

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## INDIA'S NEW COMPETITION LAW: A CANADIAN PERSPECTIVE

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### INTRODUCTION

In September of 2007, India's parliament passed a bill amending the *Competition Act* it had enacted in 2002.<sup>3</sup> Most of the 2002 Act had not been implemented pending the resolution of some constitutional issues raised by members of the Supreme Court. With these amendments, the full Act (as amended) will become effective very soon.<sup>4</sup> The purpose of this article is to introduce readers to India's recent experience with competition law and to describe the new law, with a particular emphasis on features that we believe will interest Canadian antitrust scholars.

There are at least two good reasons for Canadians in the antitrust field to inform themselves of the important recent developments with respect to India's competition policy. The first lies in India's large and growing importance as an emerging economic power. Currently the third largest economy in the world as measured by purchasing power parity (behind only the U.S.A. and China)<sup>5</sup>, it is also among the fastest growing major economies in the world, with a GDP growth rate of 9.2% at the end of the second quarter of 2006-2007.<sup>6</sup> This growth has attracted, and is some part the product of, foreign investment from around the world: a recent study regards India as the second

most popular destination for foreign direct investment (FDI). In addition, Indian companies large and small are reaching beyond their country's borders to sell services and invest in – and even purchase control of – major companies in Canada, the United States and elsewhere.<sup>8</sup> Indeed, the stock of Indian FDI in Canada has risen over 600% in the last five years. In comparison, while Canadian FDI in India has not had such a spectacular rise, it has increased steadily, and has more than trebled since 1990.<sup>9</sup> Bilateral trade between India and Canada has also increased significantly, with merchandise trade registering an annual growth rate of 11.5% over 1999-2006, and services trade increasing even more rapidly, at 13.9% annually over 1999-2004.<sup>10</sup>

With the Indian economy growing so rapidly and Indian firms and consumers increasingly integrated into global markets, it is inevitable that Canadian firms interested in participating in this growth will become exposed to a variety of Indian domestic policies, including antitrust law. Just as a working knowledge of American and European antitrust has become an asset for competition policy practitioners in this country over the last many years, knowledge of the emerging competition regimes in the new economic powers, particularly China and India, should be expected to become important as well.

The second reason relates to what we can learn from the experience of another country trying to fashion a modern competition law, and in doing so trying to draw on current economic thinking on competition and

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efficiency and on the experiences of many countries with longer antitrust histories. In this regard, India is a much more interesting study for Canadians than would be many other developing countries.<sup>11</sup> First, it took on this task with great seriousness; the work involved numerous studies and consultations with experts from within and outside the country. Attempts were made to draw on the experience of Canada and other countries with well-established antitrust regimes. Second, while our histories and traditions are clearly different on many levels, there are also some important similarities in law, government and language thanks to our common historical connections to Britain. India is also a federal state struggling to balance the needs of states for the freedom to address more local concerns with the need for a strong central authority. For these reasons, it is particularly interesting to see how India addressed some of the challenging antitrust questions with which we have been struggling in Canada.

### EVOLUTION OF COMPETITION LAW IN INDIA

While our principal focus here will be on India's new law, it is important to recognize that this is not India's first competition law. Unlike many other developing countries, India has had a competition law for some time – in fact, since 1969. We begin, therefore, with a short discussion of the historical development of antitrust in India before moving to our review of the new law.

Competition policy in India draws inspiration from Articles 38 and 39 of the Constitution of India (which came into effect in January 1950), which are a part of the Directive Principles of State Policy.<sup>12</sup> These articles reflect the aim of moving India toward a welfare state, and building a just and equitable society, and mandate that the State shall, in particular, direct its policy towards securing (a) “that the ownership and control of material resources of the community are so distributed

as best to subserve the common good;” and (b) “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.”<sup>13</sup>

Accordingly, after independence, the government of India assumed increased responsibility for the development of the country, and followed policies involving “command and control” style laws, rules and regulations. In 1951, the *Industries (Development and Regulation) Act*<sup>14</sup> was implemented, through which the government sought even greater control of the industrial sector through an industrial licensing policy which required firms in many industries to have licenses for the entry into a business or the expansion of an existing business.

In this situation, a series of three government studies led to the enactment of the *Monopolies and Restrictive Trade Practices Act (1969) (MRTP Act)*<sup>15</sup>, the first competition law in India.<sup>16</sup>

### *Monopolies and Restrictive Trade Practices Act (1969)*

The preamble to the *MRTP Act* describes it as: “An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices (RTPs), and for matters connected therewith or incidental thereto”. The Act was amended significantly twice, first in 1984, adding consumer protection provisions. In the next amendment in 1991, provisions related to concentration of economic power and various restrictions on dominant undertakings, like prior approval of the federal government for setting up a new undertaking, were removed from the Act. Below, we discuss the *MRTP Act* briefly. Until the new law takes effect, the *MRTP Act* remains the competition law of the land, so we will discuss it in the present tense.

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### Outline of the *MRTP Act*

The *MRTP Act* was clearly a product of the “command and control” mindset that dominated Indian government thinking at the time it was drafted. There was more of an effort to control who entered, exited, expanded and contracted in an industry than to foster true competition.

Under the Act, a company was classified as an “MRTP Company” when it by itself or together with its interconnected undertakings had an asset value of at least one billion Indian rupees (about \$25 million CDN) or was dominant in the relevant market (i.e. commanded a market share in excess of one-quarter (25%)). Such MRTP Companies were required to be registered with the federal government and to obtain government approval to expand an existing undertaking, establish an undertaking or carry out a merger, amalgamation or takeover, as these were believed to lead to an undesirable concentration of economic power.<sup>17</sup>

*Prevention of Restrictive Trade Practices (RTPs):* The Act defined a RTP as a practice “which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumer unjustified costs or restrictions”<sup>18</sup>. Broadly, the RTPs listed in the *MRTP Act* are: (i) refusal to deal; (ii) tie-up sales; (iii) full line forcing; (iv) exclusive dealing; (v) concerted practice; (vi) price discrimination; (vii) re-sale price maintenance; and (viii) area restriction.<sup>19</sup>

*Prevention of Monopolistic Trade Practices (MTPs)*<sup>20</sup>: According to the Act, an MTP is a trade practice which

has, or is likely to have, the effect of: (i) maintaining the prices of goods or charges for services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner; (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services; (iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India, to deteriorate; (iv) increasing unreasonably: a) the cost of production of any goods; or b) charges for the provision, or maintenance, of any services; (v) increasing unreasonably: a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase of any goods or in the provision or maintenance of any goods or by the provision of any services; and vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.<sup>21</sup>

*Prevention of Unfair Trade Practices (UTPs):* Unfair trade practices were included in the 1984 amendments of the *MRTP Act*, and effectively fall under the following categories: a) misleading advertisements and false representations, b) bargain sales, bait and switch selling, c) offering of gifts or prizes with the intention of not providing them and conducting promotional contests, d) product safety standards, and e) hoarding or destruction of goods.<sup>22</sup>

*Enforcement Authorities:* The *MRTP Act* provides for a MRTP Commission, whose Chairman is required to be a person who is or has been or is qualified to be a

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judge of the Supreme Court (highest court of India) or High Court (highest court of a State). The Commission will consist of not less than two and not more than eight other members.<sup>23</sup> The Commission is assisted by the Director General of Investigation and Registration for carrying out investigations, for maintaining a register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission.<sup>24</sup>

The powers of the Commission include the powers vested in a civil court and include further powers: (i) to direct an errant undertaking (under RTP or UTP) to discontinue a trade practice and not to repeat the same; (ii) to pass a "cease and desist" order; (iii) to grant a temporary injunction, restraining an errant undertaking (under RTP or UTP) from continuing an alleged trade practice; (iv) to award compensation for loss suffered or injury sustained on account of an RTP or UTP; (v) to direct parties to agreements containing restrictive clauses to modify the same; (vi) to direct parties to issue corrective advertisements; and (vii) to recommend to the Central Government the division of undertakings or severance of inter-connection between undertakings, if their working is prejudicial to the public interest or has led or is leading to an MTP or a RTP.<sup>25</sup>

Thus, the MRTP Commission could pass final orders in respect of RTPs and UTPs but only had an advisory role in the disposal of cases of MTPs and concentration of economic power. The central government had the sole authority to pass final orders in these other cases.

### **Economic Reforms and 1991 Amendments to the MRTP Act**

The year 1991 was a watershed year in Indian economic history, as it witnessed sweeping reforms in many areas of government policies, with a remarkable change from the previous "command and control" regime to a more market-driven one. A new Industrial Policy was

announced by the government in July 1991 based on the pillars of liberalization and competition.<sup>26</sup>

Keeping pace with such reforms in other policy areas, an important set of amendments to the *MRTP Act* were introduced in 1991. Two of the five major areas of the *MRTP Act*, namely prevention of concentration of economic power to the common detriment and control of monopolies, were de-emphasized after the 1991 amendments to the *MRTP Act*. More specifically, provisions relating to concentration of economic power and various restrictions on MRTP Companies (e.g. the requirement to obtain prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and takeovers of undertakings) were all deleted from the statute. Strikingly, then, merger control was effectively removed from the *MRTP Act*.

Further, in the same year the government, through a notification, brought previously exempt public sector enterprises, cooperative societies and financial institutions under the purview of the Act.

### **Problems with the MRTP Act**

The *MRTP Act* was not very successful in its stated objectives. This was partly because the Act was created at a time when all the process attributes of competition such as entry, price, scale and location were regulated through other policies over which the MRTP Commission had no influence. Unfortunately, while the *MRTP Act* was created to check the various competition concerns that resulted from the then command and control regime, it was not empowered to change the very elements of the regime that resulted in such concerns.<sup>27</sup>

For example, chapter III of the *MRTP Act* mandated that dominant companies were required to seek permission from the federal government (not the MRTP

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Commission) to expand, establish new undertakings, and to merge or acquire other businesses. The Government may at its discretion refer the request to the MRTP Commission for its opinion, but, in any case, it was not bound by the MRTP Commission's opinion. In fact, the frequency with which cases were sent to the MRTP Commission for an opinion was extremely low. As a result, the MRTP Commission became largely toothless to act against dominant undertakings. Moreover, no action was taken to reduce concentration of economic power that was already widespread at the time of passing of the *MRTP Act*, as noted by the three studies that led to its enactment.

Another problem stemmed from the lack of proper definitions in the Act. A perusal of the *MRTP Act* shows that there are no definitions for certain offending anti-competitive practices, for example, cartels, price-fixing, predatory pricing and bid-rigging, with the result that bringing successful actions became very difficult.

Significantly, the MRTP Commission was poorly funded, which further constrained its efficient functioning. A recent study by the non-governmental organization, CUTS International, included a comparative analysis of the antitrust agencies of seven developing countries, namely India, Kenya, Pakistan, Sri Lanka, South Africa, Tanzania and Zambia. The report revealed that all the other countries devoted a larger fraction of their total government budget to their antitrust agency than did India – some a much larger fraction.<sup>28</sup>

The problem of poor funding was compounded by the fact that the MRTP Commission required Government permission to incur expenditures beyond certain limits. This severely hampered its independence. The independence of the MRTP Commission was further impaired due to the discretionary power of the Government to appoint senior level officers. Moreover,

the MRTP Commission sat only in Delhi, making it difficult to access for small plaintiffs in distant locations in the large country.

### Reasons for a New Competition Law

Several factors contributed to the need for a new competition law for India. Most importantly, it was seen that India needed a law reflective of its more open approach to business – protections for competition and the competitive process should replace governmental command and control mechanisms. Further, over the years, a large number of judicial decisions had weakened certain aspects of the *MRTP Act*. For example, in a case involving the American Natural Soda Ash Corporation (ANSAC), the Supreme Court of India had directed that the MRTP Commission is not permitted to take actions against international cartels if the cartel meetings took place outside the country.<sup>29</sup>

Another contributing factor relates to the changing international economic environment. India's Ministry of Commerce set up an Expert Group on the interaction between Trade and Competition Policy, subsequent to the establishment of a similar group at the WTO, following the Singapore Ministerial Declaration of 1996.<sup>30</sup> The Expert Group reported that there was a need for an appropriate competition law to protect fair competition and to check anticompetitive practices, many of which could surface during the implementation of WTO Agreements.<sup>31</sup>

In view of the above, the Government appointed a High Level Committee on Competition Policy and Law in October 1999 to propose a modern competition law for the country in line with international developments.<sup>32</sup> Finally, the *Competition Act* 2002 was enacted on January 13, 2003 to replace the *MRTP Act*. The Competition Commission of India (CCI) was established in October 2003 to implement the provisions of the Act. Some constitutional issues

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delayed implementation of the law, but these appear to have been resolved with the passage of the *Competition Amendment Bill* (2007).

### **COMPETITION ACT (2002) AFTER THE COMPETITION AMENDMENT BILL (2007)**

Since 2003, India has been in a unique situation with respect to its competition regime, in that it has two competition laws, the outgoing – but still functional – *MRTP Act* (1969) and the newly enacted, but not yet implemented (at this writing), *Competition Act* (2002). However, the *Competition Act* will supersede the *MRTP Act* soon. The delay is due to a writ petition in the Supreme Court (India's highest court) which challenged the validity of the Act. It claimed that since the CCI would exercise judicial functions, in view of the doctrine of separation of powers recognized by the Indian Constitution, the Chairman of the CCI should necessarily be a judge chosen by the chief justice of India.<sup>33</sup> The *Competition Act* has been consequently amended, making the CCI an expert body, and providing for the creation of an appellate body to hear appeals from the decisions of the Commission, and to provide that the Commission's orders be executed by a civil court. The *Competition Amendment Bill* (2007) was passed by the parliament on September 10, 2007, and will come into force (and the *MRTP Act* will be repealed) after it is signed by the President.<sup>34</sup>

While the main reason for the amendment was the objection of the Supreme Court, the policymakers took the opportunity to incorporate other changes and delete some other sections to face the changing situation, and correct certain loopholes in the Act. In the end, the Amendment Bill (2007) amended a majority of the sections of the original Act. These amendments include replacement of 13 sections, and complete deletion of five sections. Further, the bill introduced 21 new sections to the Act. We will discuss the *Competition Act* as it stands after the passage of

the *Competition Amendment Bill* (2007). From this point on, unless otherwise clear from the context, references to the *Competition Act* should be assumed to be reference to the *Competition Act* (2002) including the amendments.

The objective of the *Competition Act* is written in the Preamble, which describes the establishment of a Competition Commission, "... to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India...". The key substantive provisions of the Act include section 3, which deals with anti-competitive agreements, section 4, which discusses abuse of dominance, sections 5 and 6, which deal with combinations (mergers).<sup>35</sup> Further, section 7 creates the Competition Commission of India (CCI), the new national antitrust agency charged with both enforcement and advocacy functions.

It must be noted that the regulation of unfair trade practices was removed from the ambit of the *Competition Act*, as there has been a separate law covering this area since 1986, the *Consumer Protection Act* (COPRA). Let us then examine in more detail the key elements of the *Competition Act* (2002) following the Amendment Bill.

### **Anti-Competitive Agreements**

The law prohibiting anti-competitive agreements is contained in section 3 of the Act.<sup>36</sup> Section 3(1) of the Act states that "enterprises, persons or associations of enterprises or persons, including cartels, shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India. Section 3(2) prohibits

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such agreements. This section covers both horizontal and vertical agreements.

Section 3(3) states that for four types of horizontal agreements between enterprises involved in the same or similar manufacturing or trading of goods or services, something close to a “per-se illegal” rule would be applied. These agreements are those that:

- (a) directly or indirectly determine sale or purchase prices;
- (b) limit or control production, supply, markets, technical development, investment or provision of services;
- (c) share the market or source of production or provision of services by allocation of *inter alia* geographical area of market, nature of goods or number of customers or any other similar way; or
- (d) directly or indirectly result in bid rigging or collusive bidding.

All of the above four types of agreements “shall be presumed to have an appreciable adverse effect on competition” It is not exactly a *per se* prohibition because there is a joint venture exception: “Provided that nothing in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage acquisition or control of goods or provision of services.”<sup>37</sup> Presumably, this clause only reestablishes the need for the CCI to prove that the agreement had an AAEC in India, that is, it takes the agreement from evaluation on a *per se* basis to a rule of reason treatment.

Section 3(4) identifies a number of vertical agreements subject to review under the AAEC in India test: tied selling, exclusive supply distribution agreements,

refusal to deal and resale price maintenance.

Section 3(5) of the Act lays down certain exceptions from the applicability of the provisions relating to anti-competitive agreements. First, the provisions of the Act will not restrict “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him” under the various intellectual property right statutes. The second is the exception allowed for export cartels.

Interestingly, omitted from the list of exemptions are agreements related to the collective bargaining activities of unions.<sup>38</sup> The *M RTP Act* had contained such an exemption (in its section 3), and similar exemptions are found in many other competition laws, including the Canadian *Competition Act* at section 4(1).

### Abuse of Dominance

Abusive behavior by dominant firms is dealt with in section 4 of the Act. A dominant position is defined in terms of a “position of strength” enjoyed by an enterprise in the relevant market in India.<sup>39</sup> Interestingly, even the factors to be taken into account to consider what is a relevant product and geographic market of any good or service have been laid down in the Act. However, no mathematical or statistical formula is adopted to “measure” dominance -- as was the case under the repealed provisions of the *M RTP Act* (there it was 25% of market share in any market).

Section 4(2) of the Act lists five categories of “abuse”:

- (a) imposing unfair/discriminatory conditions on purchase or sale of goods, or imposing unfair/discriminatory price on purchase or

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sale (including predatory price) of goods or service:

- (b) limiting or restricting the production of goods or services or of technical or scientific development relating to goods and services (to the prejudice of consumers);
- (c) adopting practices that deny market access;
- (d) making the conclusion of contracts subject to other parties accepting obligations that have no connection with the subject of the contracts; and
- (d) using a dominant position in one market to enter into or protect another market.

### Combinations Regulation (Merger and Amalgamation)

Merger law returns to India in sections 5 and 6 of the Act. “Combinations”, as defined in section 5 of the Act, include mergers, amalgamations, acquisition of shares and acquisition of control, when these are above specified size thresholds. Section 5 states that a combination that exceeds the threshold limits specified in the Act in terms of assets or turnover and which causes or is likely to cause an appreciable adverse impact on competition within the relevant market in India, can be scrutinized by the CCI. The threshold limits are specified in terms of assets or turnover. However, the threshold limits set are fairly high.<sup>40</sup>

The threshold limits are different according to whether the combination involves an enterprise or a group, and also whether the combination has assets or turnover only in India or worldwide. If the latter (i.e. worldwide), a “local nexus” clause is attached which adds a minimum asset value of the combination in India, in addition to existing global asset or turnover limits.

Section 6(1) declares that any combination which causes or is likely to cause an AAEC in India would not be permitted. Section 6(2), after the Amendment Bill (2007), makes it mandatory (it was voluntary in the 2002 Act) for the person or enterprise proposing to enter into a combination to give notice to the CCI of such intention, providing details of the combination. The notification requirements apply to a very wide set of combinations, many of which will have no or very minor effects in India. As a result, they have been controversial, as we discuss below. The CCI may, after due deliberation, approve the combination, or direct that the combination shall not take effect, or propose modifications. However, public financial institutions, foreign institutional investors, banks or venture capital funds which are contemplating share subscription financing or an acquisition pursuant to any specific stipulation in a loan agreement or investor agreement are not required to approach the CCI for this purpose. Thus, the Amendment Bill (2007) makes merger notification to the CCI mandatory for companies proposing “combinations” (mergers, etc., above the designated thresholds).

### Enforcement

The Competition Commission of India (CCI) is the authority entrusted with the powers to enforce the provisions of the *Competition Act*. Section 7(1) of the Act establishes the CCI. Section 7(2) enables it as the competition authority entrusted with eliminating prohibited practices, and as a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name. Section 8 declares the CCI will consist of a Chairperson and between two and six other full-time Members to be appointed by Central Government. In an important addition, section 32 of the Act provides that the CCI has the authority to consider agreements, abuse of dominance or combinations when key parties

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are outside India, when “such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.”

While most of the new act has not been implemented, pending the resolution of the constitutional issues, the CCI has been created and a single member, Vinod Dhall, appointed. It has already begun its work in the area of competition advocacy.<sup>41</sup>

Section 53A, which is a new section added in the 2007 amendments, provides for the establishment of the Competition Appellate Tribunal (CAT), which shall be a three-member quasi-judicial body headed by a person who is or has been a retired Judge of the Supreme Court or the Chief Justice of a High Court. Selections of the Chairperson and other Members of CAT are to be made by a Selection Committee headed by the Chief Justice of the Supreme Court of India or his nominee, and having Secretaries of the Ministries of Company Affairs and Law as its members.

The CAT has two main functions: (a) provide for hearing and disposing of appeals against any direction issued or decision made or order passed by the CCI; and (b) to adjudicate claims on compensation and pass orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act.

Other than the CCI members, the central government may appoint a director general – and as many other persons as required – for the purpose of assisting the CCI in conducting an inquiry into the contravention of any of the provisions of the Act, for the conduct of cases before the Commission, and for performing any other functions under the Act.<sup>42</sup>

The CCI may enquire into possibly anticompetitive agreements or abuse of dominance on receipt of a

complaint or information from any person, consumer or their association or a trade association. The CCI may also act on a reference made to it in this regard by the central government, state government, or a statutory authority.<sup>43</sup>

In the case of any combination, the CCI may inquire, upon its own knowledge or information, whether an acquisition, acquisition of control or a merger has caused or is likely to cause an AAEC within the relevant market in India. Further, as stated before, any combination with assets or turnovers above threshold limits must notify the CCI. After notification is given, the CCI must review the combination within 210 days or else the combination shall be considered approved.<sup>44</sup> Moreover, the CCI is not permitted to initiate any inquiry after the expiry of one year from the date on which such combination took effect. It may also commence an inquiry on receipt of a notice from any person proposing to enter into a combination or a reference from a statutory authority.<sup>45</sup>

### Remedies

The CCI can issue “cease and desist” orders and impose penalties not exceeding 10% of the average turnover during the preceding three years in cases of anti-competitive practice or abuse of dominance. In case of a cartel, the CCI can also penalize up to three times the illegal profits if this is more than 10% of the turnover.<sup>46</sup> The CCI can also order the break up of a dominant firm.<sup>47</sup> Finally, the CCI also has the power to provide temporary injunctions until the conclusion of an enquiry or further order if, during an enquiry, it feels an act contravening any of the sections 3, 4 or 6 of the law has been committed.<sup>48</sup>

Contravention of the CCI’s orders for the first time shall lead to the imposition of monetary penalties. If non-compliance continues or the person does not pay the monetary penalties, then it shall be treated as a criminal

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offence, and it may be punishable with imprisonment up to three years, or a very steep monetary penalty, or both, as the Chief Metropolitan Magistrate of Delhi deems fit.<sup>49</sup>

As mentioned before, anyone aggrieved by a decision of the CCI can appeal to the Competition Appellate Tribunal (CAT). Complaints against the ruling of the CAT have to be made directly to the Supreme Court, the highest judicial court in India.<sup>50</sup> The CAT will also adjudicate claims on compensation and pass orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act.<sup>51</sup>

To facilitate cooperation with cartel investigations, section 46 of the Act allows the CCI to impose a reduced penalty on any firm (not just the first) that provides vital information up to such time that the Director-General submits his/her report to the CCI. However, the amount of reduction given to the disclosing parties is discretionary.

### Competition Advocacy

Section 49 of the Act authorizes the CCI to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the request of the various levels of government in India. The Central Government or any state government can make a reference to the CCI for its opinion on the possible effect on competition of a policy under formulation or of an existing law. The CCI is mandated to provide its opinion to the Government within 60 days of receiving the reference. The Government, however, is not bound to abide by the opinion of the CCI.

In addition to the requirement that it respond to government references, the CCI is also instructed to "take suitable measures ... for the promotion

of competition advocacy, creating awareness and imparting training about competition issues."

### PROVISIONS OF PARTICULAR INTEREST TO CANADIANS

In this section we discuss aspects of the new Indian law that we think will be particularly interesting to Canadians. This interest could be due to the fact that they relate to controversial questions in our own law that we are debating, or they may just be strikingly different from the Canadian provisions and thus provide a reason for us to step back to reconsider our own approach.

We begin briefly by mentioning the goals of the Indian Act as described in what we might call a purpose clause, which follows the title but precedes any numbered sections. We have come to recognize that the Canadian Act's purpose clause has created some uncertainty as to the primacy of efficiency considerations in a case in which there are also implications for (for example) small and medium sized businesses or when consumer interests might be harmed. Similarly, the Indian Act may confuse adjudicators. While apparently attacking practices "having adverse effect on competition", this is to be done "keeping in view of the economic development of the country". The "development qualification" appears in a number of places in the Indian Act and has generated some concern among Indian scholars that it could open the door to abusive and anticompetitive behavior by firms that are seen to be encouraging development.<sup>52</sup>

### Competition Test

Throughout the Indian Act, there is only one specified competition test; it requires that to be condemned an action or agreement must have an "appreciable adverse effect on competition" (AAEC).<sup>53</sup> By contrast, in Canada we are familiar with the "undueness" test in

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section 45, the substantial lessening or prevention of competition (SLC) test that applies to most of the civil provisions and the “adverse effect on competition” test added to section 75 (refusal to deal) in 2002. In both India and Canada there are *per se* (or close to *per se*) offenses where none of these tests apply. It will be very interesting to see how the CCI, CAT and (possibly) the Supreme Court define an AAEC: that is, how large must an effect be to be deemed “appreciable”?

### Horizontal Agreements (Section 3, parts 1-3)

There has been much debate in Canada about section 45 of the *Canadian Competition Act* and whether it is overly broad or too narrow in its reach. A view shared by some is that the “undueness” test in section 45 makes it unnecessarily difficult to convict hard-core price-fixers, while at the same time the rather general prohibitions in the section might be seen to put efficiency-enhancing strategic alliances and joint ventures at risk of criminal prosecution. These concerns have led to calls for reform of section 45 to create a two-track system: a criminal track for the review of what is essentially hard-core cartel behaviour (with perhaps no undueness test), and a civil track for the review of other horizontal agreements.<sup>54</sup>

Critics of the undueness test have noted that Canada may be unique among countries with modern antitrust laws in this requirement.

As indicated, the new Indian law applies an “appreciable adverse effect on competition within India” (AAEC) test to horizontal agreements, a test that may not be much different in practice than the substantial lessening of competition (SLC) test with which we are familiar from the civil side of the *Canadian Competition Act*. Importantly, however, for a certain set of agreements listed in section 3(3) - essentially the hard-core cartel tactics of price-fixing, bid-rigging, etc. - any of these agreements is deemed to have such an adverse effect,

hence these are treated in something like a *per se* fashion. Not exactly *per se*, however: a clause provides that if these actions are taken by a joint venture that increases “efficiency in production, supply distribution, storage, acquisition or control of goods or provision of services”, they will not be presumed to have the AAEC. In our reading, this is not a complete efficiency exemption or defense - demonstrating efficiencies merely restores the government’s obligation to establish the AAEC.

Interestingly, there is, in section 19(3), an additional “efficiency” protection for all agreements (horizontal and vertical) that promise static or dynamic efficiencies. In this subsection, the CCI is directed to have “due regard” for a list of factors when it is considering whether the agreement has an AAEC in India. This list includes:

- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provisions of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

While it is certainly not obvious to us how this general efficiency provision might apply to what would otherwise be (nearly) *per se* prohibitions in section 3(3), we are of the view that it will not apply. Although section 19(3) provides a list of factors the CCI is to keep in mind when it considers whether the agreement has an AAEC, as the agreements listed in section 3(3) are presumed to involve an AAEC, this, to our minds, renders unnecessary any further consideration by the CCI.<sup>55</sup>

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### Vertical Agreements (Section 3, parts 1, 2, 4)

In the new law, vertical agreements are all subject to the AAEC test. The Act specifically mentions tied selling, exclusive supply/distribution arrangements and refusal to deal. The treatment of these kinds of cases may therefore not be very different from their treatment under Canadian law. However, in contrast to the Canadian approach, this section also lists resale price maintenance (RPM) and treats it as the others. Hence, RPM is not subject to *per se* condemnation, as is the case in Canada. In this regard, the Indian law is more consistent with current economic thinking on RPM than is the Canadian.<sup>56</sup>

### Abuse of Dominant Position (Section 4)

The abuse provisions look very different from those in the Canadian Act, though they are clearly intended to strike at many of the same behaviours by dominant enterprises. There are a number of restrictions placed on an enterprise in a dominant position.<sup>57</sup> As reported earlier, such a firm cannot impose “unfair or discriminatory” conditions in (i) purchases or sales of goods/services or (ii) prices in purchases or sales (including specific reference to predatory pricing) of goods/services. Significantly, the terms “unfair” and “discriminatory” are not defined in the Act. Recall from above that other actions that are banned for dominant firms include: (i) limiting production of goods or services; (ii) limiting technical or scientific development that hurts consumers; (iii) practices that deny market access; (iv) making conclusion of contracts subject to other parties accepting other obligations which may have no connection with the subject of the contracts (e.g. tied selling); and (v) using their dominant position in one market to enter into or protect another market.

A potentially troubling feature of these provisions is that there does not appear to be a competitive effects test here. Once a firm is determined to be in a dominant position, these actions are *per se* condemned. This could involve considerable overreach as many innocent or pro-efficient actions by dominant firms might be found to fall into this list.

Interestingly, the Act defines “predatory” as involving pricing below cost “with a view to reduce competition or eliminate the competitors” In Canada and elsewhere, while we have struggled with this at times, a consensus seems to have developed that competition policy generally, and abuse provisions (including those related to predation) specifically, should seek to protect competition, not competitors. Nevertheless, the Indian law provides, as does section 50 of the Canadian Act, for the protection of competitors.

### Combinations (Mergers) (Sections 5-6)

Section 5 of the new Act contains a number of subsections spelling out the kinds of transactions that are covered. Importantly, this includes size thresholds. Unless transactions are large enough in total value, they are not covered by the merger regulations, regardless of how large the shares of the relevant markets involved might be. More specifically, the threshold limits for notifications for acquisitions, mergers and amalgamations are the following:

- (i) For an individual firm acquiring an enterprise: Combined assets of the firm more than INR 10,000 million (approximately \$250 million CDN) or turnover of INR 30,000 million (\$750 million CDN).<sup>58</sup> These limits are U.S. \$500 million and U.S. \$1500 million where one of the firms is situated outside India. In the latter case, their business in India should have

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combined assets of INR 5000 million (\$125 million CDN), or turnover of INR 15,000 million (\$375 million CDN).

- (ii) For a group acquiring an enterprise: The limits are more than INR 40,000 million of assets (approximately \$1 billion CDN) or 120,000 million of turnover (\$3 billion CDN) and U.S. \$2 billion and \$6 billion where the group is in India or outside India, respectively; if the latter, the Indian business must have a combined asset base of INR 5000 million or turnover of INR 15,000 million.

As discussed above under “Combinations Regulation”, the 2007 amendments inserted a mandatory notification requirement into the law. This will apply to all combinations satisfying the size thresholds as described in section 5. Thus, all transactions against which merger law could be applied are obligated to notify, and the combination may not come into effect until the earlier of (in most cases) 210 days from notification or receipt of the CCI’s approval.

This notification requirement has been a cause for serious concern, as it requires that any group outside India, even if it has only a small Indian operation (with assets over only about \$125 million), prenotify the CCI of any acquisition anywhere in the world. After notification, they may have to wait for up to 210 days to get an approval from the CCI, even if the target is not situated in India, or doing business in any way in India. There are significant concerns that this will deter firms from investing in India, putting in jeopardy India’s economic revival. The issue has drawn concern from antitrust authorities and experts outside India, for example it has been raised by the

Antitrust Section of the American Bar Association (ABA), which wrote to the Indian government and the CCI (in letters dated Wednesday, November 15, 2007) that the new merger law “may be so burdensome as to discourage competitive conduct and investment in India”.<sup>59</sup> The ABA pointed out that most countries require an appropriate nexus between the jurisdiction and the transactions it reviews. This would appear to not be the case with the new Indian law. Further, the ABA noted that the waiting period of seven months is very lengthy compared to that of the other developed countries. In the U.S., for example, the initial waiting period is only 30 days. In Canada, under Section 123 of the *Competition Act*, it is 14 days after short form filings and 42 days after long form filings.

There are some other uncertainties regarding the merger section of the new law, as well. Section 6 indicates that a combination which causes, or is likely to cause, an AAEC in India is void. While section 92 of the Canadian Act permits the Competition Tribunal to intervene when a merger threatens to lessen competition, it grants this power as well for cases in which a merger “prevents” or is likely to prevent competition. This “prevent” provision is generally viewed as permitting the Tribunal to take action when, for example, a firm acquires a potential competitor poised to enter the relevant market and increase competition. In such a case, it might be argued that the transaction does not lead to a lessening of competition in the sense that it does not reduce competition below the level that existed before the merger. However, it is clear that such a merger can have harmful effects by reducing competition below the future levels that would have been observed but for the transaction. The new Indian law does not make so explicit a reference to these kinds of competitive effects, thus it is not clear to us whether the CCI will be able to bring “prevent” cases. This said, we see nothing in the law that would prevent the CCI, CAT or Supreme Court of India from

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employing a forward-looking “but for” test in such cases and finding that they may lead to an AAEC in India.

Unlike under the Canadian Act, there is no explicit efficiency defense for combinations. However, efficiencies should not be totally ignored. Section 20(4) lists a number of “factors” to which the CCI “shall have due regard” in determining whether a combination would lead to, or likely lead to, an AAEC in India. Many of these are familiar from section 93 of the Canadian Act, however item (n) in the Indian list is: “whether the benefits of the combination outweigh the adverse impact of the combination, if any.” It is not clear what may constitute “benefits” here (or whose benefits “count”), that is, we do not know if they are efficiencies as we would normally define them in Canadian cases or possibly something broader.

Finally, we note that the Indian Act grants the CCI the power to investigate a combination only up to one year after “such combination has taken effect”<sup>60</sup> In Canada, the Competition Bureau may make an application to the Tribunal regarding a merger up to three years after the merger has been “substantially completed”.<sup>61</sup>

### **The Enforcement Machinery and Remedies**

With its new law, India has opted for the “Commission” model, with obvious similarities to the European approach. The new CCI will combine investigation, prosecution and most first level adjudication functions for all types of competition cases. The Chairperson of the CCI (and any other member) need not be a judge or even a lawyer; he or she could be someone with “special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs administration or in any other matter which, in the opinion of the Central Government, may be useful to

the Commission.” All members are “whole-time” (i.e. full-time), there is no provision for part-time members as in Canada.

This is all effectively civil law, even with respect to hard-core cartel behaviour. While criminal sanctions are therefore not available, the CCI has the power to order a number of remedies against firms and individuals, including cease and desist orders and monetary penalties – and these may be applied in abuse of dominance cases as well as in cases involving horizontal and vertical agreements (as stated above in section 3.5). The CCI can also give orders that certain dominant enterprises be broken up. Prison terms may be applied for failure to comply with Commission orders.

The CCI has also been given an important advocacy function (section 49) that involves both responding to references on competition matters coming from the Central and State governments and taking suitable measures “for the promotion of competition advocacy, creating awareness and imparting training about competition issues.”

While the Chairperson of the Competition Appellate Tribunal (CAT) must be a person who is, or who has been, a Judge of the Supreme Court or the Chief Justice of a High Court, other members (there are to be not more than two other members) may be lay members with not less than twenty-five years experience in competition matters. There are no general provisions for private actions under the Indian Act, but applications to the CAT for compensation can follow on cases decided by the CCI or CAT where one of these bodies found violations of the Act, including the sections on horizontal agreements, abuse of dominance and combinations. Applicants will be required to pay “such fees as may be prescribed” to have their case for compensation heard. There is provision for

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a form of class action in which one individual can make (with the permission of the CAT) a request for compensation on behalf of “numerous persons having the same interest”.

**CONCLUDING REMARKS**

These are clearly interesting times for competition policy in much of Asia, with new laws emerging recently (or expected soon) in, among others, China, Hong Kong, Singapore and Vietnam; and heightened levels of enforcement activity in established antitrust regimes in South Korea and Japan. Among all these developments, we have argued that Canadians may be particularly interested in the recently passed *Competition Act* of India. Even beyond its status as an emerging economic power, the Indian experience is interesting to Canadians because of the more direct parallels in culture, language and institutions between our countries. We have seen that, after a great deal of study and debate, Indian legislators have opted for a model that, at the same time: (i) shares many features with the current Canadian model (in particular in the types of arrangements and actions it targets and in its economic orientation); (ii) contains provisions that have been suggested for a revised Canadian model (e.g. closer to *per se* treatment of cartel conduct, no *per se* treatment for resale price maintenance); and (iii) contains provisions quite distinct from those found in Canada (e.g. the Commission structure, civil treatment of even hard-core cartel conduct).

The success of the new Indian model will now, of course, turn on its implementation. In this regard, a number of questions have been raised that will continue to draw our attention – interest in some of these arising from our own experience in Canada:<sup>62</sup>

- (i) will the CCI and CAT be able to attract the level of expertise required to allow them to successfully conduct

their business when dealing with, as we would expect, frequently well-financed firms appearing before them?;

- (ii) related to the previous point, will the CCI be adequately funded to allow them to support high quality work by insiders and (as is contemplated by the Act) outside advisors? The funding levels of the previous MRTP Commission were not generally viewed as adequate (as discussed under “Problems with the *MRTP Act*” above), so this is a cause for concern;<sup>63</sup>
- (iii) will the CCI and CAT have the independence from government now considered essential to the proper conduct of competition policy?;
- (iv) how, and where, will efficiencies be balanced against anticompetitive effects? The law appears to allow for the consideration of efficiencies for virtually any competition matter (this is not quite clear), but provides little guidance as to how tradeoffs are to be conducted – this will presumably be determined through case law;
- (v) will economic efficiency clearly emerge as the central objective of the law or will it be compromised in some ways in the interest of furthering some “development” objectives?; and
- (vi) finally, what kind of private access will emerge here – what damages will be recognized, how open will

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the CAT be to their award, what fees will be charged to applicants, and how difficult will it be to bring group or class actions?

We will be following these developments closely for the reasons listed in our introduction: first, India promises to become an increasingly important economic partner and rival, hence an understanding of Indian domestic policies that affect Canadian interests is of obvious value; and second, we may have things to learn about our own approach to antitrust from watching India work to create a modern antitrust regime based on current thinking in competition law and economics.

## Notes

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<sup>3</sup> *Competition Act* (2002), Act No. 12 of 2003, Government of India, online: Competition Commission of India <http://www.competition-commission-india.nic.in/> [*Competition Act*].

<sup>4</sup> India's Corporate Affairs Minister announced to the press on September 10, 2007, that the Competition Commission of India (CCI) will be fully operational by 2008, after the Amendment Bill is signed by the President and selection of personnel for the CCI is completed.

<sup>5</sup> World Bank (2007), World Development Indicators Database, September 14, 2007, online: <[http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP\\_PPP.pdf](http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf)>.

<sup>6</sup> International Monetary Fund (2007), World Economic Outlook, April 2007, Washington, DC. About 12% of the global GDP growth in the next 15 years is expected to come from India. EIU Press Release March 30, 2006 <<http://store.eiu.com>>.

<sup>7</sup> A.T. Kearney (2005) "Foreign Direct Investment Confidence Index", Global Business Policy Council, 2005, Volume 8, A.T. Kearney Inc.

<sup>8</sup> For example, the formerly Calcutta-based Mittal Steel Company, now joined with Luxembourg's Arcelor, has control of Canada's Dofasco Steel Company. The Indian conglomerate, Aditya Birla Group, has acquired a number of pulp and paper mills in eastern Canada as well as Minacs Worldwide, Canada's largest business process outsourcing firm, and parts of Alcan (Novelis). Essar Global, an Indian firm with operations in steel, energy, power, communications, shipping and logistics and construction, completed its purchase of Algoma Steel in June 2007. Finally, a subsidiary of the large Indian conglomerate Tata Group (VSNL) now owns Teleglobe (as of 2006). There have been fewer high profile transactions involving Canadian firms as acquirers. One example was SNC-Lavalin's acquisition of RJ Associates (Engineers), a service engineering and contracting firm based in Mumbai, as a way to establish a permanent local presence in the Indian market for infrastructure services. There are Indian-Canadian joint ventures of note. For example, Sun Life Financial has teamed up with the Aditya Birla Group to create Birla Sun Life, and Magna International is in a partnership with Indian firm Amtek Auto to supply flexplate assemblies to the European and Indian markets. In the banking sector, the Royal Bank of Canada has sent two teams to India recently and looks set to enter the Indian market, where Toronto Dominion and Scotia Bank are already present.

<sup>9</sup> Statistics Canada (2006), "Year-end Stocks, CANSIM Table 376-0051" May 2006.

<sup>10</sup> Calculations of export figures from International Monetary Fund (IMF), Direction of Trade Statistics Yearbook, 1995, 2005 and 2007.

<sup>11</sup> For an interesting discussion of some of the challenges for competition policy in developing countries, see R.S. Khemani, "Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries", Occasional Paper 19, FIAS (Washington: The World Bank, 2007).

<sup>12</sup> S. Chakravarthy, "India" in Douglas H. Brooks and Simon J. Evenett, eds., *Competition Policy and Development in Asia*, Asian Development Bank (New York: Palgrave Macmillan, 2005).

<sup>13</sup> Article 39, Constitution of India.

<sup>14</sup> Act No. 65 of 1951, Government of India.

<sup>15</sup> Act No. 54 of 1969, Government of India [*M RTP Act*].

<sup>16</sup> The three government studies are: (a) "Hazari Committee Report on Industrial Licensing Procedure" (1955) Ministry of Industry, Government of India, New Delhi, (b) "Mahalanobis Committee Report on Distribution and Levels of Income" (1964) Government of India, New Delhi, and (c) "Monopolies Inquiry Commission Report" (1965) Government of India, New Delhi.

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- <sup>17</sup> *M RTP Act*, *supra* note 15, Chapter III.
- <sup>18</sup> *Ibid.*, section 2(o).
- <sup>19</sup> *Ibid.*, section 31.
- <sup>20</sup> *Ibid.*, section 33.
- <sup>21</sup> The definition of MTP was amended by the 1984 Amendment of the *M RTP Act*.
- <sup>22</sup> *M RTP Act*, *supra* note 15, section 36A.
- <sup>23</sup> *Ibid.*, sections 5, 6.
- <sup>24</sup> *Ibid.*, section 8.
- <sup>25</sup> *Ibid.*, sections 10, 11, 12, 36B.
- <sup>26</sup> Montek S. Ahluwalia, "Economic Reforms in India since 1991: Has Gradualism Worked?" (2002) 16:3 *The Journal of Economic Perspectives* 67.
- <sup>27</sup> *Supra* note 12.
- <sup>28</sup> For example, India's fraction of 0.0009 was lower than that of South Africa (0.033), Sri Lanka (0.003), Tanzania (0.017) and Zambia (0.056) (CUTS International (2003), "Pulling Up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project"). In a paper presented to the International Bar Association Global Competition Forum in Mexico City in 2003, Margaret Sanderson reported on competition agency staffing in a large number of countries. India's agency was reported to have only 120 employees of which only 18 were categorized as "professional" (Margaret Sanderson, "Strengthening the Economic Team within a Competition Agency" at 13).
- <sup>29</sup> Supreme Court (2002), "*Haridas Exports v. All India Float Glass Manufacturers Association*" 6 SCC 600.
- <sup>30</sup> WTO (1998) "Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council" (WTO document WT/WGTCP/2).
- <sup>31</sup> Ministry of Commerce, Government of India (1999), "Report of the Expert Group on Interaction between Trade and Competition Policy"
- <sup>32</sup> High Level Committee (2000), "Report of the High Level Committee on Competition Policy and Law" (Department of Company Affairs, Government of India, New Delhi, 2000).
- <sup>33</sup> Supreme Court (2005), *Brahm Dutt v Union of India*, Writ Petition (civil) 490 of 2003. Date of Judgement: January 20, 2005.
- <sup>34</sup> However, the MRTP Commission shall continue to exercise jurisdiction and power under the repealed *M RTP Act* for a period of two years from the date of commencement of *Competition Act* (2002) in order to adjudicate the pending cases. After two years, the cases still pending will be transferred either to the CCI or, if the case is regarding Unfair Trade Practice, to the National Commission constituted under the Consumer Protection Act (1986) (section 66, Competition (Amendment) Bill, 2007).
- <sup>35</sup> Section 5 defines a combination to be an acquisition or a merger over a certain threshold limit that is specified in terms of assets or turnover.
- <sup>36</sup> *Competition Act*, *supra* note 3, section 3.
- <sup>37</sup> *Ibid.*, section 3(3). Of some significance is the fact that "joint venture" is not defined in the Act.
- <sup>38</sup> For a useful discussion of the role of various exemptions in competition law that discusses the Indian example, see R. S. Khemani, "Exemptions, Exceptions and Differential Application of Competition Law-Policy", in V. Dhall, ed., *Competition Law Today: Concepts, Issues, and the Law in Practice* (India: Oxford University Press, 2007).
- <sup>39</sup> This position of strength must allow the firm to "operate independently of competitive forces prevailing in the relevant market" or to "affect its competitors or consumers in the relevant market in its favour."
- <sup>40</sup> Vinod Dhall, "Competition Law in India" (2007) 21:2 *Antitrust*.
- <sup>41</sup> See, for example, the CCI's website at [www.competition-commission-india.nic.in](http://www.competition-commission-india.nic.in)
- <sup>42</sup> *Competition Act*, *supra* note 3, section 16.
- <sup>43</sup> *Ibid.*, section 2(W) "statutory authority" means any authority, board, cooperation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of good or provision of any services or markets therefore or any matter connected therewith or incidental thereto.
- <sup>44</sup> *Ibid.*, section 31(11).
- <sup>45</sup> *Ibid.*, section 21(2).
- <sup>46</sup> *Ibid.*, section 27.
- <sup>47</sup> *Ibid.*, section 28(1), added in the 2007 amendment; previously, the CCI could only recommend such break-ups to the central government, which the latter had the power to overrule.
- <sup>48</sup> *Ibid.*, section 33.
- <sup>49</sup> *Ibid.*, section 42(1). Previously, the Commission itself was given the power to imprison in the event of non-compliance with the orders of the Commission.
- <sup>50</sup> *Ibid.*, section 53A(1)(a).
- <sup>51</sup> *Ibid.*, section 53A(1)(b).
- <sup>52</sup> Aditya Bhattacharjya, "Potential Problems in the Implementation of the *Competition Act*" in Jaivir Singh, ed., *Understanding Regulation. Institutional and Legal Dimensions* (New Delhi: Social Sciences Press, forthcoming) and Pradeep S. Mehta "Competition Law Regime in India: Evolution, Experience and Challenges" 4-2006 *Concurrences (International)* 150.
- <sup>53</sup> In most sections, the AAEC language is followed with "in India" though not in the section 3(3) on "per se" horizontal agreements.
- <sup>54</sup> See, for example, M. Trebilcock & P. Warner, "Rethinking Price-Fixing Law", 38(3) *McGill Law Journal* 679; and T. Kennish & T. Ross (1997), "Toward a New Canadian Approach to Agreements between Competitors" 28 *Canadian Business Law Journal* 22. The Competition Bureau has struck internal

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and external working groups of lawyers and economists to consider various proposals for reform of section 45 of the *Canadian Competition Act*. See the *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2006*, Chapter 7.

<sup>55</sup> Others are uncertain on this point as well – see Bhattacharjea, *supra* note 52 and Dhall, *supra* note 40.

<sup>56</sup> The recent decision of the U.S. Supreme Court in the case *Leegin Creative Products Inc. v. PSKS Inc.* (decision June 28, 2007) has moved the U.S. away from *per se* treatment of minimum resale price maintenance as well.

<sup>57</sup> The original Act in 2002 did not contemplate “joint dominance” and only referred to an “enterprise” in a dominant position. The amendments in 2007, however, changed the reference to “enterprise or group”.

<sup>58</sup> According to exchange rates in January, 2008, one Canadian dollar equals approximately INR. 40.

<sup>59</sup> Cecile Kohrs Lindell, “ABA Issues Warning on India’s Merger Law” dated 12.03.2007, <http://www.law.com>

<sup>60</sup> *Competition Act*, *supra* note 3, section 20(1).

<sup>61</sup> *Competition Act* (Canada), section 97.

<sup>62</sup> Others have expressed some of the same concerns. See e.g. Bhattacharjea and Mehta, *supra* note 52.

<sup>63</sup> CUTS International (2003), *supra* note 28 and Subhadip Ghosh, “India’s Competition Policy: A Brief Review” 2007 Working Paper (Phelps Centre for the Study of Government and Business, Sauder School of Business, University of British Columbia).

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### MERGER CONTROL IN BRAZIL

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#### Introduction

Merger control was introduced in Brazil in 1994, upon the enactment of Law No. 8.884.<sup>1</sup> After more than a decade, the Brazilian merger control system has improved, but its limitations have also been exposed. Notwithstanding the current debate in Brazil on the effectiveness of controlling mergers and other kinds of economic concentration and or integration<sup>2</sup>, the objective of this article is to present the main aspects of merger control in Brazil, the current legal framework and some new perspectives.

#### The Brazilian System

The Administrative Council for Economic Defense (“CADE”) is in charge of clearing mergers in Brazil.<sup>3</sup> CADE is supported by two secretariats, the Secretariat of Economic Monitoring (“SEAE”) of the Ministry of Economy and the Secretariat of Economic Law (“SDE”) of the Ministry of Justice. These three agencies together are known as the Brazilian System of Competition Defense (“SBDC”).

SEAE focuses its analysis mainly on the economic aspects of the cases under SBDC’s review. On the other hand, SDE is more concerned with legal issues and is also the authority in charge of investigating competitive misconduct such as cartels. Both secretariats issue non-binding reports to CADE which then makes the final determination.

According to the current legislation, any act or contract, regardless of its legal structure, that may in any manner restrain or harm competition or result in a dominant position in a relevant market may be required to be submitted to CADE for its approval.<sup>4</sup> CADE’s jurisdiction is broad and includes transactions conducted abroad that may have an effect on the Brazilian market.<sup>5</sup>

Law No. 8.884/94 provides for two thresholds to identify transactions that must be submitted to CADE for its approval. Transactions must be submitted whenever they involve companies (i) that hold a 20% or greater market share in a given relevant market; or (ii) that registered a gross revenue equal to or over BRL 400 million (approximately CAD 233 million) in the previous fiscal year.<sup>6</sup>

The gross revenue threshold is broadly defined and for several years CADE interpreted it to mean that the worldwide revenue of the group of companies involved in a transaction should be considered for

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this purpose. As there is no provision in the law regarding the minimum effect a merger must have on the Brazilian market in order to be subject to review, this omission has in the past resulted in more than 95% of the transactions submitted to CADE being unconditionally approved.<sup>7</sup>

The “local nexus” requirement in the International Competition Network’s best practices for merger notification procedures is therefore lacking. In light of this fact, SDE and SEAE have stated that transactions among parties with gross revenue in Brazil of less than BRL 400 million should be examined through a summary procedure which is faster and less time-consuming.<sup>8</sup> In these situations, SDE and SEAE assume that the transaction will not harm competition in the Brazilian market. There is also currently a proposal to increase the gross revenue threshold.<sup>9</sup>

Although Brazil is a civil law country, which means that the legal framework should prevail over individual decisions, there have been some recent decisions by CADE expressing the view that transactions with market concentrations producing minor effects on the Brazilian market are not subject to mandatory merger control. This was CADE’s view in the case involving Eastman Kodak Company and Practiceworks, Inc.<sup>10</sup>

Further, since the analysis of the acquisition of Krone Digital Communications Inc.<sup>11</sup> by ADC Telecommunications Inc. in January 2005, CADE has decided to analyze only transactions involving parties with gross revenues equal to or over BRL 400 million in Brazil in the previous year. In the interests of providing greater certainty to business people and the business community in Brazil, CADE has enacted a general rule regarding its understanding of the need to verify the revenue threshold of the transactions only with respect to the Brazilian market.<sup>12</sup>

Once it is determined that the transaction is subject to approval by the Brazilian authorities, the parties involved shall: (a) notify them prior to the “closing”; or (b) notify them within 15 business days of the “completion” of the transaction.<sup>13</sup> The “completion” of the transaction is understood as occurring at the time of the execution of the first binding document.<sup>14</sup> In either case, the parties are required to pay a fee<sup>15</sup> of BRL 45,000.

Taking into consideration that it is difficult to establish when the change in the competitive relationship occurs, the “first binding document” criterion has been used more frequently during the past decade. Nonetheless, due to a broad interpretation adopted by CADE in the past and the lack of a specific guideline on what is a “binding document” for filing purposes, enterprises have been fined for late submission.<sup>16</sup> CADE’s fines may range from approximately BRL 60,000 to BRL 6 million.<sup>17</sup> CADE has imposed many fines in the past years.<sup>18</sup>

The lack of an accurate statement of the rules applicable to the “first binding document” concept and the high fine amounts imposed result in serious legal uncertainty. However, this is about to come to an end. The Brazilian competition defense authorities have drafted a Bill under which the only requirement is that submissions should be made prior to the completion of the transaction (i.e. pre merger notification).

In regulated markets<sup>19</sup>, the transaction review process commences upon the delivery of the required documents to SDE.<sup>20</sup> The required information regards the parties’ activities, their economic groups, the transaction and the relevant market. In addition, the parties are requested to present copies of the transaction documents.<sup>21</sup>

Generally, the documents and information provided are public. Upon receipt of the documents and

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information, SDE publishes a note in the Official Gazette announcing the submission. This is to allow interested parties to comment on, or even oppose, the transaction.<sup>22</sup> In the event that the parties wish certain information or documents to be kept confidential, they must formally submit this request and present public versions of the documentation.<sup>23</sup>

SEAE analyzes the economic and market aspects of the transaction and has a 30 day period to render its opinion.<sup>24</sup> SEAE generally seeks information from clients, suppliers and competitors to verify the submitted information. In some cases, even trade associations are consulted. Once SEAE's opinion is rendered, SDE has the same period to issue its report.<sup>25</sup> While SEAE pronounces on the economic aspects of the transaction, SDE analyzes the legal aspects of the case.<sup>26</sup> Any additional information or documents requested by any of the involved authorities suspends the time frame.<sup>27</sup>

At CADE, the transaction is evaluated by CADE's Attorney General<sup>28</sup> who, as a rule, renders an opinion on the formal aspects of the submission (timeliness, fulfilment of the authorities' requests for information, etc.). In some cases, the District Attorney may also analyze the transaction.<sup>29</sup>

Finally, after all of the opinions are rendered, the Council Member assigned as the Reporting Council Member in charge of the transaction will draft a report before the transaction is finally reviewed. The previous opinions are not binding on CADE, and it makes an independent decision.

There is agreement among the authorities in Brazil that the review process must be expedited. In addition, the Brazilian system is such that the analysis usually occurs after the completion of the transaction, whereas the effectiveness of the transaction depends on CADE's final decision. As it is not always possible for CADE's

decisions to be made in a reasonable timeframe in regard to the completion of the transaction, CADE has introduced, by means of a Resolution, the ability to suspend the effects of the transaction by means of a provisional measure. These measures may be requested by any party interested in the transaction under analysis.<sup>30</sup>

As an alternative to the provisional measure, the parties and CADE may execute an *Agreement on the Preservation of the Reversibility of the Transaction* (APRO).<sup>31</sup> The APRO consists of an agreement pursuant to which the parties undertake not to complete the transaction or not to proceed with certain actions until CADE has approved the transaction. As a rule, this agreement has clauses binding the parties to continue their activities independently until receipt of this approval, including their accounting. Since CADE's formation, it has imposed several APROs<sup>32</sup> that have ensured the effectiveness of the decisions taken by CADE in cases involving major competition concerns.<sup>33</sup>

Law 8.884/94 established minimum requirements for the approval of transactions which are aimed at increasing productivity, improving the quality of goods and services or increasing the effectiveness and development of technology. The benefits of the transactions should be equally shared by the parties involved and consumers.<sup>34</sup> The transaction should not result in a reduction in competition. Transactions that do not entail any harm to consumers or the final users and that have positive effects on the country's economy and social welfare should be approved even if not all the requirements under Law 8.884/94 are met.<sup>35</sup>

CADE may also disallow a transaction or impose conditions to neutralize the negative effects on competition. Generally, CADE has preferred to adopt alternatives to the rejection of transactions

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through structural or conduct conditions. The recent decision that prevented Garoto's acquisition by Nestle<sup>36</sup> represents an important precedent and shift in Brazilian case law,<sup>37</sup> however, it is too early to state that it represents a new trend.

CADE's decisions are not subject to review by the Executive Branch. However, CADE itself may review the case<sup>38</sup> or the interested party may appeal to the judiciary. Appeals to CADE must be based on new evidence that was unknown until the first decision, and that would result in a decision more favorable to the parties.<sup>39</sup> The timeframe for the parties to submit the appeal is 30 days,<sup>40</sup> in which case the effects of the original decision may be suspended in certain specific circumstances.<sup>41</sup>

### Possible Changes

As mentioned above, there is currently a bill under analysis by the Brazilian Congress which would amend several important aspects of the current legal framework regarding competition in Brazil. Although there are several bills proposing amendments to Law No. 8.884, the main bill currently under analysis is Bill No. 3,937.<sup>42</sup>

Currently, CADE is the competition decision-making authority. Both SDE and SEAE support CADE with technical and non-binding opinions, and CADE then makes its own determination. According to the proposed bill, the Brazilian competition authorities will consist of CADE and SEAE only. SDE's participation will be eliminated. In addition, two new institutions will be established: a General Executive Board (SG) and an Economic Studies Department (DEE). The previous SDE functions will be given to the SG, with additional powers. Finally, CADE's Board will be renamed the "Administrative Tribunal for Economic Defense." Although there are several uncertain aspects, the new framework is intended to reduce bureaucracy and avoid overlapping functions.

According to the latest version of the bill, merger control in Brazil will become a pre-merger control system. The bill also presents new threshold criteria which should permit Brazilian competition authorities to focus public resources on transactions that have a significant effect in Brazil. Finally, harmless transactions should be subject to a shorter and simpler analysis given an early termination mechanism provided in the bill.

The bill consolidates investigative powers (dawn raids, searches and a more powerful leniency program) and aims at providing better procedural rules. Given that Brazil is a civil law country, it is crucial to have legal provisions relating to administrative powers to avoid judicial review.

Notwithstanding the structural problems and some lack of certainty related to the current dynamics of CADE's decision-making process, it is irrefutable that Brazilian competition law enforcement is increasing and improving.

### Conclusion

The effectiveness of merger control in Brazil has improved in the past ten years. Once the new legal framework is in place, it will provide for the continued increase in the quality of Brazilian competition law practice and enforcement. Brazilian society is prepared for, and expects, the change.

### Notes

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<sup>1</sup> Law No. 8.884 was published in the Official Gazette on June 11, 1994.

<sup>2</sup> There is a debate on the effectiveness and legitimacy of merger control. In Latin America, this subject was discussed during a debate in the *ForoCompetencia* (*ForoCompetencia*,

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Annual Report 2003-2004, Debate No. 21).

<sup>3</sup> CADE was created in 1962 and was converted into a federal independent body in 1994. CADE is composed of a president and six council members. CADE members are selected by the Brazilian President and ratified by the Brazilian Senate.

<sup>4</sup> Art. 54, Law No. 8.884/94.

<sup>5</sup> Art. 2, Law No. 8.884/94.

<sup>6</sup> §3 of Art. 54, Law No. 8.884/94.

<sup>7</sup> Currently, the Brazilian authorities are preparing a bill to change the criteria for interpreting the gross revenue threshold.

<sup>8</sup> Joint General Rule No. 8/2004.

<sup>9</sup> The main bill currently under analysis by the Brazilian Congress is Bill No. 3.937/2004.

<sup>10</sup> AC No. 08012.005925/2003-71.

<sup>11</sup> AC No. 08012.002992/2004-14.

<sup>12</sup> CADE's Ruling ("Súmula") No. 1, dated October 18, 2005. As mentioned above, as Brazil is a civil law country, a ruling would not prevent authorities from adopting a different approach or decision in future cases.

<sup>13</sup> § 4 of Art. 54, Law No. 8.884/94.

<sup>14</sup> Art. 98, of CADE General Rule No. 45/2007.

<sup>15</sup> The fee was created by Law No. 9.781 and must be paid prior to the filing date. The original receipt of payment must be filed together with the documents and information.

<sup>16</sup> In several cases, CADE interpreted that letters of intention, memorandums of understanding and offer letters could be considered as "first binding documents". Currently, there are cases in which CADE has interpreted this issue in a more reasonable manner and has evaluated the document terms before assessing whether it is binding or not (AC No. 08012.003579/2000-43). Moreover, in certain cases, and contrary to what it has decided in the past, CADE determined that a transaction is binding only after it receives approval from the proper foreign antitrust authority where the foreign authority requires prior filing (AC No. 08012.002591/2003-83). Notwithstanding this, considering that CADE's case law has varied over the past decade and also that the law does not provide for a specific guideline in this regard, it is not possible to state with certainty what the criteria are. This evaluation should be made on a case-by-case basis.

<sup>17</sup> § 5 of Article 54 of Law 8.884/94. The calculation of the fine is determined by Resolution No. 36/2004.

<sup>18</sup> In 2002, the fines imposed by CADE on parties involved in late submissions totalled more than BRL 6 million. Source: [www.cade.gov.br](http://www.cade.gov.br).

<sup>19</sup> In some regulated markets, the transaction is submitted to the regulatory body and the final decision is made by CADE. In the telecommunications market, submissions are made to the National Telecommunications Agency (ANATEL) that renders its opinion on the transaction and refers the case to CADE for

approval. In the financial market, the conflict of jurisdiction between CADE and the Central Bank has yet to be resolved.

<sup>20</sup> § 4 of Article 54 of Law 8.884/94.

<sup>21</sup> Article 96 of Resolution 45/2007.

<sup>22</sup> The participation of interested parties in the analysis of transactions is controversial. In the AMBEV case (Concentration Act No. 08012.005846/99-12), Reporting Commissioner, Ms. Hebe Romano, determined that a certain competitor should not participate in the procedure as an active party, but as a source of information.

<sup>23</sup> Section II of Resolution No. 45/2007.

<sup>24</sup> § 6 of Article 54 of Law 8.884/94.

<sup>25</sup> § 6 of Article 54 of Law 8.884/94.

<sup>26</sup> Concentration Act No. 08012.002482/2002-85.

<sup>27</sup> § 8 of Article 54 of Law 8.884/94.

<sup>28</sup> Article 100 of Resolution 45/2007.

<sup>29</sup> Although article 12 of Law 8.884/94 has always existed, only in the past years has the District Attorney Office assigned a representative to act along with CADE. The District Attorney only issues its report in major cases.

<sup>30</sup> Article 133 of Resolution No. 45/2007.

<sup>31</sup> Articles 139, 140 and 141 of Resolution No. 45/2007.

<sup>32</sup> Among the cases in which CADE imposed an APRO are: TAM/VARIG (airlines), Nestlé/Garoto (food companies), Pão de Açúcar/Jerônimo Martins (supermarkets), CBB/Pepsico (beverages).

<sup>33</sup> This has not eliminated the criticism regarding CADE's delayed decisions. In the Nestlé/Garoto case, CADE took two years to complete its analysis.

<sup>34</sup> Although not always met, this criterion guides CADE in the economic analysis of the efficiencies.

<sup>35</sup> § 2 of Article 54 of Law 8.884/94.

<sup>36</sup> Concentration Act No. 08012.001697/2002-89.

<sup>37</sup> CADE's decision in this case requires Nestlé to sell all assets related to the acquisition of Garoto. The final decision was rendered two years after the submission and, in addition to the criticism regarding the delayed decision, it is inarguable that the APRO executed by CADE and the parties was essential to the effectiveness of CADE's decision. The case was brought to the judiciary.

<sup>38</sup> Article 151 of Resolution No. 45/2007.

<sup>39</sup> Article 151 of Resolution No. 45/2007.

<sup>40</sup> Article 152 of Resolution No. 45/2007.

<sup>41</sup> Article 155 of Resolution No. 45/2007.

<sup>42</sup> This Bill was originally presented by Congressman Carlos Eduardo Candoca. Recently, it incorporated Bill No. 5,877/2005 drafted by the Administrative authorities. Bill No. 3,937/2004 is now being presented by Congressman Mr. Ciro Gomes ([www.camara.gov.br/sileg/integras/233311.pdf](http://www.camara.gov.br/sileg/integras/233311.pdf)).

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**THE STOLT-NIELSEN SAGA – FINAL  
INSTALMENT**

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The final chapter in the saga of *United States of America v. Stolt-Nielsen S.A.* was quietly marked by a press release issued on Friday, December 21, 2007 by the U.S. Department of Justice Antitrust Division (“Division”).<sup>1</sup> The press release indicated that the Division would not be appealing the dismissal of the indictment as determined by Judge Kauffman of the United States District Court (Eastern District of Pennsylvania) on November 29, 2007.<sup>2</sup> The Division indicated that, while it was “disappointed” with the ruling, it respected the role of the court in making its factual determinations that none of Stolt-Nielsen (“Stolt” or the “Company”), its subsidiaries, or two Company executives had breached the terms of the conditional leniency agreement (“amnesty agreement”) relative to the Company’s application for amnesty in the parcel tanker shipping cartel. The Division’s attempt to revoke Stolt’s immunity was thereby at an end.

As is now well known,<sup>3</sup> the story commenced with the Division notifying Stolt (in April 2003) that it had obtained evidence that Stolt “did not terminate its part in the illegal activities in or about March 2002” and had continued its activities until at least as late as the second half of that year, thereby breaching the amnesty agreement. Formal revocation of Stolt’s amnesty followed on March 2, 2004. One month earlier, having received notice of a pending indictment, Stolt and one of its executives commenced a civil action seeking declaratory and injunctive relief to bar the Division from proceeding with its indictment. After an evidentiary hearing, the District Court determined that neither Stolt nor its executive had breached the terms of the amnesty agreement and issued an injunction against

the Division. That case was subsequently reversed on appeal by the Division to the Third Circuit Court of Appeals upon technical grounds that the U.S. separation of powers doctrine barred the Court from granting such injunctive relief, with the appeals court reserving the issue on the merits to be determined by the trial court. The Company and two of its executives were then indicted in U.S. District Court on September 6, 2006. The defendants moved to dismiss the indictment in late November 2006. A lengthy evidentiary hearing ensued before Judge Kauffman in the District Court, whose ruling dismissed the indictment in November 2007.

The opinion and accompanying memorandum of Judge Kauffman represent complete vindication for Stolt in its dispute with the Division. The District Court completely accepted Stolt’s argument that it acted promptly to effectively terminate its participation in the conspiracy after the discovery of the customer allocation scheme in March 2002. Moreover, Kauffman J. held that Stolt completely and fully co-operated with the Division in its investigation, and met all the terms of its amnesty agreement with the government. Kauffman J. concluded that the Division had no basis to terminate its non-prosecution arrangement protecting the Company and its executives, and accordingly dismissed the indictment.

In addition to making numerous factual findings in Stolt’s favour, the District Court concluded that the Division’s actions were “fundamentally unfair” to Stolt:

Without ever speaking to Wingfield or Cooperman, whose co-operation obligations under the [leniency] [a]greement were prospective from January 15, 2003, or providing either of them the opportunity to respond to Finlay’s allegations, the Division revoked Defendants’ immunity. It then proceeded to solicit the co-

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operation of the very co-conspirators whom Defendants had reported to the Division in reliance on its promise of immunity, and used the co-conspirators' testimony to prosecute the Defendants. Not only was the Division's conduct inconsistent with 'what was reasonably understood' by the Defendants when they entered into the Agreement, [citation omitted], it was fundamentally unfair.<sup>4</sup> [emphasis added]

It should be noted that this view echoes the opinion rendered by Judge Savage<sup>5</sup> at first instance, who similarly made note of the unfair manner in which the Division benefited from the co-operation offered by Stolt (which he determined had fully met its obligations under the agreement).

Significantly, Kauffman J.'s opinion makes several critical factual findings on the credibility of witnesses from co-conspirators Odfjell Seachem and Jo Tankers, which witnesses were called at the evidentiary hearing in support of the Division's allegations against Stolt:

Odfjell and Jo Tankers witnesses had a strong incentive to lie both in order to retaliate against Stolt-Nielsen for implicating them in a criminal conspiracy, and in order to obtain immunity or lesser punishment from the Division.<sup>6</sup>

In general terms, the opinion noted that the government's witnesses on the pre-trial hearing offered contradictory and implausible testimony, and concluded that they must be considered suspect because they were all provided with immunity or reduced penalties in exchange for their testimony. This finding is significant and may have implications for antitrust regulators worldwide in terms of the level of scrutiny that ought to be brought to bear upon renditions of events presented by applicants for immunity.

Kauffman J.'s opinion adopts a modified contractual analysis of the Division's amnesty agreement. While the District Court noted in its factual findings that non-prosecution agreements (of which the Division's amnesty agreement is an example) constitute binding contracts,<sup>7</sup> it noted further that strict application of principles of contract law must be tempered against the observation that "... such agreements are unique and are to be construed in light of 'special due process concerns'".<sup>8</sup> However, the court added that the text of the amnesty agreement is to be strictly construed against the government as drafting party.<sup>9</sup> In this regard, the opinion makes a close analysis of the corresponding promises and representations of the parties. Judge Kauffman held that there was no misrepresentation made by Stolt in entering the Division's immunity program and, consequently, he completely rejected the Division's contention that Stolt had independently breached the amnesty agreement by providing false information that it had withdrawn from the conspiracy in March 2002 and thereafter had withheld evidence of conspiratorial activity. The opinion also rejects the Division's view that Stolt had breached a "condition precedent" to the amnesty agreement by representing that it had taken "prompt and effective action" to remove itself from the illegal activity. The court held that the Division's argument was "without merit":

... [A]t no time did Stolt-Nielsen represent that it terminated its anti-competitive conduct in March 2002. The Agreement was devoid of any mention of the March 2002 date and [Stolt's counsel] testified that he never made such a representation to the Division, nor was he asked to do so.<sup>10</sup>

These observations, in contractual terms, would have been sufficient to render the Division's analysis untenable. As noted in the opinion of Judge Savage

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from 2005,<sup>11</sup> the presence of an integration clause, coupled with the implications of the parol evidence rule, meant that the Division could not rely upon any understanding or assumptions outside the four corners of the conditional leniency letter. The ultimate opinion of Judge Kauffman makes a similar reference.<sup>12</sup>

Judge Kauffman also noted that at no point in the amnesty agreement does Stolt stipulate that it had “discovered” the anti-competitive activity which was reported.<sup>13</sup> Thus, as a matter of contractual analysis, the Division’s argument would fail on the basis that there was no misrepresentation (of any nature) sufficient to void the contract set out in the Division’s standard amnesty agreement.

Supplementing the contractual analysis were observations on the due process implications of the Division’s agreement and its application in the investigation of the parcel tanker shipping industry. The court observed that individual defendants relinquished their Fifth Amendment rights and provided incriminating information that enabled the Division to successfully prosecute two other companies and their executives as participants in the conspiracy scheme. It further observed that, through its successful prosecution of these other corporations and various individuals on the basis of Stolt’s information, and by dismantling the cartel in the parcel tanker industry, the Division “... received the benefit of its bargain”<sup>14</sup> Thus, the amnesty agreement was required to be enforced.

### Compliance Program Observations

The court’s opinion also included a number of interesting comments on the comprehensive and revised antitrust compliance policy implemented by Stolt commencing in late February 2002.<sup>15</sup> The following points are of interest and perhaps instructive

for parties considering remedial measures following detection of anti-competitive activity:

- The program stressed the importance of antitrust compliance, expressly prohibited collusive contacts with competitors (requiring that any contact with competitors other than routine operational activity be approved in advance by the CEO), and clarified that violation of any of its provisions would result in demotion or termination.
- In implementing this policy, the Company’s general counsel met individually with each business director and unequivocally stated that all collusive activity would cease immediately and that severe consequences would follow from non-compliance.
- In March and April 2002, Stolt held a series of mandatory seminars on a worldwide basis which were designed to inform its employees about the revised antitrust compliance policy; employees were required to sign certifications in which they represented that they comply strictly with the revised policy.
- The revised policy received extremely wide distribution within the Company, including all employees in Europe and Asia.
- The certification required by employees had the following particular terms:
  - I have received, read, and am familiar with the revised edition of the SMPG Antitrust Compliance Handbook.
  - I attended [one of] the antitrust compliance seminars.

I will comply with all the terms and conditions of the antitrust compliance policy.

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- I confirm that I am not aware of any violations of the Antitrust Compliance Handbook existing at this time.
- I will promptly report any violations or attempted violations of the policy to SMPG's legal counsel.

### Implications of the Decision

The outcome in *Stolt-Nielsen* shows that governments will be held to exacting standards in fulfilling their contractual obligations under immunity bargains with applying parties. While the decision in this case must be regarded as exceptional to its particular (and, hopefully unique) circumstances, it is instructive to antitrust regulators, not only because of the fundamental fairness and transparency standards it imposes upon governments in making and fulfilling their obligations under immunity arrangements, but also because of the high level of scrutiny and review to be accorded to the circumstances that underlie the making of such arrangements. Such sensitivity to particular circumstances is present, to a degree, in Canada's revised Immunity Policy, which now explicitly states the following:

Where the Bureau becomes aware that an applicant does not meet the terms and conditions set out in an immunity agreement, it will discuss the situation with the applicant and provide a reasonable opportunity to the applicant to address any shortfalls in its conduct before making a recommendation to the DPP that the applicant's immunity be revoked.<sup>16</sup>

Contrast this with Kauffman J.'s remarks in his opinion describing the Division's treatment of Stolt and its witnesses prior to revocation of immunity:

Without ever speaking with either Wingfield or Cooperman, the Division suspended Stolt-Nielsen's obligations to cooperate under the Agreement pending further investigation ... none of the Defendants was given an opportunity to respond to the Division's allegations ... At no time did Cooperman, Wingfield, or anyone at Stolt-Nielsen refuse to cooperate with the Division. Each was at all times available to be interviewed or to provide information to the Division.<sup>17</sup>

Informal sources indicate that the Division is already in the process of revising its conditional leniency letters to accord with the cautions and stipulations expressed in the opinion of Kauffman J. In practice, sources also report that the Division is undertaking more thorough documentary analysis and interviews of applicant witnesses prior to making its decision on granting conditional leniency.

Beyond the indicated contractual tuning-up for the Division's amnesty agreements, the decision will hopefully prompt the Division to rethink its approach of requiring corporate immunity applicants to purge themselves immediately upon discovery of potentially illegal activity or face certain draconian consequences for not doing so. The Division alleged that Stolt had breached its representation in the leniency agreement which averred that it "took prompt and effective action to terminate its part in the anticompetitive activity". Against this, however, Judge Kauffman pointedly observed that the phrase "prompt and effective action", a hallmark of the Division's policy, was undefined in the immunity agreement, and that, by the terms of the agreement, "prompt" was to be interpreted as "fast and diligent action, but did not require Stolt-Nielsen immediately to terminate its anticompetitive conduct".<sup>18</sup> No other antitrust regulator maintains such

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a draconian rule, and international antitrust regulatory activity does not seem to have suffered negatively for such omission.<sup>19</sup> Regulators should welcome immunity applicants who come forward in good faith reliance upon government policies, and not seek to concern themselves with precedent circumstances that might have prompted the application.

## Notes

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<sup>1</sup> Press release available at: [http://www.usdoj.gov/atr/public\\_press\\_releases/2007/228788.htm](http://www.usdoj.gov/atr/public_press_releases/2007/228788.htm).

<sup>2</sup> *United States of America v. Stolt-Nielsen S.A. et al.*, United States District Court for the Eastern District of Pennsylvania, (Memorandum and Order) Criminal Action No. 06-cr-466, November 29, 2007, Kauffman J.

<sup>3</sup> For a review of the earlier developments, see Graham Reynolds: "Revoking Immunity: Could the *Stolt-Nielsen* Scenario Occur in Canada?" (2005) 22:2 Can. Comp. Rec. 85 and "The Continuing Saga of the *Stolt-Nielsen* Case" (2007) 22:4 Can. Comp. Rec. 31.

<sup>4</sup> *Supra* note 2 (Memorandum and Order) at 33-34.

<sup>5</sup> *Stolt-Nielsen S.A. et al. v. United States*, No. 04-cv-537, 2005 WL 78925 (E.D. Pa. Jan. 14, 2005). (Memorandum and Order) at 30.

<sup>6</sup> *Supra* note 2 (Findings of Fact) at para. 189; the principle of requiring corroboration for "suspect witnesses" such as accomplices is also well established in Canada: see *Vetrovec v. The Queen* [1982] 1 S.C.R. 811.

<sup>7</sup> *Supra* note 2 (Conclusions of Law) at para. 6.

<sup>8</sup> *Ibid.* at para. 7, citing *United States v. Baird*, 218 F. (3d) 221, 229 (3d Cir. 2000); this analysis is not unlike that adopted in such immunity-breach Canadian cases as *R. v. Pritchard* [2002] B.C.J. No. 3174, where the British Columbia Supreme Court applied principles of contract law "only in the broadest sense" and otherwise cited due process and public interest considerations which would limit the application of a judicial stay of proceedings "...only in the clearest of cases where no lesser remedy will serve to avoid manifesting, perpetuating, or aggravating the prejudice caused by the abuse" [at para. 32].

<sup>9</sup> *Ibid.* at para. 11.

<sup>10</sup> *Supra* note 2 (Memorandum and Order) at 22.

<sup>11</sup> *Supra* note 5 (Memorandum and Order) at 29.

<sup>12</sup> *Supra* note 2 (Conclusions of Law) at para. 14: "In *Re Altro* [citation omitted] [the] parol evidence rule forbids proof of an oral agreement that might add to or vary the terms of a written contract that was intended to embody the entire agreement between the parties."

<sup>13</sup> *Ibid.* at para. 23

<sup>14</sup> *Ibid.* at para. 44.

<sup>15</sup> *Ibid.* at paras. 18-34.

<sup>16</sup> See Competition Bureau, *Immunity Program Responses to Frequently Asked Questions*, October 10, 2007, at para. 13, available at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02482e.html>.

<sup>17</sup> *Supra* note 2 (Findings of Fact) at paras. 177, 183.

<sup>18</sup> *Supra* note 2 (Conclusions of Law) at paras. 19-20.

<sup>19</sup> See references *supra* note 3.

## AUSTRALIAN NEWSLETTER

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Over the last 12 months significant amendments to the Australian competition law have been introduced. With the election of a Labor government (the first for 11 years), further reforms are likely to be introduced.

On September 24, 2007, the *Trade Practices Legislation Amendment Act (No. 1) 2007*, was passed, which included the controversial "Birdsville Amendment" to the misuse of market power provisions.<sup>1</sup> These amendments represent the second stage of the legislation following the Dawson Report changes which were implemented on January 1, 2007 via the *Trade Practices Legislation Amendment Act (No. 1) 2006* and were discussed in detail in a previous issue of the *Record*. Further amendments to the *Trade Practices Act 1974* ("TPA") regarding creeping acquisitions and representative actions were introduced into Parliament late in 2007. However, these bills lapsed due to the calling of a Federal Government election. The Labor government indicated in its policies that further amendments to the TPA will be initiated, which may include creeping acquisitions.

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### Trade Practices Legislation Amendment Act (No. 1) 2007

The *Trade Practices Legislation Amendment Act* (No. 1) 2007 (Amendment Act) makes a number of changes to the TPA which are intended to enhance the protection of small businesses from misuse of market power and unconscionable conduct in business dealings. It also provides for an ACCC Deputy Chairperson position concerned with small business matters.

#### *Predatory Pricing – Section 46(1AA)*

Until now, predatory pricing behaviour was examined under the general prohibition in section 46(1) and prevented corporations with a “substantial degree of power in a market” from taking advantage of that power for a proscribed purpose. Section 46(1) requires proof:

- of substantial market power;
- that the conduct is taking advantage of that power; and
- of a proscribed purpose.

The language of the new prohibition in section 46(1AA) is quite different, with the key elements being:

- substantial share of a market;
- a price less than the relevant cost;
- conduct for a sustained period; and
- a proscribed purpose.

There is no causal link between the governing criterion and the conduct in question – the new prohibition does not require the substantial market share to give rise to the below cost pricing. Under the existing law this link was provided by the concept of “taking advantage” of

market power. Now, market share merely identifies the category of person subject to the new law.

#### Substantial Share of a Market

The amendment applies to corporations with a “substantial share of a market”. This differs from section 46(1), whose operation is contingent on a corporation having a “substantial degree of power in a market”. The distinction between market share and market power is an important one, with the latter involving an analysis of a range of factors relevant to an assessment of the corporation’s position in the market. In addition to the corporation’s market share, these include factors such as barriers to entry and vertical integration. The precise meaning of “substantial share of a market” in section 46(1AA) is unclear, although section 46(1AB) provides that courts may have regard to the number and size of the competitors of the corporation in the market.

#### Relevant Cost

The Amendment Act also aims to address predatory pricing by permitting courts to consider whether a corporation has priced goods or services below a “relevant cost” for a sustained period and the reasons for such conduct (in determining whether a corporation has misused its market share). However, the meaning of “relevant cost” is not defined.

#### Sustained Period

“Sustained period” is not defined in the Amendment Act. The original Explanatory Memorandum to the Bill (prior to the introduction of the section 46(1AA) amendments)<sup>2</sup> recognised that:

Price reductions that occur for a short period of time may be a consequence of lawful, competitive behaviour rather than a misuse of market power

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for the purpose of eliminating or substantially damaging a competitor.

Presumably, the length of time required to constitute a “sustained period” will depend on the particular circumstances of the case, having regard to such matters as the nature of the goods or services, the commercial arrangements under which they were supplied or to be supplied and all the circumstances in which the supply occurs. The courts may also consider the relevant proscribed purpose (and the length of time required to achieve it). In relation to this concept, Graeme Samuel, Chairman of the Australian Competition and Consumer Commission (ACCC) commented that, “it may be a case of looking at the period that might be necessary to achieve one of the three proscribed purposes in relation to the market at hand”.<sup>3</sup>

### Taking Advantage Requirement Eliminated

The new section 46(1AA) prohibition does not require a connection between the corporation’s substantial market share and the relevant pricing conduct. For example, unlike the existing prohibition on the misuse of market power, there is no requirement that a corporation has “taken advantage” of its position. It will be sufficient that it has a substantial market share and that it engaged in the relevant conduct with one of the proscribed purposes.

### Recoupment not Required

The Explanatory Memorandum to the Amendment Act makes it clear that a firm can breach section 46 without having a reasonable prospect, expectation, or intention of being able to recover the losses incurred as a result of a misuse of market power or prohibited below cost pricing (although as a practical matter, evidence of recoupment would ordinarily assist a claim).

### Impact

The precise scope of the new prohibition and the way it will operate is uncertain. This is partly due to the newness of the prohibition and also because new concepts such as “substantial share of a market”, “sustained period” and “relevant cost” to the corporation are undefined in the Act and will be open to interpretation by both the ACCC in enforcing the new prohibition and the courts.

### *Other Amendments to Section 46 and Section 151*

The Amendment Act provides a non-exhaustive list of further factors that the court may consider in determining the degree of power a body corporate has in the market, including power that results from:

- any contracts, arrangements or understandings with other parties or proposed contracts, arrangements or understandings (sections 46(3A)(a) and 151AH(5A)(a)); and
- any covenants or proposed covenants that the body corporate would be bound by/entitled to the benefit of (sections 36(3A)(b) and 151AH(5A)(b)).

Further amendments provide that a corporation may have substantial degree of power in a market even though:

- the body corporate does not substantially control the market (sections 46(3C)(a) and 151AH(6A)(a)); or
- the body corporate does not have absolute freedom from constraint by the conduct of competitors/potential competitors, or persons to whom or from whom the body corporate supplies or acquires goods or services in that market (sections 46(3C)(b) and 151AH(6A)(b)).

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The Amendment Act also makes it clear that more than one corporation may have a substantial degree of power in a market (sections 46(3D) and 151AH(6B)).

### *Unconscionable Conduct*

The Amendment Act amends section 51AC of the TPA (unconscionable conduct in business transactions) to increase the transaction limitation from \$3 million to \$10 million for companies that are not publicly listed (provisions 12CC(8) and (9)).

Additionally, unilateral variation of a contract is now a factor in section 51AC of the TPA.

### *Deputy Chairperson*

The Amendment Act also provides for a second Deputy Chairperson position for the ACCC, to be filled by a person who is experienced in small business matters. The Deputy Chairperson is an important role within the ACCC. If this person does bring an increased focus on enforcing provisions of the TPA in favour of small businesses, this could prove to be a more substantive change than the other proposed amendments to the TPA.

### *Further Reform*

The Labor Government has indicated that it will review the amendments regarding predatory pricing and has expressed that it wishes to amend section 46 further to include guidance on the meaning of the words "take advantage".

### **Further Amendments to the TPA**

#### *Possible Labor Amendments*

In addition to the forecast amendments to section 46 above, outlined below are the further initiatives in

relation to the TPA and related legislation that Labor has indicated it will pursue.

#### ACCC's Evidence Gathering Power

Labor has promised to strengthen the powers of the ACCC in relation to its use of section 155 notices during the course of interlocutory litigation. Currently these powers are not able to be used once the ACCC has commenced proceedings, even by way of interlocutory action.

#### Creeping Acquisitions

In relation to the creeping acquisitions amendments, Kevin Rudd, leader of the Labor party and the new Australian Prime Minister, has indicated that Labor will carefully consider amendments to prevent creeping acquisitions which subsequently lessen competition in the market.<sup>4</sup> Labor has indicated that creeping acquisitions legislation would be introduced only after consultation.<sup>5</sup>

#### Criminalisation of Hard Core Cartels

The Labor party has strongly advocated legislation to criminalise hard core cartel behaviour. Whilst the previous Liberal Government had indicated support in principle, it had been slow in implementing the recommendations, initially made by the Dawson Committee,<sup>6</sup> and later as a result of its interdepartmental inquiry. It is clear that, as a result of the decision in *ACCC v Visy Industries Holdings Pty Limited*,<sup>7</sup> (discussed below) this will become a matter of high priority.<sup>8</sup>

#### Petroleum Commissioner

The Labor party will appoint a Petroleum Commissioner.

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### National Grocery Pricing Inquiry

The ACCC has committed the Government to a national grocery inquiry to be undertaken by the ACCC within 6 months of it taking up office.

### Deregulation Minister

The new Prime Minister Kevin Rudd has promised major regulatory reform, designed to reduce the burden on business. A Senior Cabinet Minister will be appointed to oversee this area.

### Infrastructure Bottlenecks

It is likely that the Part IIIA third party access regime in the TPA will be reviewed insofar as it effects infrastructure.

### *Other Amendments*

The *Trade Practices Amendment (Small Business Protection) Bill 2007* was tabled in the House of Representatives on August 15, 2007 but has now lapsed. The Bill will be reintroduced by the Labor Government. The Bill would amend section 87 of the TPA to allow the ACCC to take representative action on behalf of third parties who have suffered or are likely to suffer loss or damage as a result of unlawful secondary boycotts (pursuant to sections 45D and 45E). Currently, the ACCC is able to commence a representative action pursuant to subsections 87(1A) and 87(1B) in relation to all contraventions of Part IV other than the secondary boycott provisions.

### **ACCC's Focus on Cartel Conduct**

The ACCC recently successfully prosecuted Visy Industries Holdings Pty Limited (Visy) for cartel conduct in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited*.<sup>9</sup> In that case, Visy and Amcor Limited (Amcor) were

competitors in the market for cardboard packaging. The companies agreed to maintain their current market shares, not to seek to enter into contracts for the supply of the packaging with each other's principal customers and that each would focus on increasing its prices for the packaging. They also had an understanding that they would increase their prices for non-contract customers and further understandings in relation to specific customers.

Amcor obtained immunity from the ACCC in respect of the conduct under the ACCC's Immunity Policy for Cartel Conduct. However, Visy was found to have breached the competition laws by engaging in price fixing and bid rigging. Three of its senior executives admitted to being knowingly concerned in the contraventions. The Federal Court ordered this firm to pay a record penalty of \$36 million. This penalty was more than twice the highest previous penalty imposed by the Federal Court. Two of the executives were ordered to pay penalties of \$1.5 million and \$500,000, respectively.

In making its decision to impose the penalties in this case, the Federal Court emphasised the importance of firms having a corporate culture genuinely focused on compliance. While the defendant company did have a trade practices compliance program, the Federal Court considered that it was inadequate to prevent contraventions of Australian competition laws. The Federal Court took this inadequacy into account when deciding that it was appropriate to impose the record \$36 million penalty.

### **High Court Rules on the Extension of Crown Immunity to Third Parties**

On August 29, 2007, the High Court, in *ACCC v Baxter Healthcare Pty Ltd*,<sup>10</sup> by a majority of six to one, overruled the Full Federal Court, and upheld the

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ACCC's case that Crown immunity from prosecution for contravention of the TPA does not automatically extend to third parties who have contracted with the Crown.

On appeal to the High Court, the majority held that Crown immunity does not extend to third parties (unless it is necessary to protect the Crown's proprietary, contractual or legal rights). The majority (Chief Justices Gleeson, Gummow, Hayne, Heydon, and Justice Crennan) noted that:

- generally extending Crown immunity to third parties conflicts with the stated purpose of the TPA, which is to enhance the welfare of Australians through the promotion of competition and fair trading;
- the TPA contains other methods by which immunity can be extended – the state could have granted specific exemption from the operation of the TPA for the relevant conduct under section 51 of the TPA; and
- the real question is the extent to which the TPA and its remedies are modified in order not to divest the Crown of proprietary, contractual or other legal rights or interests.

### Notes

<sup>1</sup> The amendments introducing section 46(1AA) to the *Trade Practices Legislation Amendment Act* (No. 1) 2007 have been referred to as the "Birdsville Amendment" following the media release by Senator Barnaby Joyce, "Acceptance of 'Birdsville Amendment' to s 46 of the *Trade Practices Act*" Media Release (11 September 2007). The amendments are intended to specifically target predatory pricing by introducing a new prohibition on "below cost pricing"

<sup>2</sup> This version of the Bill would have amended section 46 to provide that a court, in assessing whether a corporation had misused market power under section 46(1), could (but was not required to) consider the "conduct of the corporation that involved selling goods or services for a sustained period at a price that is below cost"

<sup>3</sup> ACCC Chairman Graeme Samuel, *Promoting competition or protecting consumers – the role of competition policy and its implications for Australian businesses*, John Curtin Institute of Public Forum (Perth, 12 October 2007).

<sup>4</sup> Radio Interview with Kevin Rudd, Leader of the Australian Labor Party, fiveaa Adelaide (9 November 2007).

<sup>5</sup> Commonwealth of Australia, *Parliamentary Debates*, Senate, 17 September 2007, 122 (Senator Sherry, Australian Labor Party).

<sup>6</sup> Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, chaired by Sir Daryl Dawson.

<sup>7</sup> (No 3) [2007] FCA 1617.

<sup>8</sup> *ACCC v Visy Industries Holdings Pty Limited* concerned a cartel for cardboard packaging. Amcor Limited was also a member of the cartel but was granted immunity under the ACCC's immunity policy. The Federal Court handed down agreed penalties against Visy of \$36 million.

<sup>9</sup> [2007] FCA 1617.

<sup>10</sup> [2007] HCA 38.

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## EC COMPETITION LAW DEVELOPMENTS

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### RECENT DEVELOPMENTS IN EC COMPETITION LAW

#### Merger Control

#### *Prohibition of Ryanair's Proposed Acquisition of Aer Lingus*

The Commission's prohibition on June 27, 2007 of Ryanair's proposed acquisition of Aer Lingus (COMP/M.4439-*Ryanair/Aer Lingus*) was the second transaction to be prohibited under the EC Merger Regulation since Neelie Kroes took office as Commissioner for Competition.<sup>1</sup> The prohibition followed an extensive and high profile investigation of the competitive effects of Ryanair's hostile bid for Aer Lingus. The Commission analysed the transaction on a route-by-route basis. It found that the companies, both "low-cost" carriers, competed on 35 routes to

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and from Ireland. The Commission concluded that the merged entity would have been a monopoly carrier on 22 of those routes and would have a significant market share (over 60%) on the remaining routes. The extent of the overlap was unprecedented in airline mergers reviewed under the EC Merger Regulation because the transaction was the first combination of the number one and number two airlines in a Member State to have been reviewed under the Regulation. The Commission also found that the merged entity would be shielded from competition by high barriers to entry stemming from its market position as well as the high level of peak-time congestion at certain airports on the routes where the merging parties overlapped. Although Ryanair offered certain remedies with a view to obtaining clearance, the Commission judged them to be inadequate to eliminate its concerns. Accordingly, the Commission prohibited the transaction. However, the Commission did not require Ryanair to divest the minority shareholding in Aer Lingus that it had built-up in contemplation of launching its bid. Both Ryanair and Aer Lingus have lodged appeals with the Court of First Instance of the European Communities ("CFI") against the Commission's decision. Ryanair claims in its appeal that the decision should be annulled because the Commission committed manifest errors when assessing the effects of the transaction and did not meet the evidential standard required in order to prohibit the transaction. Aer Lingus has challenged the prohibition decision on the ground that the Commission erred by not requiring Ryanair to dispose of its minority shareholding in Aer Lingus.

*Consolidated Jurisdictional Notice*

On July 10, 2007, the Commission published its Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Consolidated Notice").<sup>2</sup> Publication of the Consolidated Notice was

the culmination of the Commission's work to update and consolidate into one Notice the four previous Notices that dealt with jurisdictional aspects of the EC Merger Regulation.<sup>3</sup> The Consolidated Notice has been updated to reflect the numerous precedents resulting from judgments by the Community courts and decisions by the Commission since the four former Notices were published (March 1998). The rapid development of EC merger control law over the past decade has led to the inclusion in the Consolidated Notice of a substantial amount of new guidance that did not appear in the Notices that it replaced. The Consolidated Notice therefore represents an up-to-date source of guidance on the concept of a "concentration" under the EC Merger Regulation and on the methodology to be used in order to determine whether a concentration has a Community dimension.

*Guidelines on Non-horizontal Mergers*

On November 28, 2007, the Commission adopted Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the "Guidelines").<sup>4</sup> The Guidelines provide detailed guidance on the analytical methodology that the Commission uses to determine whether mergers notified under the EC Merger Regulation are likely to give rise to anti-competitive vertical or conglomerate effects. The Guidelines compliment the Commission's Guidelines for the assessment of horizontal mergers.<sup>5</sup> The Guidelines reflect up-to-date economic thinking on vertical and conglomerate mergers and refer to numerous previous decisions under the EC Merger Regulation to illustrate the analytical methodology described in the Guidelines. The Guidelines establish a safe harbour threshold below which, absent certain aggravating factors described in the Guidelines, the Commission is unlikely to have vertical or conglomerate concerns. The safe harbour (which is

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an “initial indicator” rather than a legal presumption) applies when the post merger market share of the merged entity in each relevant vertical or conglomerate market is below 30% and the post merger HHI is below 2000.

The Guidelines go on to describe in detail the methodology that the Commission uses to assess the effects of vertical and conglomerate mergers that do not fall within the safe harbour. The Commission’s methodology covers the analysis of both non-coordinated effects and coordinated effects in vertical mergers and conglomerate mergers. In the case of non-coordinated effects in vertical mergers, the Guidelines distinguish between input foreclosure and customer foreclosure. The Guidelines describe the methodology that the Commission uses, and the factors likely to be relevant in assessing whether a vertical merger may give rise to these types of foreclosure.

### *Ineos/Kerling: Dawn Raid in Suspected Gun-jumping*

In December 2007, the Commission took the unusual step of conducting surprise “dawn raid” inspections in the context of a merger investigation under the EC Merger Regulation (Council Regulation (EC) No 139/2004). The Commission carried out the inspections at the UK premises of Kerling ASA and Ineos Group Limited to investigate whether these companies had breached the waiting period obligation imposed under the EC Merger Regulation.<sup>6</sup> The Commission appears to have been particularly concerned that the companies had infringed the waiting period obligation by prematurely exchanging competitively sensitive information. This dawn raid occurred while the Commission was conducting a Phase II review of Ineos’ proposed acquisition of Kerling. Ineos and Kerling compete in the sale of suspension PVC.

Although the Commission has the power to conduct dawn raid inspections for suspected breach of the EC Merger Regulation,<sup>7</sup> in practice it uses that power very rarely.<sup>8</sup> In addition, to date, there has been only one reported example of the Commission taking action to stop pre-merger gun jumping.<sup>9</sup> For that reason, the Ineos/Kerling case is a noteworthy addition to the currently sparse precedent on action by the Commission to ensure compliance with the EC Merger Regulation waiting period. The Commission’s press release also emphasises the risks inherent in gun-jumping by pointing out that the exchange of competitively sensitive information between merging parties prior to closing a transaction can infringe both the EC Merger Regulation and Article 81 of the EC Treaty.

The Commission’s decision to carry out dawn raids is a clear reminder that it places great importance on proper conduct of due diligence and integration planning prior to granting of clearance under the EC Merger Regulation. This is all the more important when the merging parties, like Ineos and Kerling, are close competitors whose combination gives rise to prima facie competition concerns that trigger a Phase II review.<sup>10</sup>

### **Articles 81 and 82**

#### *Record Fines on Lifts and Escalators Manufacturers*

On February 21, 2007, the Commission imposed fines totalling EUR 992.3 million on Kone, Mitsubishi, Otis, Schindler and ThyssenKrupp as punishment for their involvement in cartels in the sale, installation and maintenance of lifts and elevators. These were record fines under Article 81 for cartel behaviour. The individual fines ranged from EUR 1.8 million (Mitsubishi) to EUR 479.6 million (ThyssenKrupp). It is noteworthy that the fine imposed on ThyssenKrupp was increased by 50% to reflect the fact that ThyssenKrupp was a repeat offender.

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### *Proposal to Introduce Settlement Procedures in Article 81 Cartel Cases*

The Commission issued draft proposals on October 26, 2007 to introduce a settlement procedure for cartel cases. The draft proposals comprise a draft Notice that explains the settlement procedure in detail and a draft Regulation which, if adopted, would introduce the settlement procedure into the existing procedural Regulation (Council Regulation (EC) No 1 2003).<sup>11</sup> The proposed procedure would enable companies under investigation by the Commission for alleged participation in hard core cartel activity to enter into a settlement with the Commission, thereby shortening the investigation process. If enacted into law, the proposals would bring the Article 81 investigative procedure closer into line with the antitrust procedures in jurisdictions that allow for settlement by way of plea bargaining. It is not presently clear if, or when, the proposals will be enacted into EC law.

### *Commission Fines E.ON EUR 38 Million for Breaking a Seal*

The Commission has imposed its first ever fine to punish alleged tampering with a seal affixed during a dawn raid inspection. The inspection took place in May 2006 at the offices of the German energy company E.ON Energie AG ("E.ON"). On January 30, 2008, the Commission imposed a fine of EUR 38 million on E.ON for having removed a seal placed by Commission officials on the door of a room at E.ON's premises that the Commission was using for the overnight storage of documents seized during the dawn raid. Since May 2004, the Commission has the power to seal premises during a dawn raid in order to preserve documents.<sup>12</sup> Tampering with a seal can lead to a fine of up to 1% of the total global turnover of the undertaking concerned.<sup>13</sup> E.ON contested that it had tampered with the seal and put forward a number of explanations for the damage to the seal. These

included vibrations from an adjacent room, the use of an aggressive cleaning product, age of the seal and the high level of humidity in the building. E.ON is understood to be likely to appeal the decision before the CFI. As the Commission's guidelines on setting fines<sup>14</sup> apply only to fines for substantive infringements of Articles 81 and 82, and not to infringements of the procedural rules, the CFI's findings on the legality of the Commission's methodology for calculating the fine will be of particular significance.

### **Judgments by the Court of First Instance**

#### *Schneider Damages Action*

On July 11, 2007, the CFI found the EC Commission liable for damages following the Commission's unlawful prohibition of Schneider Electric's acquisition of Legrand. This is the first time the Commission has been found liable to pay damages as a consequence of the erroneous exercise of its merger review powers.

Schneider Electric ("Schneider") claimed damages from the Commission by way of compensation for loss resulting from the Commission's prior prohibition of Schneider's acquisition of a competing electrical equipment supplier, Legrand (the "Transaction").<sup>15</sup> Schneider already had acquired 98% of Legrand and, following the Commission's prohibition decision, Schneider agreed to sell its Legrand shares to a third party. Schneider's disposal agreement with the third party provided time for Schneider to pursue an appeal of the Commission's prohibition decision and, in the event of an annulment of that decision by the CFI, an opportunity for Schneider to retain the Legrand shares in lieu of selling the shares to the third party. The CFI annulled the Commission decision in October 2002, following which the Commission resumed its review of the Transaction; but, in December 2002, Schneider (perceiving that the Commission continued to oppose the deal) abandoned the Transaction and completed

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its sale of the Legrand shares to the third party. Schneider filed an action in the CFI for reimbursement of losses it claimed to have suffered as a result of the Commission's improper prohibition decision.

The legal basis for the claim was Article 288(1) of the EC Treaty.<sup>16</sup> It imposes a heavy evidential burden on claimants. Specifically, in order to obtain damages against the Commission, a claimant must prove (i) the Commission's conduct amounts to grave and manifest disregard of the limits on its powers; and (ii) a direct causal link between the Commission's erroneous conduct and the loss for which damages are claimed.

In support of its claim for damages, Schneider alleged that there were a number of flaws in the Commission's investigation of the Transaction that met the "grave and manifest disregard" standard. The CFI concluded, however, that only one of the alleged defects, namely the Commission's failure to give Schneider adequate opportunity to respond to concerns regarding possible "portfolio effects" of the Transaction arising out of the addition of Legrand's complementary products to Schneider's product range, amounted to manifest and grave disregard. (Because the Commission had not included an objection along those lines in its Statement of Objections relating to the Transaction, Schneider was unable to address that objection in the course of the Commission's review proceedings.) In reaching its decision, the CFI recognised the need to preserve substantial discretion for the Commission in analysing the likely effects of mergers subject to review under the EC Merger Regulation, but concluded that the Commission could be held liable for damages caused by manifest errors that lack objective justification.

The CFI then conducted a searching review of the causal link between this flaw in the Commission's investigation and the various types of financial loss that Schneider pleaded. The CFI concluded that only

two of the losses cited by Schneider were sufficiently connected to the Commission's misconduct to be eligible for compensation. First, the CFI found that the costs that Schneider had incurred in participating in the Commission's reassessment of the Transaction following the CFI's annulment of the prohibition decision could be recovered from the Commission.<sup>17</sup> Second, the CFI found that Schneider could recover damages for the reduction in the price at which Schneider eventually sold its shares in Legrand to a third party in the deferred disposition transaction. However, the CFI found that, inasmuch as Schneider should have been aware of the risks inherent in any merger review by the Commission, Schneider had contributed to its loss by proceeding with its acquisition of Legrand prior to the granting of approval under the EC Merger Regulation. For that reason, the CFI held that Schneider would be entitled to recover damages for only two-thirds of the loss relating to the price at which it sold the Legrand shares to the third party.

The judgment is the first occasion on which an aggrieved merging party has sought damages from the Commission in relation to errors made in a merger investigation. For that reason, the judgment gives useful insight on how the CFI applies the "grave and manifest disregard" standard in a merger review context – at least as that standard relates to procedural errors. The judgment also throws light on how the CFI assesses the causal link between defects in a merger investigation and the losses claimed from an abandoned merger. The judgment did not provide relief, however, for any errors of substantive analysis given the CFI's focus on the Commission's procedural errors.

Schneider's success in recovering damages for certain of its alleged losses is also noteworthy because, historically, only a small number of the claims made under Article 288(1) have led to an award of damages. The Commission has lodged an appeal with the

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Court of Justice claiming that the CFI's judgment is erroneous in a number of respects. Unless the judgment is overturned by the Court of Justice, it is likely to provide some hope to parties seeking damages from the Commission in a merger review context. Even so, given the greater rigor that the Commission now exercises when reviewing mergers (largely as a result of the procedural reforms that followed the CFI's annulment of the prohibition of the Transaction and of the Commission's prohibition of the Airtours/First Choice and Tetra Laval/Siedel mergers), the Commission is less likely in future merger investigations to commit errors that constitute "grave and manifest disregard" of the limits of its powers.

*Akzo: Legal Professional Privilege*

On September 17, 2007, the CFI delivered a long-awaited judgment on the applicability of legal professional privilege in the context of Commission investigations into alleged breach of EC competition law to materials accessed during a "dawn raid" inspection. The judgment came as a disappointment to many observers because the CFI declined to extend legal privilege to communications between in-house counsel and their clients. However, the CFI provided useful guidance on the procedures that the Commission must follow to resolve disputed claims of privilege. The CFI also clarified the circumstances in which privilege will attach to documents prepared by company employees to brief external counsel.

Akzo Nobel Chemicals Ltd. and its affiliate Akros Chemicals Ltd., (together "Akzo") challenged the document collection procedures used by the Commission during a dawn raid inspection at Akzo's premises in 2003.<sup>18</sup> Akzo claimed that the Commission officials conducting the inspection had infringed its right to claim privilege with respect to two sets of documents because the officials had read and retained copies of the documents in the course of

the dawn raid. The first set of documents (the "Set A documents") consisted of a memorandum between two Akzo executives together with a further copy of the memorandum bearing manuscript notes. These documents had been prepared by Akzo employees to brief an external competition lawyer engaged to advise on the legality of certain agreements involving Akzo. The documents were neither sent, nor intended to be sent, to the lawyer, although they were discussed during a telephone conference with the lawyer. The second set of documents (the "Set B documents") consisted of handwritten notes prepared by an Akzo employee in connection with the preparation of the Set A documents, as well as certain e-mails between the general manager of the business under inspection and Akzo's in-house competition law specialist, who was a member of the Netherlands Bar. During the inspection, the Commission officials forced Akzo to allow them to read both sets of documents in order to provide the officials with the opportunity to assess the merits of Akzo's claim that the documents were privileged. As the Commission officials were not able to decide on the spot whether the Set A documents were privileged, they placed copies of the Set A documents in a sealed envelope which they took away from Akzo's premises together with all the other documents seized during the inspection. The investigators concluded on the spot that the Set B documents clearly were not privileged and, accordingly, took copies of those documents without using the sealed envelope procedure.

The CFI's judgment addressed three questions: (1) whether the Commission's procedure for dealing with the Set A documents and the Set B documents had breached Akzo's right to claim legal professional privilege; (2) whether internal documents prepared in order to brief an external lawyer ("preparatory documents") are subject to legal professional privilege; and (3) whether legal professional privilege applies to correspondence between in-house counsel and their clients.

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The CFI found that a company wishing to claim legal privilege in relation to a document must provide evidence to support its claim for privilege. However, this obligation does not extend to giving the investigating officials access to the document if the company believes that even a cursory review of the document is impossible without revealing the contents of the document and provided that the company gives the officials appropriate reasons for this belief. The CFI held that by forcing Akzo to allow them to read the documents at issue, the Commission officials had infringed Akzo's right to claim privilege. The CFI also found that when, during a dawn raid inspection, Commission officials are not satisfied with the reasons put forward to justify a privilege claim, they may not read the documents at issue before adopting a formal decision rejecting the claim for privilege and allowing the company under inspection sufficient time to challenge that decision before the CFI. The CFI opined that the sealed envelope procedure that the Commission had used in relation to the Set A documents complied with these requirements. However, the CFI found that, by not applying a similar procedure in relation to the Set B documents, the Commission had breached Akzo's right to claim privilege (other than with respect to the e-mail correspondence with Akzo's in-house counsel, which the CFI concluded was not privileged).

The CFI held that documents drawn up exclusively for the purpose of seeking legal advice from an external lawyer can be subject to the legal professional privilege, regardless of whether the documents are physically sent to the external lawyer. The fact that a document was discussed with an external lawyer is not, in itself, sufficient to confer privilege on the document. The CFI pointed out that companies wishing to assert privilege over preparatory documents bear the evidentiary burden of proving that the sole purpose of the preparatory document was to enable an external lawyer to give advice. Consequently, this purpose

should be "unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found." The CFI found that the Set A documents did not meet the standard of being prepared for the sole purpose of seeking external legal advice. Although they had been prepared in the context of Akzo's competition law compliance program, they were not addressed to a lawyer and did not state that their exclusive purpose was to enable an external lawyer to convey legal advice.

Akzo, supported by no fewer than five interveners (including the American Corporate Counsel Association) requested the CFI to reconsider the appropriateness of the current EC rules on the legal professional privilege, derived principally from the ruling by the Court of Justice in the AM&S case.<sup>19</sup> The AM&S rules deny application of the legal professional privilege to any communications involving a lawyer bound by a contract of employment to his or her client on the ground that, in the Court's view, an employment relationship undermines a lawyer's independence. The CFI concluded that, notwithstanding the various changes in the role of in-house lawyers since the AM&S judgment (published in 1982), the CFI was not prepared to extend the legal professional privilege to in-house lawyers' communications.

The judgment is currently subject to appeal by Akzo before the Court of Justice. In its appeal, Akzo claims, *inter alia*, that the CFI should have taken the opportunity to extend legal privilege to in-house counsel. If the ECJ, like the CFI, declines to take up this invitation, it will perpetuate the divergence between EC law and the various common law jurisdictions that recognise privilege for communications with in-house counsel.

#### Notes

<sup>1</sup> The first prohibition (the merger involving EDP, GDP and ENI (COMP/M.3440-ENI/EDP/GDP) was a legacy case from

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the time of Mrs Kroes' predecessor, Mario Monti.

<sup>2</sup> The Consolidated Notice can be found at [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_in.html](http://ec.europa.eu/comm/competition/mergers/legislation/draft_in.html).

<sup>3</sup> The Notices are (i) Notice on the concept of concentration; (ii) Notice on undertakings concerned; (iii) Notice on calculation of turnover; and (iv) Notice on the concept of full-function joint ventures.

<sup>4</sup> The Guidelines can be found at <http://ec.europa.eu/comm/competition/mergers/legislation.html>.

<sup>5</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings.

<sup>6</sup> Commission press release entitled Mergers: Commission has carried out inspections in the S PVC sector (Memo.07.573).

<sup>7</sup> Article 13 of Council Regulation (EC) No 139/2004.

<sup>8</sup> The last reported example of the Commission using its dawn raid powers under the EC Merger Regulation occurred in 1998, when the Commission conducted a dawn raid as part of its investigation into whether Skanska's acquisition of its competitor Scancem should have been notified under the EC Merger Regulation (Case IV/M.1157-Skanska/Skancem).

<sup>9</sup> The only reported case of gun jumping during a Commission investigation of a transaction dates back to 1998, when the Commission took action requiring Bertelsmann to cease certain conduct that the Commission considered to be tantamount to premature implementation of its acquisition of a joint controlling interest in Premiere (Case IV/M.993-Bertelsmann/Kirch/Premiere).

<sup>10</sup> The Commission cleared the transaction unconditionally on January 30, 2008. The outcome of the gun-jumping investigation will not be made public for some time.

<sup>11</sup> <http://europa.eu/rapid/pressreleasesaction.do?reference=IP/07/1608>.

<sup>12</sup> Article 20(2)(d) of Council Regulation (EC) 1/2003.

<sup>13</sup> Article 23(1)(e) of Council Regulation (EC) 1/2003.

<sup>14</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation No.1/2003.

<sup>15</sup> In prior proceedings, the CFI annulled the Commission's prohibition of the Transaction because, among other defects in the Commission's investigation, the Commission had failed to provide to Schneider an adequate opportunity to respond to concerns about the strengthening of Schneider's market position as a result of the addition of Legrand's complementary products to Schneider's existing product range.

<sup>16</sup> Article 288(1) provides that "[...] the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

<sup>17</sup> The annulment of a Commission decision under the EC Merger Regulation leads, by operation of law, to the

Commission reopening its investigation of the transaction at issue (assuming that the parties have not abandoned the transaction).

<sup>18</sup> Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission of the European Communities*.

<sup>19</sup> Case 155/79, *AM&S v Commission of the European Communities*.

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## U.S. ANTITRUST LAW DEVELOPMENTS

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### UPDATE ON U.S. ANTITRUST ENFORCEMENT<sup>1</sup>

#### Introduction

The end of 2007 and beginning of 2008 were marked by continued merger activity, as measured both by overall number of merger filings in 2007 as well as announced decisions or actions by federal (and state) antitrust authorities in a number of matters. Based on recent data, there were a total of 2,201 HSR premerger notifications in 2007, up from 2006, where the total was 1,768. The total number of CIDs issued went up from 271 in 2006 to 395 in 2007 and there were more than 80 active investigations of HSR filings in 2007.<sup>2</sup>

This 2007-early 2008 period included several challenges to mergers, some involving litigation and others with settlements via consent decree. The settlements are of particular note because they involved a wide range of types of assets, including intellectual property as well as physical assets (e.g., plants or equipment). Moreover, examination of the competitive effects theories underlying the cases indicates that the majority involved unilateral effects theories, in product markets involving both differentiated and undifferentiated products, and where the alleged competitive effects<sup>3</sup>

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were the elimination of next closest competitors in markets with relatively few participants. In addition, several of the matters, including those litigated in 2007, involved various applications of the Merger Guidelines “hypothetical monopolist” test for market definition and use of Critical Loss Analysis to evaluate market definition as well as competitive effects. In this regard, the Whole Foods-Wild Oats merger remains of interest due to the application of these tests in a litigated matter; the economic expert testimony focused principally on competitive effects theories in differentiated products markets, and application of Critical Loss Analyses to pricing and other financial data in a number of local geographic markets.<sup>4,5</sup> The theme of unilateral effects carried through in a jointly sponsored DOJ/FTC public workshop on February 12, 2008, focusing on unilateral effects theories and applications. The major topics that were focused on during the workshop were the general foundation of unilateral effects theories, the role of market definition, judicial perspectives, and the virtues and limitation of developing economic evidence.<sup>6</sup>

This paper highlights some of the key enforcement matters in this 2007-2008 period of the Department of Justice (DOJ) and Federal Trade Commission (FTC), which in some cases were pursued in coordination with states,<sup>7</sup> with an eye toward divestiture and competitive effects theories, particularly unilateral effects theories.

### Overview of Merger Enforcement Actions

The following provides a brief overview of merger challenges that were resolved by divestiture of physical assets or intellectual property, as well as cases that were investigated but not challenged under unilateral effects theories. The cases are recent matters and were chosen because they represent an array of industries, including differentiated and undifferentiated products, and are ones where the competitive effects theories tended to

be focused on unilateral effects theories. The unilateral effects theories covered a range of potential sources of competitive harm, including capacity as well as effects on innovation and product development.

### *Proposed Merger between Thomson and Reuters*

In early 2008, the DOJ challenged the proposed merger between Thomson and Reuters, two large providers of financial data for investment banking and trading type institutions. The DOJ alleged that the companies, with revenues of \$6.6 billion and \$5 billion respectively, were the “two major suppliers” of fundamentals databases and that a significant number of customers regarded the products of both companies as “their first and second choices when purchasing” financial data. In considering the competitive effects of the proposed transaction, the DOJ focused its evaluation on customer likely response to a post-merger price increase and assessment of whether the companies could profitably raise price without risking sufficient diversion.<sup>8</sup> The relevant market analyses focused on fundamentals data, earnings estimates, and aftermarket research and the DOJ claimed there are no substitutes for these financial data products and thus a post-merger price increase (SSNIP) would be profitable. It further claimed that the post-merger entity would likely “increase price both to institutional financial data users to whom they sell fundamentals data directly, either via data feed or as part of a financial data terminal product sold by Thomson or Reuters, as well as to institutional financial data users to whom Thomson and Reuters sell indirectly, via resellers that offer financial data terminals in competition with Thomson and Reuters.” The DOJ measured share (alleged to be in excess of 70%) in a worldwide market for earnings estimates data and for aftermarket research reports (estimated to be 90%), and concluded that the two firms were “significantly larger than the third largest supplier.” In addition to allegations of potential increases in

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prices, the DOJ alleged that the merger could reduce innovation for “fundamentals data, earnings estimates data and aftermarket research reports.”

The matter is of interest with regard to the nature of the assets involved in the divestiture and settlement, in this case data bases and intellectual property licensing: the consent decree required that the Thomson Corporation sell copies of three financial datasets and license related intellectual property. Included in the required divestiture were Thomson’s Worldscope, a fundamentals product, Reuters Estimates and Reuters Aftermarket (Embargoed) Research Database.<sup>9</sup>

### *Proposed Merger between UnitedHealth and Sierra*

Also in February 2008, the DOJ challenged the proposed acquisition of Sierra Health Services Inc. by UnitedHealth Group Inc., both national health insurance providers and each with substantial operations in the state of Nevada. In order to complete its acquisition of Sierra Health Services Inc. valued at \$2.6 billion, the DOJ required UnitedHealth Group Inc. to divest assets related specifically to the Medicare Advantage business in the Las Vegas Region.<sup>10</sup> The DOJ raised concerns that the resulting company would control 94% of an alleged Medicare Advantage health insurance market in the geographic area of Las Vegas. The competitive effects theory raised in the complaint is that the combination of the companies in this market would lessen “substantial actual and potential competition...eliminating actual and potential competition between United and Sierra,”<sup>11</sup> and would have “resulted in higher prices, fewer choices, and a reduction in the quality of Medicare Advantage plans purchased by senior citizens in the Las Vegas area.”<sup>12</sup> It would also increase market concentration by 4,080 points to an HHI of 8,836.<sup>13</sup>

This complaint differs to some extent from some of the earlier challenges of health insurance mergers

by the DOJ, which alleged monopsony concerns over physicians or healthcare providers as well as consumer effects in the form of reduced innovation for products and increased prices for premiums.<sup>14</sup> In the Sierra merger, the complaint was focused primarily on consumer effects, in the form of innovation and pricing. The DOJ alleged that regulatory constraints limited the ability of Las Vegas area residents to enroll in Medicare Advantage plans elsewhere in the state and thereby limited the relevant geographic market to the Las Vegas region, consisting of Clark and Nye Counties. In this region, the DOJ estimated that United and Sierra provided health insurance to approximately 27,800 and 49,500 Medicare Advantage enrollees.<sup>15</sup> The alleged competitive effects theory thus focused on next best substitutes and the alleged limited ability of customers to seek out alternative suppliers and products to exert sufficient competitive discipline on the merged parties.

This case was one where the investigations were coordinated by the state and federal authorities; the relief sought and obtained by each differed to some extent. Nevada Attorney General Catherine Cortez Masto also challenged the transaction with regard to the effects on Medicare Advantage competition.<sup>16</sup> The state and the DOJ reached different resolutions with regard to divestitures, with the DOJ as noted above requiring the divestiture of assets that would enable an additional competitor to serve residents and the state seeking specific commitments with regard to funding and changes to claims administration. In particular, the state obtained monetary and administrative relief that required that “the only public hospital and provider of last resort in Southern Nevada, University Medical Center, will receive over \$7 million to improve health care delivery and fund infrastructure improvements for the benefit of the one in five persons in Southern Nevada who are uninsured or underinsured. United has offered UMC in a separate commitment letter a

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two-year rate guarantee, and sweeping changes in the way claims are administered and paid, including a cash advance of over \$2 million towards old claims.”<sup>17</sup>

### *Proposed Acquisition of Harcourt by Pearson*

The proposed acquisition by Pearson of Harcourt represents another example of divestiture related to intellectual property, and competitive effects theories focused on innovation as well as price effects for consumers.<sup>18</sup> In early 2008, the DOJ challenged the proposed acquisition of Harcourt by Pearson, and focused on the overlap in the provision of clinical tests for personality disorders. The Department required Pearson to divest assets in relation to three clinical testing markets, claiming the transaction would have resulted in higher prices for consumers of the tests (a variety of school and professional customers) and “likely impaired the launch of a competitive new test for adult abnormal personality disorders;” the DOJ alleged that the transaction would have eliminated potential independent entry by Harcourt into the “market.”<sup>19</sup> The divestiture involved assets related to specific tests: “clinical tests used by psychologists, speech-language pathologists, and clinicians to diagnose persons who have or are at risk of developing certain disorders or disabilities.”<sup>20</sup>

### *Proposed Acquisition of Disc-O-Tech by Kyphon, Inc.*

The sale of intellectual property and related assets was relevant as well in the sale of specific assets approved by the FTC in late December. The FTC had challenged the proposed acquisition by Kyphon, Inc. of assets from Disc-O-Tech Medical Technologies, Ltd. and Discotech Orthopedic Technologies, Inc. (“Disc-O-Tech”) in October 2007. In that FTC decision and order, a divestiture was required under allegations that the combined entity would reduce competition for medical devices for “minimally invasive vertebral

compression fracture treatment.”<sup>21</sup> The December letter represented the conclusion of the divestiture process, which involved the identification and approval of a company to acquire the divested assets.

### *Other Merger Matters*

In addition to these matters, there were challenges to other transactions involving targeted resolution or divestitures in late 2007. For example, the DOJ required the divestiture of an Arizona mill in order to address concerns that the merger of two of the nation’s largest newsprint manufacturers, Abitibi-Consolidated Inc. and Bowater Inc., would lessen competition in a market defined by the DOJ in its complaint as a North American market. The DOJ in public statements noted that this represented the application of unilateral effects theories to an undifferentiated products industry, as compared to the other matters above.<sup>22</sup> Selected additional transactions that received scrutiny and involved divestitures also tended to involve unilateral effects theories.<sup>23</sup>

While these transactions merit attention for the specifics of the claimed competitive effects and the types of divestitures that would resolve competitive concerns, of continuing note are the transactions that involve detailed inquiry and are not challenged by the agencies. A recent example is the FTC’s inquiry into the proposed acquisition by Google Inc.’s Internet advertising server DoubleClick Inc, which was concluded on a 4-1 vote in late December 2007. In its statement on the decision, the Commission noted that it had investigated three separate antitrust theories with regard to the merger, and had separately addressed issues that arose with regard to consumer protection and privacy in the course of the investigation that were not necessarily transaction-specific.<sup>24</sup> With regard to the antitrust theories, the majority concluded that the marketplace evidence did not support a concern about direct and horizontal competition between the

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two parties, nor about the elimination of a strong or unique potential competitor in “third party ad serving.” In addition, the Commission investigated vertical theories associated with Google’s ad intermediation product and DoubleClick’s third party ad serving services, to ascertain whether the facts would suggest that conditions of market power relevant to the theory would hold.<sup>25</sup> The majority concluded that the evidence did not support a competitive effects theory, although the dissent expressed concerns about the competitive effects and the direction of the market trends.<sup>26, 27</sup>

### Summary

The merger review and enforcement activity set out above highlights an interesting trend over the past few years, with the evolution of competitive theories for merger review and challenge, to an increasing focus on unilateral as opposed to coordinated effects theories. This is echoed in the detailed inquiry and discussion at the agencies’ joint workshop on unilateral effects, and its focus on both the theoretical underpinnings and the empirical applications of methodologies for assessing unilateral effects. The mix of cases before the agencies has resulted in applications involving both differentiated and undifferentiated products, as well as the role of intellectual property and innovation in merger and non-merger enforcement. In that regard, there continues to be substantial attention to competitive issues, particularly involving pharmaceutical competition at the FTC and the role of standard setting and joint ventures at the DOJ.<sup>28</sup>

### Notes

<sup>1</sup> This summary reflects the views of the author and is not intended to reflect those of her colleagues at Compass Lexecon; information presented herein is based on public and not on confidential information.

<sup>2</sup> US Department of Justice Workload Statistics <http://www.usdoj.gov/atr-public/workstats.htm>.

<sup>3</sup> See, US Department of Justice & Federal Trade Commission Horizontal Merger Guidelines, (1992) [www.usdoj.gov](http://www.usdoj.gov)

<http://www.usdoj.gov/atr-public/guidelines/hmg.htm>.

<sup>4</sup> The case was brought by the FTC alleging that the merger would reduce competition and increase prices in several local geographic markets for the services of “premium natural and organic supermarkets.” The FTC alleged that the merging companies were differentiated from other traditional retail supermarkets, and that the merger would enable the merged companies to raise prices and/or reduce quality of service or innovation. The case was decided in favor of the parties in August 2007 and upheld on appeal. *Federal Trade Commission v. Whole Foods Market, Inc.*, No. 07-1021, slip op at 29 (D.D.C. Aug. 16, 2007), [www.ftc.gov/os/caselist/0710114-0710114dcoipub.pdf](http://www.ftc.gov/os/caselist/0710114-0710114dcoipub.pdf).

<sup>5</sup> Joseph Farrell and Carl Shapiro, “Improving Critical Loss Analysis” (December 17, 2007), Competition Policy Center, Paper CPC07-079 (<http://repositories.cdlib.org/iber-cpc/CPC07-079>) provides an overview of some of the issues relevant to the Whole Foods – Wild Oats merger and the economic analyses presented to the court.

<sup>6</sup> FTC Press Release, “FTC to Host One-Day Workshop on Unilateral Effects in Merger Review” November 15, 2007; Agenda for “UNILATERAL EFFECTS ANALYSIS AND LITIGATION WORKSHOP” February 12, 2008.

<sup>7</sup> See, *UnitedHealthcare Group – Sierra* below, which also involved the state of Nevada.

<sup>8</sup> Citations for this section are found in *US v. The Thomas Corporation*, Complaint, CASE NO.: 1:08-cv-00262.

<sup>9</sup> DOJ Press Release, “Justice Department Requires Thomson to Sell Financial Data and Related Assets In Order to Acquire Reuters” February 19, 2008.

<sup>10</sup> *US v. UnitedHealth Group Inc., Sierra Health Services, Inc.*, Complaint, Civil No. 1:08-cv-00322 at 4-8. United, with revenues of approximately \$75 billion, provides health insurance to over 70 million people across the country. Sierra reports revenues of \$1.9 billion and services over 655,000 people nationwide.

<sup>11</sup> *Ibid.* at 8.

<sup>12</sup> DOJ Press Release, “Justice Department Requires Divestiture in UnitedHealth Group’s Acquisition of Sierra Health Services” February 25, 2008; Complaint, *supra* note 10 at 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> For example, in December 2005, the DOJ required the divestiture of assets in Arizona and in Colorado in a consent decree reached in the merger of UnitedHealth Group and Pacificare; in that transaction, the alleged competitive effects involved increased prices for commercial insurance products and the prospect of reduced reimbursements for physicians and healthcare providers. See, [http://www.usdoj.gov/atr/public\\_press\\_releases/2005/213814.htm](http://www.usdoj.gov/atr/public_press_releases/2005/213814.htm). Similarly, decisions to challenge or not challenge mergers of health insurers focused on both consumer and provider effects. See, e.g.; discussion

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of the competitive effects theories in the challenge of the Aetna-Prudential, as addressed in Marius Schwartz, Economics Director of Enforcement, Antitrust Division, U.S. Department of Justice, "Buyer Power Concerns and the Aetna-Prudential Merger" October 20, 1999, Text Released November 30, 1999, and the Department of Justice Antitrust Division Issues Statement on the Closing of its Investigation of UnitedHealth Group's Acquisition of Oxford Health Plans, [www.usdoj.gov/atr/public/press\\_releases/2004/index04.htm](http://www.usdoj.gov/atr/public/press_releases/2004/index04.htm).

<sup>15</sup> Complaint, *supra* note 10 at 3, 4.

<sup>16</sup> See, statement of Nevada Division of Insurance Commissioner Moalsky-Arman, regarding the competitive implications of the merger for federal Medicare plans; [http://www.doi.state.nv.us/press\\_uhchshorder\\_08-27-07.pdf](http://www.doi.state.nv.us/press_uhchshorder_08-27-07.pdf). See Findings of Fact, Conclusions of Law, and Order, addressing a relevant product market of Medicare Advantage Plans; <http://www.doi.state.nv.us/Laws-merger.pdf> at 42.

<sup>17</sup> Nevada Office of Attorney General Press Release, "Masto announced divestiture and \$15 million charitable contribution in the proposed acquisition of Sierra Health Services, Inc by United Health Group, Incorporated" February 25, 2008.

<sup>18</sup> The theme of competitive effects in innovation and pricing as part of the DOJ enforcement is addressed more fully in a speech by Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Presentation to the George Mason University Law Review, 11th Annual Symposium on Antitrust, Washington, DC, October 31, 2007.

<sup>19</sup> DOJ Press Release, "Justice Department requires divestitures in Pearson's acquisition of Harcourt Assessment" January 24, 2008.

<sup>20</sup> *Ibid.* "Under the terms of the proposed settlement, Pearson and Harcourt must divest: Harcourt's adaptive behavior clinical test, the Adaptive Behavior Assessment System; Harcourt's adult abnormal personality clinical test, the Emotional Assessment System, which is under development; and in the speech and language clinical test market, either Pearson's Comprehensive Assessment of Spoken Language and the Oral and Written Language Scales or Harcourt's Clinical Evaluation of Language Fundamentals. Under the proposed settlement, the Department's Antitrust Division must approve the buyer of each of the divested assets."

<sup>21</sup> Commission Approves Proposed Divestiture in Matter of Kyphon, Inc. <http://www.ftc.gov/os/caselist/0710101/071221letter.pdf>. The FTC had focused its inquiry on the competitive alternatives and prospects for entry of competitors.

<sup>22</sup> David L. Meyer, "We Should Not Let The Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust" October 31, 2007, referencing the Abitibi/Bowater transaction ([http://www.usdoj.gov/atr/public/press\\_releases/2007/227085.pdf](http://www.usdoj.gov/atr/public/press_releases/2007/227085.pdf)). See Competitive Impact Statement, *United States v. Abitibi-Consolidated Inc.*, No. 1:07-cv-01912 (D.D.C.

Oct. 23, 2007), available at <http://www.usdoj.gov/atr/cases/f227100/227108.pdf>.) as well at the Vulcan Materials matter. See Competitive Impact Statement, *United States v. Vulcan Materials Co.*, No. 1:07-cv-02044-EGS (D.D.C. Nov. 13, 2007).

<sup>23</sup> Other matters of note for involving divestitures of assets were settlements requiring divestiture of stock ownership and other interests in companies involved in providing drop cable to cable television (see, DOJ Press Release, "Justice Department requires divestitures in Commscope's Acquisition of Andrew Corporation" December 6, 2007) and divestiture of a number of radio stations in order to approve the acquisition of ClearChannel by a group of private equity investors. DOJ Press Release, "Justice Department requires divestitures in private equity funds' acquisition of Clear Channel" February 13, 2008. This transaction and its resolution is of interest for the fact that the overlap was due to ownership interests by the purchasers of ClearChannel of competing channels in cities in which ClearChannel had stations. The competitive effects theories alleged were similar to those in many prior matters, and involved the potential reduction in competition for radio advertising.

<sup>24</sup> The staff issued a statement with regard to principles of online privacy. "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles: Statement of the Bureau of Consumer Protection Proposing Governing Principles For Online Behavioral Advertising and Requesting Comment" <http://www.ftc.gov/os/2007/12/P859900stmt.pdf>.

<sup>25</sup> As noted in the press release: "In some instances, according to the Commission, a proposed transaction may allow a dominant seller of one product to harm competition in the market for a related complementary product, for example, by exclusively bundling – or otherwise tying together – its product with the acquired firm's product after the acquisition. Such a strategy, however, can only be anticompetitive if the merged firm has market power." <http://www.ftc.gov/opa/2007/12/googledc.shtm>.

<sup>26</sup> See, <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>.

<sup>27</sup> Finally, in a transaction addressed in this column in the past, the U.S. Court of Appeals for the Fifth Circuit in January 2008 ruled in favor of the FTC, denying a petition by Chicago Bridge & Iron Company (CB&I) for a review of the FTC opinion related to the company's acquisition of Pitt-Des Moines, Inc. (PDM) in early 2001. FTC Press Release, "Federal Appeals Court Rules in Favor of FTC in Case Against Chicago Bridge & Iron Co." January 25, 2008. This effectively ended the litigation.

<sup>28</sup> See, e.g., <http://www.ftc.gov/opa/2007/12/fyi07268.shtm>, for December 21, 2007 announcement with regard to

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ongoing study of generic drugs at the FTC and discussion in Meyer, *supra* note 22, concerning standard setting and joint ventures.

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