian Ministry of Justice, addresses the legal and conceptual challenges of anti-cartel enforcement. In its first year, Subgroup 1 focused its work on hard-core cartel behavior and the basic elements of effective institutional frameworks used to detect, investigate and punish this activity. At the Bonn conference, the Subgroup presented a report setting out the experiences of agencies with a substantial level of anti-cartel enforcement, which will be useful for agencies that are currently contemplating enhancement of their anti-cartel programs.

The Enforcement Techniques Subgroup 2, co-led by the Competition Bureau and the Australian Competition and Consumer Commission, aims to improve the effectiveness of anti-cartel enforcement. It does this by identifying and sharing specific investigative techniques and advancing the educative and information sharing agenda of the International Cartel Workshops.

One of Subgroup 2's main projects is the development of an Enforcement Techniques Manual to provide information and guidance on the practical issues and effective techniques in the detection, investigation and prosecution of cartel activities. These techniques include cooperation, leniency programs, search procedures, electronic evidence gathering, and obstruction. During the last Annual Conference, Subgroup 2 presented the first two chapters of its Anti-Cartel Enforcement Manual on Searches, Raids and Inspections and Drafting and Implementing an Effective Leniency Program. The first two chapters of the Manual were well received. Members see the Manual as a valuable resource for the conduct of their own investigations. Over the next year, the Subgroup will prepare a new chapter on electronic evidence gathering which is an important vital aspect of any search as more information is often stored electronically.

In addition to the Anti-Cartel Enforcement Manual, Subgroup 2 is creating a template to collect information from ICN members about their anti-cartel enforcement regimes. All ICN Members will be asked to complete the template prior to the ICN Annual Conference in Cape Town, South Africa. Once completed, the information will be available on the ICN Web site.

Subgroup 2 is also responsible for organizing the ICN's annual Cartel Workshop. The workshop formalizes the initiatives begun more than five years ago by anti-cartel enforcement officials who gathered in Washington, D.C. at an "enforcers-only" workshop to share their expertise and experience in investigating and prosecuting cartels. That initial workshop led to four subsequent pre-ICN annual Workshops in Brighton, U.K, Ottawa, Canada, Rio de Janeiro, Brazil and Brussels, Belgium.

For the first ICN Cartel Workshop, hosted by the Australian Competition and Consumer Commission in

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November 2004, over 100 representatives from more than 30 competition enforcement authorities around the world attended. The agenda addressed cooperation and coordination, the necessity to address obstruction, the use of border watches and Interpol, case selection and management, interviewing techniques, approaches to and techniques for searches, raids and inspections and good practices for conducting searches.

Workshop participants recognized that international cooperation and coordination are critical for the effective investigation and prosecution of international cartels. Given the tendency for cartel members to meet and implement their anti-competitive agreements throughout the world, key evidence and witnesses may be located in many jurisdictions and unavailable to others. While competition enforcement authorities have a common interest in sharing information, they often face restrictions on the type of information that can be shared. With this in mind, authorities continue to explore ways to enhance their ability to share information.

Dealing with obstruction is also a timely topic for consideration by competition authorities. Convictions against the British Morgan Crucible Company plc in the past two years for obstructing investigations by the Competition Bureau and the U.S. DOJ in relation to the carbon brushes price fixing cartel are good examples. Effective penalties against obstruction are a necessary component of the tools available to competition enforcement authorities. This topic likely will continue to be of interest to both the anti-cartel enforcement community and the private sector as we witness new developments, such as the U.S. DOJ's recent efforts to extradite the former chief executive of Morgan Crucible from the U.K. to face charges in the U.S. relating to, among other things, obstruction of justice.

Leniency was considered to be the single most effective of the many detection tools discussed at the Cartel Workshop and an intensive, two-day Leniency Workshop immediately following the Cartel Workshop in Sydney. Though geared toward competition enforcement authorities, the Leniency Workshop included the participation of invited NGAs from Canada, the United States, Australia, Korea, and the European Union who presented an inside look at how a potential immunity applicant decides whether to self-report cartel conduct in one or more jurisdictions. The study also addressed the disincentives to self-reporting under leniency programs.

At the Leniency Workshop, enforcers and NGAs exchanged views and shared experiences in respect of current and proposed leniency programs aided by a combination of presentations and role-plays. A consistent theme throughout was that the cornerstone requirements for an effective leniency policy are severe sanctions, fear of detection, and transparency and predictability as to the treatment of leniency applicants. Enforcers generally acknowledged that with increasingly multi-jurisdictional cartel activity and the proliferation of anti-cartel laws, it is important for all jurisdictions to adopt leniency programs. They also recognize the need for international convergence of such programs. The DVD from this Workshop was circulated at the Annual Conference in Bonn and will no doubt be a valuable tool on every anti-cartel enforcer's desk.

Increased access to leniency programs will help reduce the possibility for safe havens. It will also help promote cooperation and coordination in enforcement as applicants are encouraged to seek immunity and/or lenient treatment across all affected jurisdictions. However, there is still significant work to be done in terms of the convergence and coordination of leniency policies. Moreover, there are several jurisdictions that

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have yet to adopt such a policy. For some jurisdictions, the road to leniency may be long insofar as the concept is not consistent with the common corporate and wider social culture.

Canada's leniency policy, as set out in its Immunity Program, has been the most effective tool for detecting and prosecuting international cartels over the past 10 years. The Competition Bureau maintains an ongoing commitment to ensure its policy is transparent and predictable and encourages immunity applicants to come forward. To this end, the Bureau currently is assessing the strengths and weaknesses identified in its Immunity Program. It plans to consult with the private sector and other competition enforcement authorities to ensure its Immunity Program remains modern and effective. The information and experiences shared by enforcers and NGAs at the Leniency Workshop will be invaluable for the Bureau as it undertakes this review.

We look forward to the next Cartel Workshop in Seoul in November 2005, which will address issues including obstruction, electronic evidence gathering and methods of determining appropriate fines and other sanctions.

Looking ahead, the Cartel Working Group faces two major challenges. First, it needs to ensure its work remains relevant to all anti-cartel enforcers. To this end, the Working Group must encourage greater involvement of newer and less experienced competition enforcement authorities. It must also find optimal ways to disseminate information and share experiences among ICN Members. Second, the Working Group needs to strike the right balance between maintaining confidentiality and obtaining valuable input from NGAs. To date, NGAs have had limited involvement in the Cartel Working Group given the sensitive nature of the topics considered. We in the Bureau will continue

to seek opportunities to include appropriate NGA participation.

Mergers

The Bureau is an active member of the ICN's Merger Notification and Procedures Subgroup which seeks to improve procedural aspects of international merger review in such areas as notification thresholds and waiting periods. The ICN has adopted eight guiding principles for merger notification review (see the Winter 2002-2003 issue of the *Record* for details). Prior to the 2005 Annual Conference, the ICN had established 11 recommended practices¹ in this area, which address the following topics:

- Nexus to Reviewing Jurisdiction
- Notification Thresholds
- Timing of Notifications
- Review Periods
- Requirements for Initial Notification
- Transparency
- Review of Merger Control Provisions
- Conduct of Merger Investigations
- Procedural Fairness
- Confidentiality
- Interagency Coordination

During the 2005 Annual Conference, the ICN endorsed two additional recommended practices which relate to remedies and agencies' enforcement powers. The subgroup plans to hold a workshop in the Spring of 2006 in Washington, D.C. to promote undertaking and implementation of these guiding principles and recommended practices.

The subgroup also presented a study, in Bonn, of the underlying rationale, content and use of waivers and included several model waivers of confidentiality for the reference of ICN members. This will be beneficial

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to members who have little experience in the use of waivers.

The Competition Bureau also participated in an ICN Merger Investigative Techniques Workshop, in Brussels, in October 2004. The Workshop addressed merger review procedures, and covered areas such as preparing and planning an investigation, developing evidence from the merging parties, quantitative analysis, and evidence from third parties. Delegates participated in group discussions, led by moderators, that included examples of merging and third party documents, interviews, and quantitative and market studies. Delegates also took part in mock interviews with moderators and NGAs acting as representatives of the agency, merging parties and third parties. Feedback from delegates representing less experienced jurisdictions was overwhelmingly positive.

At the 2005 Annual Conference, members approved a preliminary draft of the Merger Guidelines Workbook, a sourcebook for analyzing the competition effects of mergers. The ICN also approved a handbook on investigative techniques which is the result of a three year effort by subgroup members.

The Analytical Framework Subgroup presented a study on merger remedies that outlines key principles and the range of tools in the use of merger remedies, based on and illustrated by remedy practice in a variety of jurisdictions.

The Analytical Framework and Investigative Techniques Subgroups were merged to form the Merger Investigation and Analysis Subgroup. The Subgroup plans to finalize the Merger Guidelines Workbook, arrange regional workshops on investigative techniques as well as possibly holding a thematic workshop to deepen participants' knowledge of specific analytical issues in merger review.

Competition Policy Implementation

The mission of the Competition Policy Implementation (CPI) Working Group is to identify key elements that contribute to successful capacity building and competition policy implementation in developing and transition economies. The Competition Bureau co-chairs a subgroup on enhancing the stature of competition authorities. This subgroup addresses some of the complex issues raised by the interface between competition enforcement and consumer interests. In February 2005, the subgroup held a workshop to discuss different approaches to consumer outreach, messaging, and other practical communications techniques. Over 23 ICN members participated in the workshop, including the Steering Group Chair.

The Competition Bureau produced a short multimedia presentation outlining examples of the media and outreach activities of ICN members. The presentation, which was very well received at the Annual Conference in Bonn, contains submissions from over 30 Member agencies.

New Initiatives

I look forward to co-chairing, with the Italian Antitrust Agency and the South African Competition Tribunal, a new Working Group established at the Bonn conference on the Telecommunications Services Sector. The work of this group could be of immediate benefit to members from developing countries. I encourage those interested in learning more about its planned program of work to check out the ICN website.

During the Bonn conference, and for the first time during one of our Annual Conferences, we held a panel focusing exclusively on the interests of younger member agencies. This led to a lively discussion involving a range of subjects. ICN leadership from mature agencies has been challenged to think about how the

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ICN could assist members from developing countries to leverage the greater experience and skills base of their developed country counterparts. Areas where we may see action in the near future could be on the subjects of mentoring and internships.

Conclusion

The Competition Bureau recognizes the tremendous importance of working with its counterparts, sharing experiences, and promoting soft-convergence in the area of competition law and policy. The ICN provides a forum for undertaking these efforts with our international colleagues from both developed and developing jurisdictions, and with the important involvement of NGAs.

Notes

¹ The OECD Competition Committee has recently sent a draft Recommendation for OECD Council approval, which adopts many of the elements of the ICN Recommended Practices on merger notification and procedures.

AUSTRALIAN NEWSLETTER

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AUSTRALIAN COMPETITION LAW ON THE MOVE: 2005 IS A YEAR OF CHANGE

The Australian Government has announced the forthcoming program for a number of reforms to the *Trade Practices Act 1974* ("TPA"). These reforms have been announced in response to:

1. the 2003 "Review of the competition provisions of the *Trade Practices Act*" (the "Dawson Review");
2. the 2003 Senate inquiry into "The effectiveness of the Trade Practices Act 1974 in protecting small business" (the "Senate Report");
3. the 2001 Productivity Commission inquiry into the National Access Regime; and
4. an Australian Government review of serious cartel conduct.

And there is more to come; in particular, changes flowing from a review of the interface between competition law and intellectual property law and two mandatory codes of conduct, in the horticulture and petroleum industries. These codes will relate to the relationship between small business operators and their suppliers or wholesale customers.

Trade Practices Legislation Amendment Bill (No. 1) 2005

The Government's Bill, announced in response to the Dawson Review, was introduced into Parliament last year prior to the federal election, but lapsed when Parliament was prorogued for the election. It has now been reintroduced, debated and passed in the House of Representatives. Minor amendments were made to the Bill before its reintroduction. The broad policy of the Bill remains unchanged by these amendments, which include the collective bargaining notification provisions.

We have reported previously on these proposed amendments to the TPA (Volume 22, No. 1 of the *Record*). If passed, the legislation will come into effect on January 1, 2006. The returned Government controls both Houses of Parliament as of July 1, 2005.

Trade Practices Legislation Amendment (Small Business Protection) Bill 2005

Last year, the Government's response to the Senate Report was announced. The Government expects to

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be in a position to introduce the Trade Practices Legislation Amendment (Small Business Protection) Bill 2005, to give effect to the Government's response to the Report, after approval of the draft legislation by the states and territories as required under Australian National Competition Policy.

The Bill will include changes with respect to the prohibition on the misuse of market power to clarify the operation of the TPA in the wake of High Court decisions. It will also extend existing provisions dealing with unconscionable conduct in business transactions. This will include extending the operation of the section to cover a greater range of transactions by increasing its threshold from \$3 million to \$10 million, making it more available to a large number of small businesses.

The Bill will also contain provisions to implement the Government's proposal to amend the TPA to establish an additional Australian Competition and Consumer Commission ("ACCC") Deputy Chairperson position.

Trade Practices Amendment (National Access Regime) Bill 2005

A Bill has been prepared to implement the recommendations of the 2001 Productivity Commission inquiry into the National Access Regime (access to natural monopolies). This Bill proposes to streamline the current access regime in the TPA.

Trade Practices Amendment (Cartel Conduct) Bill 2005

The Government has announced that it will amend the TPA to introduce criminal penalties for serious cartel conduct. Under the proposed changes, a new offence will prohibit agreements between competitors to fix prices, restrict output, divide markets or rig bids, where the agreement is made with the intention of dishonestly

obtaining a gain from customers who fall victim to the cartel.

Breaches of the new offence will attract substantial penalties, up to five years imprisonment and a fine of \$220,000 for individuals, and for corporations a fine that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10% of annual turnover.

The proposed criminal offence is described below.

The Cartel Offence

The cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from the customers who fall victim to the cartel.

Dishonest intent will be proved if a jury is satisfied that the cartel arrangement was dishonest according to the standards of ordinary people, and the defendant knew it was dishonest according to those standards. Indicators of dishonesty include deception (such as lies or misleading statements), making or relying upon representations or promises that are known to be false or which will not be carried out, concealing facts that there is a duty to disclose, and engaging in conduct that the defendant knows they have no right to engage in.

To ensure effective enforcement, the Australian Government also considers it appropriate that there be parallel civil and criminal prohibitions on cartel behavior. This will enable a proportionate response to any attempt by cartels to stifle competition. The most serious cartel

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conduct would be pursued under the criminal provisions, and other cartel conduct would be litigated civilly.

To ensure consistency with international best practice, the legislated definition of cartel conduct in Australia under both the civil and criminal regimes will accord with the OECD's definition of serious cartel conduct, that is, agreements, practices or arrangements that fix prices, rig bids, restrict output or establish quotas and share or divide markets by allocating customers, suppliers, territories or lines of commerce. In 1998, the OECD recommended members ensure their competition laws halt and deter these cartel activities.

The Dawson Review recommended that a criminal cartel offence should apply to individuals as well as corporations so as to strengthen its deterrent effect. The offence will also apply to all businesses, with investigations and prosecutions being targeted at serious cartel conduct that causes large scale or serious economic harm.

Investigation and Prosecution

Criminal sanctions will only be pursued where they can be clearly justified. The ACCC will undertake the investigation of criminal cases and the Director of Public Prosecutions (DPP) will prosecute.

To ensure that the cartel offence targets serious cartel conduct that causes large scale or significant economic harm, the DPP and the ACCC will enter into a formal, publicly available Memorandum of Understanding (MOU) establishing procedures for the investigation of cartel offences and the circumstances in which the ACCC will refer a case to the DPP for prosecution instead of pursuing civil penalties itself. The intention is that the ACCC will not ordinarily refer relatively minor matters to the DPP for criminal prosecution.

The MOU will set out factors that the ACCC must consider before referring a matter to the DPP for possible criminal prosecution. The ACCC would need to consider:

- whether the alleged conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred;
- whether the alleged conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants; and
- whether one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct, either criminal or civil.

Thresholds will also be included in the MOU to provide further guidance. The ACCC would need to consider whether the value of affected commerce exceeded \$1 million within a 12 month period, that is, whether the combined value for all cartel participants of the specific line of commerce affected by the cartel exceeded \$1 million within a 12 month period. For bid rigging cases, the value of the successful bid or series of bids would need to exceed \$1 million within a 12 month period.

The MOU will also set out that if the ACCC does refer a matter to the DPP, then the DPP will make an independent assessment of whether to prosecute the case, based on all of the evidence available and on the *Prosecution Policy of the Commonwealth* (the "Prosecution Policy"). In addition, the MOU will specify that in making an independent determination

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whether to prosecute a cartel offence, the DPP will consider:

- the impact of the cartel on the market;
- the scale of the detriment caused to consumers or the public; and
- whether any of the alleged members of the cartel have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behavior.

Immunity

It is proposed that the DPP and the ACCC put arrangements in place to provide immunity from prosecution for cartel whistleblowers. Immunity will be available to individuals and corporations.

The detection and exposure of cartels often depends on a cartel member breaking ranks. Therefore, the protection provided to cartel whistleblowers to encourage them to break the cartel can assist in discovering serious cartel conduct. An immunity policy is a low cost compliance tool for cartel enforcement – international experience suggests that immunity programmes have been highly successful in combating cartel activity. Therefore, an immunity policy enhances the deterrent effect of criminal penalties.

An immunity policy is generally accepted to be more effective when immunity can be offered in the early stages of an investigation. However, in Australia, the discretion to provide immunity from criminal proceedings is currently exercised by the DPP at the conclusion of an investigation. The exercise of this discretion is guided by the Prosecution Policy. It is proposed that the Prosecution Policy be amended to enable immunity to be granted at an early stage in an investigation. This would be on the recommendation

of the ACCC, and where the applicant meets certain conditions. From OECD member countries' experiences with immunity programmes, it appears that placing special conditions on the granting of immunity will assist with cartel enforcement.

An incentive for potential whistleblowers to come forward is the certainty that they will receive preferential treatment relative to others involved in the cartel conduct. To maximise this incentive, the first party to approach authorities before they are aware of the cartel should receive the most favorable treatment. If parties delay until there is sufficient evidence to institute proceedings, or they are not the first to approach the authorities, they should not receive immunity.

The grant of immunity will be dependent on the following:

- the ACCC was not already aware of the conduct;
- the party was the first to come forward (subsequent applicants for immunity should be dealt with under the existing provisions in the Prosecution Policy);
- the party was not a clear individual leader in the cartel;
- the party had not coerced anyone to join the cartel; and
- the party fully cooperates with the ACCC and attends court to give evidence, as required.

A clear understanding of the availability of immunity, and the conditions under which it will be granted, will be critical in ensuring it provides sufficient encouragement for cartel whistleblowers to come

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forward. Published guidelines will enable its promotion in business and legal circles. The Government proposes that the ACCC develop, publish and publicise such guidelines.

Managing Parallel Civil and Criminal Provisions

The Government proposes that the ACCC release guidelines, developed in consultation with the DPP, which outline in general terms the factors relevant to determining whether to pursue a criminal or a civil investigation. Proving criminal cartel conduct will involve different procedures in both investigation and prosecution than proving a civil contravention. Therefore, the Government proposes that the MOU between the ACCC and DPP also provide a clear statement of the roles and responsibilities of investigators and prosecutors.

There is a higher standard of proof – proof beyond a reasonable doubt – for a criminal conviction. There are also restrictions on the use of evidence in multiple proceedings. This makes it desirable for the ACCC to determine early in an investigation whether it will proceed civilly or criminally. The existence of parallel civil and criminal provisions for potentially the same conduct could give rise to issues concerning the order in which matters are litigated and the appeals process. Therefore, statutory bars will be incorporated in the TPA to provide appropriate protection, for example, to stay civil proceedings until criminal proceedings are completed, after which time, if the defendant is convicted, the civil proceedings would be terminated.

Penalty

In determining an appropriate maximum penalty for a criminal cartel offence, the Government considered penalties for similar offences in other countries, penalties for similar offences under Australian law, and pecuniary penalties for cartel breaches under the civil

provisions in the TPA. Other consequences of a criminal conviction also were taken into account. Criminal convictions attract a strong social stigma, especially where imprisonment is ordered, and may disqualify participation in certain activities.

In Australia, maximum terms of imprisonment for fraud-related offences range from five to ten years. Nine OECD countries prescribe maximum terms of imprisonment, ranging from two to ten years, for competition offences. The Government considered an appropriate maximum term of imprisonment for the cartel offence to be within the international range, but also reflecting the seriousness of the cartel offence relative to other corporate criminal offences in Australia.

The Government will set a maximum jail term for individuals, and maximum fines for individuals and corporations who are convicted of the cartel offence. By setting a penalty maximum, judges may use their discretion to determine the penalty in the particular circumstances before the court, taking into account a range of sentencing considerations, including whether there has been previous offending, the circumstances of the victim or victims, whether the person has cooperated and the deterrent effect.

The *Crimes Act* also provides a default maximum fine for corporations, being five times the fine for individuals. However, a fine of this magnitude is significantly lower than that applying in the civil regime. This is intended to be strengthened on the basis of the Dawson Review reforms so that the maximum fine for corporations will be the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be readily ascertained, 10% of the annual turnover of the body corporate and all of its related bodies corporate (if any) (recommendation 10.2.1 of the Dawson Review).

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Adopting the default maximum under the *Crimes Act* would mean a corporation convicted of a criminal cartel offence would face a lower maximum fine than if convicted of a civil breach. Even taking into account the other consequences of a criminal conviction, such as negative publicity, or ineligibility to obtain certain licences or accreditation, the disparity is marked. The Government considers financial disincentives for corporations who engage in cartel conduct should be at least as strong in the criminal regime as in the civil regime.

There are a range of other remedies, existing and proposed, available under the TPA, such as the payment of compensation or injunctions or adverse publicity orders. In addition, Dawson Review recommendation 10.2.2 will give the court the option to disqualify an individual implicated in a contravention from managing a corporation. These remedies will also apply to individuals and corporations convicted of the cartel offence. In addition, the Government notes that criminalising cartel conduct means that the *Proceeds of Crime Act 2002* will apply.

EC COMPETITION LAW DEVELOPMENTS

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First Use of the Binding Commitments Procedure under Commission Regulation (EC) 1/2003

Among other significant changes, Commission Regulation (EC) 1/2003 ("Regulation 1/2003") introduced a procedure to enable the EC Commission to close its investigations into suspected violations of EC competition law on the basis of binding behavioral commitments by the suspected perpetrators of such infringements. The new procedure, which is established by Article 9 of Regulation 1/2003, was used for the

first time in the Commission's investigation of the marketing arrangements for media rights to certain football matches in Germany. Under the arrangements in question, the German Liga-Fussballverband e.V (the "League Association") was granted the exclusive right to sell the various media rights. Given this exclusivity, individual football clubs belonging to the league were precluded from independently selling the media rights to the matches in which they played. The Commission had been investigating the arrangements since 1998 and had identified a number of concerns regarding their effects on competition. Essentially, the arrangements amounted to joint selling of the media rights. However, on August 6, 2004, the League Association submitted a detailed package of commitments to the Commission with a view to allaying the Commission's concerns. Having followed the consultation procedure provided for in Article 9 of Regulation 1/2003, the Commission adopted a decision making the commitments binding on the League Association and confirming that, in light of the commitments, it would take no further action in relation to the investigation.¹

The Commission subsequently used the Article 9 procedure to settle its long-running investigation into the distribution practices of The Coca-Cola Company,² and currently is in the process of using the Article 9 procedure to settle investigations in relation to agreements involving the Spanish oil company Repsol³ and in relation to a co-operation agreement between Austrian Airlines and Scandinavian Airlines System.⁴

Although it is too early to draw any firm conclusions about the strengths and weaknesses of the Article 9 procedure, the *Bundesliga*, *Coca-Cola*, *Repsol* and *Austrian Airlines* cases suggest that the procedure has considerable practical value. By giving the Commission a clear legal basis to accept, and thereafter enforce, behavioral commitments in the context of Article 81 and Article 82 investigations, the procedure

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offers a relatively speedy route for the settlement of complex and, in some cases, long-running investigations into alleged violations of Articles 81 and 82. That said, a number of uncertainties remain regarding the legal effects of settlement decisions adopted under the Article 9 procedure, not least in the context of litigation before the courts of the EC member states.

Commissioner Kroes Sets Out Her Goals

In March and April of this year, Commissioner Neelie Kroes gave two important speeches in Brussels setting out her current goals and aspirations as Commissioner for Competition.⁵ In the course of the speeches, Commissioner Kroes announced the following initiatives:

Sector investigations in energy and financial services: The Commission has launched sector investigations into certain areas of the energy and financial services markets in the EU.⁶ The investigations are focusing on the gas, electricity, banking and insurance sectors. The Commission plans to issue a report next year summarizing its findings from each of the investigations.

Encouraging private enforcement: The Commission recognizes that there are a number of obstacles to the private enforcement of EC competition law through the courts. In contrast to other jurisdictions, most notably the United States, where antitrust litigation is widespread, litigation seeking relief from the effects of conduct that infringes EC competition law is infrequent. As a first step in trying to break down the obstacles to more frequent recourse to litigation, the Commission intends to launch a consultation exercise on ways to make private litigation more attractive in the EU. The Commission is preparing a consultation document (a so-called Green Paper) which is expected to be published later this year and which will present a number of ideas for changes intended to encourage

the victims of conduct that violates EC competition law to seek redress through litigation in the EC member states' courts.

New Cartel Unit in DG Comp: Commissioner Kroes has made the fight against cartels her number one priority. In this context, she has approved the establishment of a new Directorate within DG Comp that will focus solely on the detection and investigation of cartels.

Improvements to the EC leniency program: Although Regulation 1/2003 made a number of far-reaching changes to the procedural aspects of the enforcement of Articles 81 and 82, it did not make any changes to the Commission's leniency program.⁷ During the time leading up to the adoption of Regulation 1/2003, and since its adoption, there has been increasing call for the Commission to act as a one-stop shop for leniency applications under EC competition law. To date, those calls have met with little success. Making a leniency application in one EU member state does not automatically entitle the applicant to leniency in any other member state. In practice, therefore, companies seeking leniency in relation to conduct that has effects in a number of EU member states have to consider the merits of filing a leniency application in each of the relevant member states (assuming that each of those member states operates a leniency program). Commissioner Kroes recognizes that the burden of having to file multiple leniency applications can deter would-be applicants and thereby undermine the effectiveness of the leniency program. In view of these concerns, the Commission is currently considering various options to establish one-stop leniency treatment across the EU.

The Commission is also looking at ways to reduce the risk of documents provided pursuant to a leniency application being the subject of discovery in civil litigation.

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It is likely that any procedural changes made as a result of these initiatives will be reflected in a revised version of the Leniency Notice.

Court of Justice Dismisses Commission's Appeal Against the Court of First Instance's Judgment in *Tetra Laval v. EC Commission*.

In a judgment dated February 15, 2005, the Court of Justice of the European Communities (the "Court") upheld a ruling by the Court of First Instance ("CFI") that the EC Commission had erroneously blocked the acquisition by packaging company Tetra Laval ("Tetra") of Sidel.

The Court's judgment in Case C-12/03 P, *Commission v. Tetra Laval BV*, confirms that, although the Commission has the power to prohibit mergers on the basis of their anticipated conglomerate effects, the Commission must meet a very high evidentiary standard when blocking a merger on that basis. In addition, the Court held that the Commission was wrong in rejecting out-of-hand certain behavioral undertakings proffered by Tetra with a view to securing the Commission's approval of its acquisition of Sidel.

Background

On October 30, 2001, the Commission adopted a decision prohibiting Tetra's acquisition of Sidel, concluding that the transaction would create or strengthen a dominant position on the part of Tetra. The Commission found that the transaction would enable Tetra to leverage its dominance in the carton-packaging sector to the prejudice of its competitors.⁸

Tetra appealed to the CFI requesting annulment of the Commission's decision. In its judgment in Case T-5/02, *Tetra Laval BV v. Commission* (October 25, 2002), the CFI annulled the Commission's prohibition decision, holding that the decision had been based on manifest errors of assessment by the Commission.

The CFI held that, because the effects of a conglomerate-type merger generally are considered competitively neutral or beneficial, the Commission may rely on the "conglomerate effects" doctrine to prohibit a merger only where it is established that, as a result of the proposed transaction, the merged entity would have not only the ability, but also the incentive, to leverage its market power.

The CFI concluded that the Commission had failed to meet the required level of proof to establish that the merged entity would have the ability and incentive to leverage its dominant position in the aseptic carton markets to obtain an advantage in other markets through, among other things, tying, bundling, predatory pricing or loyalty rebates. The CFI held that the Commission had erroneously based its leveraging determination on the presumption or expectation that Tetra would engage in tying or bundling practices that would have violated Article 82 of the EC Treaty. The CFI further found that the Commission had erred in rejecting out-of-hand certain behavioral commitments offered by Tetra.

Although Tetra's acquisition of Sidel was cleared by the Commission following the CFI's ruling, the Commission nevertheless appealed the ruling to the Court on the ground that the evidential standard applied by the CFI would, in practice, be almost impossible for the Commission to meet and, in addition, that the Commission had not erred in rejecting Tetra's proposed undertakings purely because of their behavioral nature.

The Court's Judgment

The Court made clear that judicial review of the Commission's merger decisions by the CFI should not shy away from addressing the economics of the case. The Court held that "the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from

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reviewing the Commission's interpretation of information of an economic nature".

The Court left undefined the exact standard of proof that the Commission must satisfy in conglomerate effects cases. However, the Court stressed that, as conglomerate effects theories are based on an analysis of events in the future, and are therefore inherently speculative, the quality of the Commission's evidence is very important:

The analysis of a "conglomerate-type" concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a [prohibition] decision . . . is particularly important, since the evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

The Court determined that, in light of these factors, the CFI had not exceeded its powers of judicial review.

The Court also agreed that the CFI correctly held that the Commission should have taken account of the commitments submitted by Tetra to refrain from conduct that amounted to leveraging Tetra's dominant position in carton packaging.

The Court did accept one of the Commission's arguments. The CFI had ruled that the Commission should not have presumed that Tetra would engage in such anti-competitive conduct as leveraging because the proscription of such conduct by Article 82 of the

EC Treaty (which makes illegal the abuse of a dominant position) and the resulting exposure to significant sanction, including the possible imposition of sizable fines, would dissuade Tetra from engaging in such leveraging practices. The Court disagreed and found that there was no requirement on the Commission to assess whether an infringement of Article 82 would be likely, as such an inquiry would be too speculative and place too great a burden on the Commission when carrying out its review of a merger.

Significance of the Judgment

Although the Court did not decide the exact standard of proof the Commission must satisfy in prohibiting mergers on the basis of conglomerate effects, the Court's general endorsement of the CFI's ruling confirms the high evidentiary standard that the Commission must meet in such circumstances.⁹

In addition, the Court's findings regarding the behavioral undertakings offered by Tetra will require the Commission, in future cases, to give consideration to behavioral undertakings offered by merging parties, rather than simply rejecting them out-of-hand because of their purely behavioral nature.

Notes

¹ Decision dated January 19, 2005 in COMP/C-37.214 - "Joint selling of the media rights to the German Bundesliga".

² Commission press release dated June 22, 2005 (IP/05/775) "Commission makes commitments from Coca-Cola legally binding, increasing consumer choice".

³ Case COMP/B-1/38348-*Repsol CPP SA* (2004/C258/03).

⁴ Case COMP/37.749-*Austrian Airlines/SAS* (2005/C233/08).

⁵ "Taking Competition Seriously - Anti-Trust Reform in Europe" (speech given on March 10, 2004 at the International Bar Association/European Commission Conference: Antitrust Reform in Europe: A Year in Practice) and "The First Hundred Days" (speech given on April 7, 2005 at the conference to celebrate the fortieth anniversary of the Studienvereinigung Kartellrecht).

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⁶ Commission press releases dated June 13, 2005 (IP/05/716) "Commission opens sector inquiry into gas and electricity" and (IP/05 719) "Commission opens sector inquiries into retail banking and business insurance". Article 17 of Regulation 1:2003 gives the Commission wide-ranging investigative powers to conduct investigations into sectors in which the Commission feels competition may be inhibited.

⁷ The program is described in the Commission's "Notice on immunity from fines and reduction of fines in cartel cases" (the "Leniency Notice").

⁸ The Commission concluded that Tetra's acquisition of Sidel had three foreseeable anticompetitive conglomerate effects. First, the merged entity could use its dominant position in the traditional carton-packaging market as a "lever" to enhance Sidel's leading (but not dominant) position in the market for SBM machines and, thereby, establish the merged entity as the dominant producer in that market. Second, the transaction would enhance Tetra's existing dominant position in the market for aseptic cartons and aseptic carton packaging equipment by eliminating potential competition from Sidel in the closely-related polyethylene terephthalate packaging market. Third, the transaction would generally strengthen the merged entity's position in the market for materials and equipment used for the packaging of products that are sensitive to light or oxygen.

⁹ The Commission is currently drafting Guidelines describing its methodology for assessing the competitive effects of vertical and conglomerate mergers. A first draft of these Guidelines is expected to be published later this year.

U.S. ANTITRUST LAW DEVELOPMENTS

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Review of Recent Developments in U.S. Antitrust Enforcement

The pace of U.S. merger activity in 2005, which had accelerated over 2004 relative to earlier years, resulted in a number of high profile investigations, challenges or threatened challenges, and resolutions, including decisions to forego challenges as well as divestitures at the U.S. federal agencies.¹ Among the high profile

matters were transactions in the consumer video area (proposed mergers involving Blockbuster, Hollywood Video and Movie Gallery), mergers in an airline industry fraught with pending or actual bankruptcies (America West – USAirways), and a number of transactions involving gaming, including the mergers of Harrah's and Caesar's as well as MGM-Mirage – Mandalay Bay Resort Group and Penn National's acquisition of Argosy. By the summer of 2005, merger enforcement activity was also marked by the culmination of three separate "Part III" litigation matters at the Federal Trade Commission ("FTC"): *Arch Coal, Evanston Northwestern Hospital* and *CBI-PDM*.²

Other major developments for antitrust policy included the June 28, 2005 decision by the U.S. Court of Appeals for the District of Columbia in the *Empagran S.A. v. F. Hoffman Laroche, Ltd.* matter.³ The central issue decided by the DC Circuit Court in the remand from the Supreme Court was whether the Foreign Trade and Antitrust Improvements Act of 1982 ("FTAIA") precluded the plaintiffs (overseas purchasers of vitamins) from pursuing their antitrust claims in U.S. courts. In their decision, the Appeals Court ruled that plaintiffs experiencing antitrust injury in foreign commerce cannot pursue suits in the U.S., unless the "direct" or "proximate" cause of their antitrust injury was the effect or result of U.S. conspiracy and determined that the plaintiffs in this matter had not met that threshold of sufficient or direct causal relationship. There are other cases in which the agencies have filed amicus briefs with the U.S. Supreme Court, the outcomes of which bear watching for developments in application of antitrust laws to joint ventures as well as issues related to conditions of leniency.⁴

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Overview of Merger Enforcement Activity

Scholars and practitioners of U.S. merger enforcement have much to interest them so far in 2005. The merger matters were many and varied and include a number of decisions not to challenge transactions (that were accompanied by detailed statements), as well as a number of matters involving divestiture of assets in order to resolve competitive concerns. As noted above, among the most interesting set of developments were the three cases involving the FTC's Part III administrative hearing process, which are discussed here first.

The *CBI-PDM* (Chicago Bridge & Iron) case was decided by an administrative law judge ("ALJ") with a recommendation for divestiture, which decision was reviewed and approved by the FTC and is now on appeal to the federal courts; the *Evanston Northwestern Hospital* case was litigated before an ALJ with closing arguments in July and a decision expected in October; and the FTC declined to pursue Part II litigation against Arch Coal. All three matters involved consummated mergers – albeit at vastly different stages of timing. The *Evanston Northwestern Hospital* transaction was one of several hospital retrospectives conducted by the FTC and involved a merger from early in 2000.⁵ The *CBI-PDM* case is one in which the parties received early termination but had not closed the transaction at the point at which the FTC undertook a more detailed investigation in November 2000. The transaction closed in February 2001 with a complaint issuing later and a subsequent hearing was held with an initial decision by the ALJ in 2003. Each of the matters raises some similar as well as many unique features.

The central issues in the *Evanston Northwestern Hospital* case revolved around product and particularly geographic market definition, with the FTC alleging a substantially narrower geographic market with fewer

hospitals than the Defendants, who claimed a market inclusive of nearby Chicago hospitals. The *Evanston* case has significant interest outside of the healthcare area for the theory of alleged harm – the FTC alleged that the merged hospitals had successfully implemented post-merger price increases that were substantially in excess – on a percentage change basis – of those of "comparable" or cohort hospitals. Thus, the focus was on the relative percentage increase as opposed to the specific level of pricing attained. Much of the expert economic testimony went to an examination of the factors that drive pricing, differences and similarities among the hospitals and products in the cohort or comparison groups, and the base point from which price changes commenced for various hospitals.⁶ Since much of the testimony was in camera, additional specifics on the methodology for proving competitive effects will await the decision in its public version but can be seen to some extent in the redacted versions of the briefs available at the FTC website.⁷

In addition, unlike the *CBI-PDM* matter in which the concern was potentially more about prospective price increases and ease of entry into the relevant markets, the *Evanston* case focused on whether the price increases were "out-of-line" with those of other hospitals, and were explained in part by investments in improved quality or adjustments in the marketplace. The FTC also focused the competitive effects analyses on the mechanism by which the alleged competitive harm occurred – namely, that payors (commercial insurance companies purchasing on behalf of consumers) claimed that they did not have credible alternatives to the merging hospitals and hence were subject to price increases. Given recent cases (e.g. *Arch* and *Oracle*) in which customer testimony was critiqued by the courts as insufficient to demonstrate competitive harm, the upcoming decision will be interesting to review to determine the nature and scope of evidence on this point.

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The third case involving possible Part III litigation is the *Arch Coal* merger. In an extensive decision reviewing the record and also the specific analyses raised in Commissioner Jones Harbor's dissent, the FTC concluded that it would not seek additional litigation against the merger.⁸ Among the factors cited were the absence of evidence of price increases post-merger, confidential information on the capacity, output and competitive decision of both the larger coal companies in the Powder River Basin who had been the focus of the FTC's claims with regard to potential coordination post-merger and other confidential information on smaller companies including the acquirer of the divested Buckskin mine.

Of the numerous mergers under investigation, a number were resolved at the FTC as well as the Department of Justice ("DOJ") with consent orders involving divestiture of assets. Among the more significant are the divestiture of service mark, spectrum and consumer accounts in 16 rural areas in the *Alltel-Western Wireless* matter,⁹ the divestiture of terminals and other assets in the *Valero* matter,¹⁰ and the divestiture of a riverboat casino in Baton Rouge Louisiana to resolve competitive concerns in a geographic market involving gaming in that area.¹¹ There were two other major decisions involving gaming in 2005, including approval of the MGM-Mirage – Mandalay Bay Resort transaction and the acquisition of Caesar's Entertainment by Harrah's (who in the prior year had purchased Horseshoe).¹²

At the same time, the agencies continued their efforts to some extent in transparency in decision making, with relatively detailed statements concerning the rationale for not challenging a transaction or business practice.¹³ For example, the statement approving the America West – US Airways transaction noted the fact that the two have largely non-overlapping networks with hubs in the west for the former and in the east for the latter

and more extensive competition from other airlines as well.¹⁴ Similarly, a decision not to challenge certain exclusive contracting practices of Western Union received detailed scrutiny and analysis with regard to the current state of competition and change within financial markets. Other transactions involved licensing of assets.¹⁵ Finally, there were high profile transactions involving the video rental and sale business, with the proposed transactions involving Blockbuster, Hollywood Video, and Movie Gallery, which culminated in the merger of the latter two and a variety of legal proceedings related to the second request process.¹⁶

Competition Advocacy by DOJ and FTC

In addition to merger activity and numerous amicus briefs or other briefs on matters reported at significant length elsewhere, the agencies were also involved in a range of competition issues outside of merger enforcement. Among the areas of "competition advocacy" activity for the DOJ and FTC in 2005 were a number of efforts to promote "unbundling" of real estate brokerage services and prices – that is, to facilitate the ability of consumers to purchase either full-service brokerage services or à la carte services at separate and presumably reduced prices. Interestingly, the agencies chose a number of different modes of intervention including letters to state legislatures as well as litigation. These included several filings before state legislatures or regulatory commissions (in Oklahoma, Missouri and Texas) setting out the potentially adverse competitive consequences of proposed legislation or regulation that would require real estate brokerage firms to provide "full service" brokerage services, revision of a 1973 consent decree to allow advertising of commission rates and structures, and a suit against the Kentucky Real Estate Commission challenging prohibitions on rebates or other forms of inducements.¹⁷ A settlement was subsequently entered that provides for consumers' ability to choose among

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real estate services and for brokers to have flexibility in the terms offered, including rebates. These interventions are of interest for a number of reasons – as part of DOJ/FTC initiatives to remove or deter regulations or legislation that tends to limit competition by unnecessary regulation as well as efforts by the FTC and DOJ, each of whom have filed cases challenging the protection of the specific activity by state regulation or oversight.¹⁸ In addition, as noted below, reform or repeal of exemptions and immunities from the antitrust laws are a major focus of the Antitrust Modernization Commission, with hearings in November specifically on exemptions and immunities.

Antitrust Modernization Commission

A place to watch for substantive updates and extensive review on the U.S. antitrust laws and practice is the Antitrust Modernization Commission (“AMC”) and its website. The AMC, which is charged by Congress under a tight timeline with reviewing a wide number of areas of enforcement and structure in the U.S. has released its work plan and commenced hearings concerning potential reforms to the U.S. antitrust laws and practice.¹⁹ The hearings and AMC documents provide an important resource on a wide variety of topics including criminal and civil practice, exemptions and immunities, potential reform of the merger review process (as well as the structure of the enforcement agencies) and specific topics including exclusionary conduct, merger enforcement, international, regulated industries and remedies. There are hearings scheduled throughout the fall on these topics with the initial ones occurring already on civil practice and criminal issues.²⁰

Notes

¹ See, e.g., Antitrust Division Workload Statistics for FY 1995-2004, which document the increased number of reported transactions in 2004 relative to the immediately preceding years. In addition, a recently issued report provides detailed comparison of trends with regard to enforcement actions

and second requests in 2004 relative to other periods. (U.S. Department of Justice and Federal Trade Commission, Annual Report to Congress 2004, <http://www.ftc.gov/reports/hsr05050810hsrrpt.pdf>). Staffing has changed to some extent with a full year’s tenure for the FTC Chair and new commissioners, and recently appointed Acting Assistant Attorney General Barnett, as well as an incoming new head to the economics section, with an initial speech focusing on dominant firm behavior. (Michael A. Salinger; FTC Director Bureau of Economics <http://www.ftc.gov/speeches/salinger/050711santefe.pdf>.)

² The FTC has the ability to challenge a transaction and have the hearing conducted before an administrative law judge (“ALJ”) in Part III litigation. As is discussed in greater detail herein, the FTC voted not to pursue the *Arch Coal* case (which it had lost on appeal in the fall of 2004 after an adverse District Court opinion), did challenge the *Evanston Northwestern Hospital* merger (with final arguments in July 2005 after a several week trial) and subsequent to an ALJ opinion ordering divestiture of PDM from CBI, affirmed the decision which was the result of Part III litigation and ordered divestiture. The most recent stages of this matter included review of issues related to divestiture with additional orders from the FTC in May 2005. <http://www.ftc.gov/opa/2003/06/cbi.htm>. In June 2005 the FTC decided to close its investigation into the merger of Arch Coal <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf>.

³ *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*; see <http://pacer.cadc.uscourts.gov/docs/common/opinions/200506/01-7115c>.

⁴ Brief for the United States as Amicus Curiae, *Texaco, Inc. v. Dagher*: <http://www.usdoj.gov/atr/cases/f209200/209.htm> and Brief for Appellant United States of America, *Stolt-Nielsen, et al. v. U.S.*; <http://www.usdoj.gov/atr/cases/f209100/209127.htm>.

⁵ The FTC issued an administrative complaint against Evanston Northwestern Healthcare (“ENH”) in February 2004, which challenged ENH’s acquisition of Highland Park Hospital. In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.; File No. 011 0234. Docket No. 9315; <http://www.ftc.gov/os/adjpro/d9315/>; see brief of respondent hospitals: <http://www.ftc.gov/os/adjpro/d9315/>; and of complaint counsel (FTC): <http://www.ftc.gov/os/adjpro/d9315/050701ccreplyposttrialbrief.pdf>.

⁶ This is of interest to practitioners who are examining price changes in industries that are undergoing significant cost or price changes for a variety of reasons other than mergers; such was the experience of the hospital industry in the late 1990s and early 2000s.

⁷ See note 3.

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⁸ The decision was 4-1 on June 13, 2005. See majority opinion and dissent at <http://www.ftc.gov/opa/2005/06/archcoal.htm>.

⁹ Press Release, "Justice Department Requires Divestitures in Alltel's Acquisition of Western Wireless" (July 6, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209918.htm).

¹⁰ In the Matter of Valero L.P., a Limited Partnership; Valero Energy Corporation; and Kanab Pipe Line Partners, L.P., a Limited Partnership, Docket No. C-4141, Decision and Order, July 26, 2005, <http://www.ftc.gov/os/caselist/0510022/050726do0510022.pdf>.

¹¹ In the Matter of Penn National Gaming, Inc., a corporation, Decision and Order, July 27, 2005, <http://www.ftc.gov/os/caselist/0510029/050727do0510029.pdf>; Penn National Gaming, Inc., a corporation, File No. 051 0029, Agreement Containing Consent Orders, July 27, 2005; <http://www.ftc.gov/os/caselist/0510029/050727agree0510029.pdf>. See also Press Release, "Reuters LTD. And Moneyline Telerate Restructure Proposed Deal to Alleviate Justice Department's Antitrust Concerns" (May 24, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209146.htm).

¹² Press Release, "FTC Closes its Investigation of Harrah's Entertainment, Inc.'s Acquisition of Caesars Entertainment, Inc." (June 9, 2005, <http://www.ftc.gov/opa/2005/06/harrah.htm>); Proposed Acquisition of Caesars Entertainment, Inc. by Harrah's Entertainment, Inc., File No. 041-0166, June 8, 2005, <http://www.ftc.gov/os/2005/06/050609harrahcaesarltr.pdf>; Proposed Acquisition of Mandalay Resort Group by MGM Mirage Inc., FTC File No. 041-0145, Closing Letters, February 16, 2005, <http://www.ftc.gov/os/closings/staff/050216mgmmandalay.pdf>.

¹³ This continues the agencies' efforts at transparency in enforcement, to set out the empirical and analytical bases for agencies' assessments of the competitive implications of specific transactions or practices. See, for example, the detailed analysis in the decision by the FTC based on a 4-1 vote not to pursue litigation in administrative proceedings in the *Arch Coal* merger case.

¹⁴ Press Release, "Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the America West / US Airways Investigation" (June 23, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209709.htm).

¹⁵ Press Release, "Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Western Union Money Transfer Investigation" (March 16, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208145.htm).

¹⁶ *FTC v. Blockbuster, Inc.*, Agreed Order Regarding Extension of Hart-Scott Rodino Waiting Period, March 9,

2005, <http://www.ftc.gov/os/caselist/blockbuster/050311orderblockbuster.pdf>; Blockbuster to Comply with FTC's Premerger Rules, March 11, 2005, <http://www.ftc.gov/opa/2005/03/blockbuster2.htm>.

¹⁷ Press Release, "Justice Department Moves to Modify Real Estate Consent Decree" (June 29, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209833.htm); Press Release, "Justice Department Statement on Oklahoma Legislature's Proposed Real Estate Legislation" (May 25, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209196.htm); Press Release, "The Justice Department and the Federal Trade Commission Urge the Governor of Missouri to Continue to Allow Consumer Choice in Real Estate Brokerage Services" (May 24, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/209148.htm); Press Release, "The Justice Department and the Federal Trade Commission Urge the Alabama State Senate to Continue to Allow Consumer Choice in Real Estate Brokerage Services" (May 12, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208996.htm); Press Release, "Department of Justice and Federal Trade Commission Urge Texas Real Estate Commission to Continue to Allow Flexibility in Brokerage Services" (April 21, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208653.htm); Press Release, "Justice Department Urges Oklahoma State Legislature to Continue to Allow Choice in Real Estate Services" (April 8, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208486.htm); Press Release, "Justice Department Sues Kentucky Real Estate Commission for Limiting Competition Among Real Estate Brokers" (March 31, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208360.htm). See also, http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm regarding a decision by South Dakota Real Estate Commission to allow rebates and incentives.

¹⁸ See Comments by the American Bar Association's Antitrust Section on State Action, <http://www.abanet.org/antitrust/comments/2005/05-05/at-state-action-05.pdf>; and the FTC Report on State Action and cases cited therein, at [ftc.gov](http://www.ftc.gov). See also action by DOJ to challenge certain conduct as not immune from antitrust enforcement: Press Release, "Justice Department Requires Two West Virginia Hospitals to End Illegal Market-Allocation Agreements" (March 21, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208209.htm).

¹⁹ <http://www.amc.gov/>; http://www.amc.gov/pdf/meetings/amc_timeline050330.pdf.

²⁰ http://www.amc.gov/pdf/meetings/amc_timeline050330.pdf.