FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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THE DAWSON COMMITTEE REVIEW OF THE COMPETITION PROVISIONS OF THE AUSTRALIAN *TRADE PRACTICES ACT 1974*

The Background

In October 2001, the Australian Government announced that there would be an independent review of the competition provisions of the *Trade Practices Act 1974* (Cth) (the "Act"). The result of this review, the Dawson Report, was released in April 2003. The Review Committee considered all competition and authorisation provisions of the Act, and received detailed submissions from many interested parties. Overseas experience was also taken into account. The Report makes a number of recommendations for improvements to the Act and its administration by the Australian Competition and Consumer Commission (the "ACCC"). Whilst it has received a mixed response from large and small business and consumers, almost all of its recommendations have been accepted by the Federal Government, and legislation is expected to be introduced into Parliament soon.

The Recommendations

The recommendations for reform are designed to achieve three main objectives:

- improved transparency, speed and certainty for business and consumers in the administration of the Act by the ACCC;
- modernising the Act to deal with new business structures such as joint ventures and dual listed companies; and
- fixing the law where it did not strike the right balance between business conduct and consumer interests such as third line forcing, the need for small business to engage in collective bargaining and the scope of exclusionary provisions. An exclusionary provision is a provision of a contract or arrangement between two or more competitors which results in the boycott of another person or class of persons.

The Committee made a number of general recommendations, and indicated firstly that any consideration of changes to the Act should have regard to international developments in the area of competition. It further recommended that the provisions should be applied broadly across the economy, rather than to particular industries. The Committee also acknowledged that compliance by each business with the Act is vital.

Specific provisions of the Act were also addressed in detail.

Mergers

Section 50 of the Act prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The Committee made three major recommendations relating to mergers, and if those recommendations are introduced, business will have three options to obtain merger approval. The three options are not mutually exclusive.

Firstly, they can seek informal clearance from the ACCC, a process that has already been in use for some years. The Report recommends that the ACCC should be obliged to provide reasons for its decision where they are requested, or where a merger has been rejected or undertakings accepted. Informal clearance does not protect against challenge by third parties.

Secondly, the Report recommends the introduction of a new voluntary formal 40-day ACCC clearance process. Under this procedure, parties will receive a binding clearance and immunity from third party action, with limited right of appeal to the Tribunal.

Finally, the existing formal authorisation procedure will be altered. Applications for authorisation will be made directly to the Australian Competition Tribunal instead of the ACCC, and the Tribunal will have three months to consider applications. This is a particularly important recommendation, as the Tribunal has traditionally been more willing to accept arguments relating to public benefits, such as efficiency, than the ACCC.

Section 46

Section 46 deals with misuse of market power. It prohibits a corporation with a substantial degree of power in a market from taking advantage of that power to eliminate or damage a competitor, prevent the entry of a person into that market, or deter or prevent a person from engaging in competitive conduct in that or another market.

The small business sector has been particularly critical of the section, arguing that it should be strengthened. The judgement in *Boral Besser Masonry Ltd* v *ACCC* [2003] HCA 5, handed down in February 2003, has been used as an example of the failure of section 46 to protect the interests of small business. In that case, the High Court confirmed that where a firm with significant market power has a legitimate business rationale for pursuing a competitive strategy, it is unlikely to be taking advantage of its market power for the purposes of section 46. The most important issue in the concern about the *Boral* outcome is the threshold market issue.

However, the Committee accepted that no amendment should be made to the section, and rejected claims that proving the purpose element of section 46 is difficult. It recognised that the introduction of an effects test could stifle competition and innovation to the detriment of consumers. Small business was thus given no special treatment in this area, despite immense discussion and controversy.

The Committee further acknowledged that there is no basis for reintroducing a specific price discrimination provision as this conduct is adequately covered by section 46. The Committee avoided the issue of predatory conduct, even though the High Court in the *Boral* case cast doubt on whether the misuse of market power law covered such conduct.

Collective Bargaining

The Report nevertheless makes some concessions to small business. It acknowledges the particular needs of the sector by allowing small business to collectively bargain with large businesses. Small business will be defined by reference to the value of the transaction,

and the Committee recommended that the initial amount should be set at AUS$3 million, which is the financial benchmark for breaches of Part IVA of the Act prohibiting unconscionable conduct against small business. Collective bargaining will be carried out using a procedure of notification to the ACCC, which is quicker and less complicated than seeking authorisation. The Government has endorsed this recommendation, and has indicated that the notification fees for collective bargaining will be low.

Cease and Desist Orders

At present, the ACCC can apply to the Federal Court for an injunction, which will be granted where the Federal Court is satisfied of a breach or threatened breach of the law. In its submissions to the Committee, the ACCC sought additional power to make an order that a corporation cease and desist from engaging in anti-competitive conduct, where the corporation has a substantial degree of power in a market. However, the Committee rejected this request, concluding that interim injunctions are sufficient.

Authorisation

Under the Act, some otherwise prohibited conduct can be authorised upon application to the ACCC. The authorisation process for non-mergers will be streamlined by imposing a six month time limit on the ACCC and giving it the flexibility to reduce application fees. These recommendations are designed to decrease the time and cost involved for business in obtaining an authorisation.

Third Line Forcing

Under the current law, third line forcing is a *per se* breach of the law. The Committee recognised that third line forcing may be beneficial and pro-competitive and as such, the third line forcing prohibition should be subject to a competition test. It further recommended that related companies should be treated as a single entity in the consideration of this conduct. This change will greatly assist retailers offering discounts or credit conditional upon consumers acquiring goods or services from a third party. In the past, such retailers have been forced to either breach the law or lodge costly notifications.

Exclusionary Provisions

Exclusionary provisions, like third line forcing, are currently a *per se* breach of the law. The Report recommends that exclusionary provisions should be significantly narrowed, and if the recommendations are adopted, it will be a defence if the conduct does not have the purpose, effect or likely effect of substantially lessening competition. In addition, only conduct targeting competitors will be prohibited. These changes will significantly assist common place commercial arrangements and will bring Australia's laws in line with those in New Zealand.

Joint Ventures

The Act includes a *per se* prohibition against price fixing. Under the existing law, joint ventures are exempt from this prohibition. However, the Committee pointed out that the exemption covers a limited range of conduct. Some joint ventures, including newer forms of joint ventures where there is agreed action but no joint production of goods or services, are therefore not covered. The Government has agreed with the Committee's recommendation that the exemption should be extended to ensure that it applies to all joint ventures, as long as they do not substantially lessen competition.

Dual Listed Companies

DLCs are to be treated on the same basis as corporate groups, so that they avoid technical breaches of the Act as a result of the separate status of the companies.

Criminal Sanctions

The ACCC has pushed strongly for the introduction of criminal sanctions, including imprisonment, for serious cartel behaviour. The Committee acknowledged the need for such sanctions, but recognised that more work must be done on this recommendation. In particular, there must be a satisfactory definition of serious cartel behaviour, and a method of combining this with a clear and certain leniency policy. The Government agreed that further consideration is necessary before the introduction of criminal sanctions, and indicated that a committee should be established to examine this issue.

Civil Penalties

The Act currently provides for a range of civil penalties, including pecuniary penalties and compensation orders. In addition, the Committee has recommended the introduction of a financial penalty that is the greater of AUS$10 million, three times the gain from the contravention or, where the gain cannot be calculated, 10% of the turnover of the corporate group. A further recommendation is that the court should be allowed to exclude an individual implicated in a contravention from being a director or a manager of a corporation. If implemented, this recommendation would bring Australia's law in line with that of New Zealand. The Committee has also recommended that corporations be prohibited from indemnifying their officers, employees or agents for the imposition of a financial penalty.

Corporate Governance

Many submissions to the Committee expressed concern about the accountability of the ACCC. The Committee has addressed these concerns through a number of recommendations, including the establishment of a Joint Parliamentary Committee to oversee the ACCC's administration of the Act, the appointment of an Associate Commissioner to handle complaints against the ACCC, and a new ACCC Charter. The Government has indicated that it may review these issues, pending a report by Mr. John Uhrig on corporate governance of Commonwealth statutory bodies.

The Government has accepted the recommendation that a media code of conduct, governing all formal and informal comment by the ACCC to the media and the ACCC's use of the media, should be developed. The Code will encourage objective and balanced reporting of cases and investigations by the ACCC. Other recommendations on governance have been put on hold pending the report by Mr. Uhrig.

"Subpoena" Powers

Section 155 gives the ACCC extensive powers to demand documents and information from a company and to enter a company's premises to search for and take extracts from documents.

The Report recommends that the ACCC's power to search premises and seize information should be extended. However, it will have to obtain a warrant from a judge or magistrate before it is permitted to conduct searches.

The Committee also recognised that there are significant financial costs to a company in complying with an ACCC demand under section 155. The Report recommends that the ACCC should be required to give careful consideration to these financial implications

prior to using its power under section 155. The Committee rejected arguments that parties should be able to claim costs from the ACCC in the event of an unsuccessful investigation.

EC COMPETITION LAW DEVELOPMENTS

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Merger Review

The EC Commission recently has undertaken four important initiatives in relation to the review of mergers under Council Regulation (EEC) 4064/89 (the "EC Merger Regulation"):

1. publication of a draft Regulation (the "Draft Regulation") to replace the EC Merger Regulation;[1]

2. publication of draft Guidelines (the "Draft Guidelines") describing in detail the Commission's analytical methodology in relation to horizontal mergers;[1]

3. a number of administrative reforms in relation to the way in which the Commission enforces the EC Merger Regulation (the "Administrative Reforms"); and

4. publication of standard form texts for divestiture commitments and Trustee Mandate, accompanied by Best Practice Guidelines.

Replacement of the EC Merger Regulation

As a result of the consultation initiated by the Commission's 2001 *Green Paper on the Review of Council Regulation (EEC) No. 4064/89*, the Commission has decided to propose that the Council of Ministers replace the EC Merger Regulation in its entirety. Although the Commission's reform proposal does not go so far as to change the institutions responsible for EU merger review or the substantive standard against which mergers are to be assessed, the Draft Regulation will make a number of significant changes to EC merger review. These are summarized below:

Increased flexibility in the EC merger review timetable

The Draft Regulation would introduce the ability to file a merger notification (Form CO) with the EC Commission prior to conclusion of a binding agreement to bring about the merger or the making of a tender offer (in the case of transactions structured as tender offers). The Commission proposes that, provided the parties demonstrate a good faith intention to conclude a binding agreement to merge, they will be entitled to file the Form CO prior to signature of such binding agreements. Similarly, in the case of tender offers, the Commission proposes to allow parties to file their Form CO at any time after they have publicly announced their intention to make the tender offer. In addition to these changes, the Commission proposes to abolish the current requirement under the EC Merger Regulation that transactions have to be notified within one week after signature of the binding agreement or announcement of the tender offer. Should this proposed change be implemented, EC law will be brought into line with merger control laws in Canada, the United States and numerous other countries where there is no set time for filing a merger notification provided that the merging parties comply with the applicable waiting period obligations.

The Commission proposes to introduce additional flexibility on timing by extending the one month Phase

I and four month Phase II timetables for the conduct of reviews under the EC Merger Regulation. Under the proposals, the timetable for completion of a Phase I review will be extended by a further week when the parties offer remedial undertakings during the Phase I period. Thus, it will be extended from the present six, to seven weeks. Further, the Commission proposes to make two amendments to the Phase II timetable. First, there will be a right for the Commission and merging parties, by mutual agreement, to extend the Phase II timetable. Second, the merging parties will have the right unilaterally to require the Commission to extend the Phase II timetable. Only one such request will be permitted and the maximum extension of the Phase II timetable (whether by agreement among the Commission and the parties or if the parties exercise their right to require an extension), must not exceed twenty working days.

Increased flexibility in the referral of transactions by the Commission to member states, and vice versa

The Commission intends to introduce a system of so-called "streamlined referrals" to deal with allocation of merger reviews between the Commission and national antitrust authorities in the EU member states. The proposed new rules will increase the complexity in determining whether a transaction is to be referred by the Commission for review by the authorities of one or more member states. The Commission also intends to make it easier for member states to refer to the Commission, transactions that have cross border effects but do not exceed the jurisdictional thresholds in the EC Merger Regulation. The practical implications of these proposed changes will be to increase the opportunity for transactions to be referred by the Commission to member states authorities, and vice versa. For this reason, the proposed new rules will to some extent, weaken the "one-stop shop" principle reflected in the EC Merger Regulation by increasing the uncertainty as to whether a transaction will be reviewed in whole or in part at Community level and/or Member state level.

Clarification of the application of the EC Merger Regulation to oligopolistic market structures

The Commission has resisted calls for replacement of the current dominance standard by a substantive lessening of competition standard.[2] However, the Commission proposes to expand the definition in the EC Merger Regulation of what constitutes a "dominant position" so as to make clearer the circumstances in which a transaction will create or strengthen a position of collective dominance (and therefore run the risk of prohibition). The Commission proposes to introduce new language into the EC Merger Regulation stating that one or more undertakings will be deemed to be in a dominant position if they "hold the economic power to influence appreciably and substantively the parameters of competition, in particular prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition".

This proposed change is intended to remove doubt as to whether the Commission is entitled to block mergers that lead, create or strengthen non-collusive oligopoly markets. However, the proposed changes have given rise to concerns that the Commission is introducing into the Merger Regulation new concepts, that are not generally understood by practitioners.

The Draft Horizontal Merger Guidelines

The Draft Guidelines describe the methodology used by the Commission to assess the lawfulness of horizontal mergers notified under the EC Merger Regulation.[3] Although the Commission has had the power to review mergers since 1990, the Draft Guidelines are the first detailed general statement by the Commission describing the methodology that it uses

to assess the competitive effects of mergers notified to it.

The Draft Guidelines describe the Commission's analytical methodology in relation to five aspects of horizontal merger review:

- possible anti-competitive effects of horizontal mergers (which assesses single firm dominance and collective dominance);
- countervailing buyer power;
- market entry;
- post merger efficiencies; and
- the failing firm defence.

The Draft Guidelines are also the first detailed statement by the Commission of the types of efficiencies that could act to outweigh anti-competitive effects of mergers reviewed under the EC Merger Regulation.

Administrative Reforms in EC Merger Review

The Administrative Reforms bring about important changes in the Commission's procedures and are intended to strengthen the "checks and balances" embodied in the investigatory process established under the EC Merger Regulation.[4] The most noteworthy Administrative Reforms are as follows:

Appointment of a peer review panel

The Commission will, as a matter of practice, subject the findings of each case team investigating a Phase II merger to a "peer review" by a panel of senior officials drawn from within the Commission. The peer review process will take place *in camera* and there is no suggestion that the Commission would disclose the findings of the peer review to the merging parties.

Earlier access to the Commission's file

The Commission proposes to allow merging parties to have access to its file after the opening of the Phase II investigation but (in contrast to the present procedure) before issuance of a Statement of Objections. This reform should increase transparency for merging parties. In addition, this reform will reduce the pressure on merging parties who, under the present procedure, have only a relatively short time in which to (i) review the Commission's file; (ii) prepare a written response to the Statement of Objections; and (iii) prepare for the oral hearing of the case.

"Triangular meetings"

The Commission proposes to allow so-called "triangular" meetings among the case team, merging parties and third party complainants. Such meetings would be held only with the consent of all concerned and would be a forum to allow the merging parties to test the veracity of the complainant's concerns in relation to a merger under review by the Commission.

Creation of the post of Chief Competition Economist in DG Comp.

The Commission intends to create a new post in the Competition Directorate: Chief Competition Economist. The Commission hopes that the resulting increase in the pool of economic expertise available within the Competition Directorate will enhance the quality of the economic analysis underpinning the Commission's decisions under the EC Merger Regulation. Consequently, there will be reduced likelihood that, on appeal, the Commission will be found to have committed errors of assessment of the types found by the CFI in the *Airtours*, *Schneider* and *Tetra Laval* judgments.

Standard Form Divestiture Commitments and Trustee Mandate

On May 2, 2003, the Commission published standard forms of Divestiture Commitments and Trustee Mandate. These standard forms provide a starting point for the drafting of divestiture undertakings and terms of appointment of monitoring trustees and divestiture trustees.

Changes in the Enforcement of Articles 81 and 82

On December 16, 2002, Council Regulation (EC) 1/2003 *on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty* ("Regulation 1/2003") was adopted by the EC Council of Ministers. Regulation 1/2003 will enter into force on May 1, 2004 and give effect to the Commission's previous proposals to "modernize" the way in which Articles 81 and 82 are enforced. Regulation 1/2003 will abolish the current notification system under Article 81 and give national competition authorities and courts in the EU the power to determine whether agreements that infringe Article 81 are eligible for individual exemption under Article 81(3). As part of the devolution to the member states of the Commission's current role in enforcing Articles 81 and 82, Regulation 1/2003 will establish a "network" among the various national competition authorities in the EU.

Reorganization of the EC Commission's Competition Directorate

On April 30, 2003, the Commission announced that its Competition Directorate ("DG Comp") is to be radically reorganized. The reorganization is intended to pave the way for the Commission to carry out the enforcement of EC competition law in an enlarged European Community comprising 25 member states. The reorganization will lead, by and large, to the disbanding of the Merger Task Force ("MTF"). A new unit will be created in each of the four sector-specific directorates in DG Comp. The new units will have responsibility for reviewing mergers involving their respective sectors.

A smaller MTF will remain and will take on the role of co-ordinating the activities of the new merger review units in each of the sectoral directorates. In addition to these changes relating to merger review, a new unit will be created to enforce the Commission's decisions in the State aid field.

Notes

[1] Available from the Competition Directorate's website: http://www.europa.eu.int/comm./compeition/mergers/review.

[2] At present, mergers reviewed under the EC Merger Regulation are blocked if they lead to the creation or strengthening of a dominant position as a result of which competition would be significantly impeded in all, or a substantial part of the European Union (Article 2 of the EC Merger Regulation).

[3] The Commission has stated that it intends to issue similar Guidelines on vertical aspects and conglomerate aspects of mergers. At present, there is no precise timeframe for the issuance of those Guidelines.

[4] Some of the Administrative Reforms are described in the Commission's draft guidelines *Best Practices on the Conduct of EC Merger Control Proceedings*. Those guidelines were issued for comment on December 19, 2002.

U.S. ANTITRUST LAW DEVELOPMENTS

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Merger filings continued their recent pattern of decline at the U.S. agencies, due both to the first full fiscal year of changes in filing requirements (which raised the threshold levels for filing) as well as the continued general decline in merger activity. A recent report to the U.S. Congress by the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ")

("Annual Report to Congress Fiscal Year 2002") indicated that filings were 50% lower in FY2002 as compared to FY2001 (and 76% lower than in FY2000).[1] Of the 1187 filed transactions during FY 2002, 49 transactions received intensive inquiry (as indicated by the issuance of a request for additional information or "second request"); this represented an increase in the proportion of transactions receiving a second request. These investigations that resulted in more extensive scrutiny also resulted in a number of enforcement actions.

During FY2002, both agencies challenged a number of transactions (24 transactions were challenged by the FTC and 10 by the DOJ). Most of these challenges were resolved by consent decrees or the parties abandoning the transactions; two challenges by the FTC resulted in administrative proceedings and the DOJ filed suit in a U.S. district court in four transactions.[2] A number of these enforcement actions were addressed in prior issues of the *Record*. This article will focus on some of the recent enforcement actions, as well as decisions that have been rendered on transactions reported earlier. In addition to the specific enforcement-related matters, two policy statements of particular interest were issued by the FTC – one on divestiture policy and one on disgorgement; these are addressed briefly in the next section.

Divestiture and Disgorgement Policy Statements

As noted above, a number of the challenged mergers were resolved by consent decrees and divestitures. While each case is fact-specific, there were a number of common elements to the divestiture proposals, including the sale of sufficient business assets to an entity deemed capable of providing sufficient competition to allay the competitive concerns raised by the merger. The specifics of U.S. divestiture policy have evolved over time and a recent policy statement issued by the FTC in August 2003,[3] which sets out that agency's approach, provides a useful summary of some of the major developments: "This statement addresses issues arising in the following areas: (1) the assets to be divested, (2) an acceptable buyer, (3) the divestiture agreement, (4) additional order provisions, (5) orders to hold separate and/or maintain assets, (6) divestiture applications, and (7) timing." The statement is of particular interest for its discussion of circumstances in which the proposed divestiture would include the sale of assets that are not currently an ongoing business unit or where the sale of assets involves intellectual property. The general principles that would apply in these two cases mirror those of the sale of an ongoing business asset in that the sale should comprise assets that allow the purchaser to be an active and viable competitor. The specific language of the statement includes the following principles:

> The Assets to be Divested
>
> A proposal to divest a demonstrably autonomous, on-going business unit comprising the entire business of one of the parties to the merger will, in all likelihood, expedite the divestiture process.
>
> If the proposed package of assets does not comprise a separate business unit that has operated autonomously in the past, the parties must show that the package includes all components of an autonomous business or that they are otherwise available before the staff will recommend that the Commission accept such a proposal.
>
> If the parties propose a divestiture primarily of intellectual property (or other limited categories of assets necessary to facilitate entry), they must show that an acceptable buyer exists and that divestiture to that buyer

> will achieve the remedial purposes of the Commission's order.

The FTC statement indicates that if the divested assets fall into the second category (sale of less than an on-going business), then the agency will typically require an up-front purchaser (presumably to be able to vet the sufficiency of the assets to be sold and the capability of the purchaser).[4]

In addition to its statement on divestiture policy, the FTC also has issued a statement on the circumstances in which disgorgement and restitution may be used in competition cases:[5]

> The Commission continues to believe that disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties. . . Nonetheless, we do not view monetary disgorgement or restitution as routine remedies for antitrust cases. In general, we will continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.

The statement sets out some conditions that will be considered in the FTC's decision whether to apply such relief. Among the conditions that will be considered are whether there is a "clear" violation, whether there is a "reasonable" basis for estimating and calculating the payment, and whether there are other practical relief options such as private action.

Application to Recent Matters

Turning to the recent enforcement actions, there were a number of matters that provide an opportunity to understand the role that divestiture and divestiture policy play in shaping the outcomes of enforcement decisions. This section addresses a few of the more interesting matters that involved divestiture remedies and focuses on those that involved (1) full divestiture of the assets acquired; (2) partial divestiture of assets with sale to specified buyers; and (3) divestiture or sale of intellectual property or other assets.[6]

There were two matters involving already consummated mergers in which divestiture of all of the assets acquired in the transaction was sought as the solution to the perceived competitive problem. A decision was issued in a matter that had been challenged by the FTC (in the fall of 2002) after an administrative hearing at the FTC. The matter, Chicago Bridge & Iron/Pitt Des Moines, Inc,[7] was challenged based on alleged anticompetitive effects in markets involving certain types of tanks for sale to U.S. customers (LNG, LPG, thermal vacuum chambers, and LIN/LOX tanks). In his decision, the Administrative Law Judge found that the effect of the transactions (which had already been consummated) "may be to substantially lessen competition", and ordered that all of the assets acquired by CB&I were to be divested. In a second matter, in April 2003, the DOJ filed suit seeking the divestiture of Southern Belle Dairy, which had been acquired by Dairy Farmers of America, alleging that the effect of this non-HSR reportable transaction was the elimination of competition in school milk bidding.[8]

Another matter resolved by divestiture but sale of only some of the assets involved in the transaction[9] was the proposed challenge by the FTC of the acquisition by Nestlé S.A. of Dreyer's Grand Ice Cream Inc.[10] The concern raised by the FTC in its complaint was that the acquisition would lessen competition in a market for "superpremium" ice cream. The parties to the transaction marketed different brands of ice cream, with Nestlé marketing the Häagen-Dazs

brand and Dreyer's marketing Dreamery, Godiva (via license with Godiva Chocolatier, Inc.) and Starbucks (via a joint venture with Starbucks Corporation). According to the complaint, the FTC alleged that the two parties accounted for about 60% of the relevant market, which had only one other player of consequence.

The divestiture remedy in this matter involved a number of assets and required changes to certain contractual arrangements, including the sale of brands (Dreamery, Godiva, the Whole Fruit sorbet) and certain of Nestlé's distribution assets to a specific buyer - CoolBrands International, Inc.[11] In addition to the sale of these brands, Nestlé was required to make further commitments with respect to distribution services and supply of products to CoolBrands (including supply of certain products at cost and distribution of brands for CoolBrands in areas previously served by Dreyer's) and required to make its licensing agreement with Starbucks non-exclusive and to allow certain firms to be freed from contractual arrangements with Dreyers (e.g., Ben & Jerry's).

Two recent cases are of particular interest because they involve restructuring of some assets and changes to long term agreements as "fixes" for the competitive problems. The DOJ reached an agreement with the parties involved in the ICAP PLC – Broker Tec LLC transaction,[12] an acquisition involving two large interdealer brokers. The competitive "fix" was focused on contractual changes that would address concerns raised by the DOJ with respect to entry and expansion by competitors for interdealer brokerage services. Specifically, the DOJ sought changes to the parties' longer term contracts with shareholder-customers to eliminate most favored nation clauses and non-compete provisions, and to change certain elements with respect to commission caps.

The second matter involved a recent (August 2003) administrative complaint filed by the FTC in the Aspen Technology, Inc. - Hyprotech, Ltd acquisition.[13] This transaction was not HSR-reportable. The two companies are alleged to be competitors in a variety of software products and services, with the FTC alleging competitive effects in several different markets. In addressing the alleged competitive effects, the FTC complaint indicated that the transaction: "creates a single entity that could undermine the ability of open standard setting organizations to decrease barriers to entry, thereby limiting innovation and third party entry to provide niche applications except with AspenTech approval." The FTC relief included the divestiture of assets, effectively required the undoing of the transaction and the re-constitution of certain parts of the acquired company, and provided for the development of a competitor through the divestiture of intellectual property.

Recent Case Decision

In addition to the CB&I decision noted above, there was a recent decision in a DOJ suit brought against the UPM Kymmene's Raflatac - Bemis Corporation's MACtac transaction, which involved the combination of two of the largest producers of "pressure-sensitive labelstock."[14] The DOJ had alleged that the transaction involved two of the closest competitors in a market with few competitors and raised a concern that coordination had already occurred: "our investigation has revealed that this market is already one in which competitors have sought to coordinate rather than compete."

The decision of Judge James B. Zagel of the Northern District of Illinois, which was issued on July 25, 2003, found in favor of the DOJ (and its request for a preliminary injunction). The competitive effects reasoning in the decision relied in part on the concept

that the merged parties and the largest supplier (Avery) and other competitors would tend to be able to raise prices without substantial concern about countervailing effects or discipline from expansion by smaller fringe players[15]:

> Indeed, when 80% of current production is in the hands of three companies who agree to raise prices, they will be able to do so with little fear that the fringe of other competitors can defeat their attempts at price increases because those fringe competitors will be unable to expand their own output to serve the customers of the giants.

The decision addressed arguments with respect to the weakened competitor status of one of the companies (MACtac) but rejected that argument indicating that both parties would face pressure to compete more aggressively. The decision also included some interesting language with respect to the relevance of acceptable timing of anticompetitive effects:

> If one takes the longest view, Raflatac 2nd and Avery will eventually go head to head on prices and if they don't, their customers will go to other products or other ways of obtaining what they now buy from these suppliers and Green Bay will eat into their customer base. But this will not, I find, happen for at least a year, and antitrust law does not permit this period of anti-competitive conduct simply because competition will return after it is over.

Other Developments – Changes in Leadership at the Antitrust Agencies

There were a number of changes at both the FTC and the DOJ in the senior positions, with two new lead economists (David Sibley at the DOJ and Luke Froeb at the FTC) and the appointment of Susan Creighton to replace Joseph Simons as Director of the Bureau of Competition and the appointment of Pamela Jones Harbour as FTC Commissioner (replacing Sheila Anthony). Another appointment at the DOJ was Makan Delrahim to serve as the Deputy Assistant Attorney General responsible for international, policy and appellate matters.

Notes

[1] http://www.ftc.gov/os/2003/08/hsrannualreport.pdf.

[2] Of the matters that were challenged, the outcomes included: consent orders (14), administrative complaints (2), abandoned transactions (12), consummation of a merger after denial of the preliminary injunction (1), and restructuring of the transaction (5).

[3] Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (www.ftc.gov/bc/bestpractices/bestpractices030401.htm).

[4] The FTC sets out the conditions for "An Acceptable Buyer

> To be acceptable, a buyer must be competitively and financially viable; proposing a buyer that does not satisfy these tests will be unacceptable and will slow down the process.
>
> If parties seek to divest a package of assets comprising less than an autonomous, on-going business, the Bureau will usually require an up-front buyer."

[5] Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003, http://www.ftc.gov/os/2003/07/disgorgementfrn.htm).

[6] Southern Union/Panhandle Pipeline (http://www.ftc.gov/opa/2003/05/southernunion.htm); UPM Kymmene/Bemis Corporation (http://www.usdoj.gov/atr/cases/upm-kymmene.htm).

[7] See http://www.ftc.gov/os/2003/06/cbiid.pdf.

[8] See http://www.usdoj.gov/atr/cases/f200900/200972.htm.

[9] Some of the other recent cases that involved partial divestitures included a bank merger (BB&T/First Virginia) in which the DOJ sought divestiture of a number of branches in some of the markets in which the parties had overlap operations (http://www.usdoj.gov/atr/public/press_releases/2003/201009.htm) and in which the parties agreed that they would provide for the additional opportunity for sale or lease of branches, which otherwise would be closed due to the merger, to commercial banks. A second such matter was the Waste Management case in which the DOJ had challenged the proposed

Waste Management, Inc. - Allied Waste Industries, Inc. transaction, which would have combined the two commercial waste hauling and disposal companies, and along with the complaint had filed a consent decree seeking divestitures of certain assets of the company. The divestitures were aimed at seven overlap markets where the DOJ alleged that the parties were two of a few competitors. The assets to be sold to address the competitive concerns included both waste collection and waste disposal services (http://www. usdoj.gov/atr/cases/wastem2.htm).

[10] See http://www.ftc.gov/opa/2003/06/nestle.htm.

[11] Another example of divestitures to "pre-approved" or specific buyers was the merger of Pfizer and Pharmacia in which the FTC required divestitures in a number of product markets and in which several different buyers were deemed acceptable purchasers (http://www.ftc.gov/opa/2003/04/pfizer.htm).

[12] See http://www.usdoj.gov/atr/public/press_releases/2003/200960.htm.

[13] See http://www.ftc.gov/opa/2003/08/aspen.htm.

[14] See http://www.usdoj.gov/atr/cases/upm-kymmene.htm.

[15] See http://www.usdoj.gov/atr/cases/f201100/201196.pdf.