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Transnational Competition Law Aspects of Mergers and Acquisitions

*William M. Hannay**

I. INTRODUCTION

As more and more U.S. companies engage in overseas operations, even the most routine merger or acquisition seems to have a transnational component which requires analysis and perhaps premerger notification under an increasing number of foreign "competition laws" (or what we call antitrust laws). An understanding of those competition rules has become an imperative for American lawyers.¹

While the United States has by far the broadest and most aggressively enforced antitrust laws in the world, the European Union is now running a close second, and other countries are beginning to follow suit. Any company that is involved in overseas operations -- either through exports or through the activities of foreign subsidiaries or other affiliated companies -- or that is acquiring such a company should include a review of relevant foreign merger control laws as a part of its pre-merger analysis.²

Some 70 countries around the world now have their own competition laws that apply to business transactions involving those nations.³ Regional

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¹For a comprehensive, one-volume treatise on E.U. competition law, see L. RITTER, W.D. BRAUN AND F. RAWLINSON, *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* (2d ed. 2000). Updated material and information about EU competition law can be found on the European Commission's Internet website (visited Apr. 18, 2000) <<http://europa.eu.int/comm/dg04>>.

²In making this assessment, it is wise to retain an experienced antitrust or competition law practitioner in each relevant jurisdiction -- typically, but not necessarily, a foreign attorney.

³As of the end of 1996, 70 countries had a competition law, the majority of which are relatively new. See Mark Palim, *The Worldwide Growth of Competition Law: An Empirical*

economic organizations have also established competition law regimes. The best known of these are articles 81 and 82 of the E.C. Treaty (formerly articles 85 and 86 of the Treaty of Rome), which govern the E.U. countries.⁴

II. E.U. COMPETITION LAW

With the growing importance of international markets, many American firms find themselves subject to foreign competition laws, especially those of the European Union.⁵ In turn, compliance with those competition rules has become an imperative for American companies.

A. Overview

The European Commission, through its Directorate General for Competition (referred to as "DG-IV"), is the E.U.'s competition law enforcement agency. The principal rules of competition are set forth in articles 81 and 82 of the EC Treaty (formerly articles 85 and 86 of the 1957 Treaty of Rome) and in the more-recent Merger Regulation.⁶ Article 81(1) generally prohibits concerted market behavior that restricts or prevents competition within the Common Market.⁷ Article 82 prohibits the abuse of dominant position within the Market.⁸ These rules can be seen as rough counterparts

Analysis, 43 ANTI. BULL. 105 (1998). Palim finds that three-quarters of these laws date from 1980 or later and that the countries with competition laws account for 79 percent of world output and 86 percent of world trade.

⁴The "Treaty of Rome" refers to the original Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (signed at Rome). Treaty on European Union, Feb. 7, 1992, O.J. C 224/1, [1992] 1 C.M.L.R. 719, (amending original Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Maastricht Treaty]. Consolidated Version of the Treaty Establishing the European Economic Community, Oct. 2, 1997, 1997 O.J. (C 340) 173, art. 81-82 (former art. 85-86) [hereinafter EC Treaty]. Article 12 of the EC Treaty provided for complete renumbering of the Maastricht Treaty in accordance with a table of equivalencies included in the treaty's annex. Throughout the text, all article references (and the use of "EC Treaty") will be to the new renumbered articles, which took effect May 1, 1999. Specifically, articles 85, 86, 90, 92, and 93 of Treaty on European Union are renumbered as articles 81, 82, 86, 87, and 88 of EC Treaty, respectively).

⁵The European Union (E.U.) comprises the European Communities (EC) and the two intergovernmental "pillars" of the European Union covering common foreign and security policy and co-operation on justice and home affairs issues. It formally came into being on Nov. 1, 1993, with the entry into force of the Maastricht Treaty. The E.U. consists of Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden.

⁶Council Regulation 4064/89 on the control of concentrations between undertakings, 1989 O.J. (L 257) 14 (EEC), as amended by Council Regulation (EC) 1310/97, 1997 O.J. (L 180) 1 [hereinafter Merger Control Regulation].

⁷EC Treaty, *supra* note 4, at art. 81(1).

⁸*Id.* at art. 82.

of sections 1 and 2 of the Sherman Act; however, there are some significant difference American lawyers should keep in mind.

B. A Comparison of U.S. and E.U. Merger Policy

Like the U.S.'s Hart-Scott-Rodino Act, the E.U.'s merger policy requires parties to transactions above a certain size threshold to notify the regulator prior to completing the merger or acquisition. In the U.S., the merging parties must refrain from closing until expiration of a 30-day waiting period. In Europe, by contrast, a notifiable "concentration" (*i.e.*, a merger, acquisition, or other consolidation) of two or more "undertakings" (*i.e.*, corporations or other entities) must not be implemented until it has been authorized. The Commission, however, must decide either to authorize (or clear) the transaction or to challenge it within one month.⁹ In the U.S., the waiting period is extended for a somewhat indeterminate period if the government issues a "second request" for information, while in the E.U. the time may be extended an additional four months if the Commission initiates a "second-stage investigation." Both U.S. and E.U. enforcement agencies have adopted implementing regulations to facilitate the premerger notification process.¹⁰

The E.U.'s merger policy is set forth in a comprehensive merger control regulation, enacted in 1989 and substantially revised in 1997.¹¹ Mergers, acquisitions and certain joint ventures of community dimension, as defined by quantitative thresholds in the Regulation, have to be notified in advance to the Commission. The threshold for notification is an aggregate worldwide turnover in excess of 5 billion Euros (approximately US\$5.5 billion) *and* an individual turnover within Europe in excess of 250 million Euros (approximately US\$275 million) for at least two of the parties to the merger or joint venture.¹² The Merger Regulation does not require E.U.

⁹Merger Control Regulations, art. 10, para. 1. The time period extends to six weeks in the event (1) the Commission receives a request for referral from a Member State or (2) the parties submit commitments intended to form the basis of the clearance decision. *Id.* Transactions that create or strengthen a dominant position in a distinct market within a Member State may be referred by the Commission to the Member State for review. *Id.* at art. 9.

¹⁰Compare 16 C.F.R. § 800 et seq. (implementing regulations to HSR Act's premerger notification provisions) with Commission Regulation 3384/94, 1994 O.J. (L377) 1; Commission Notice on the Notion of a Concentration 1994 O.J. (C385) 5; Commission Notice on the Notion of Undertakings Concerned 1994 O.J. (C385) 31; Commission Notice on the Calculation of Turnover 1994 O.J. (C382) 15.

¹¹Commission Regulation 4064/89 on the Control of Concentrations between Undertakings, as amended by Commission Regulation 1310/97 of 30 June 1997. It was not until 1987 that the European Court of Justice upheld the Commission's view that article 81 even covers mergers and acquisitions. *See*, Case 142 BAT, E.C.R. 4487, (1987) and Case 156/84, R.J. Reynolds v. Commission, 4 COMM. MKT. L. R. 24 (1987). The court had earlier upheld the application of article 82 to mergers and acquisitions. *See* Europemballage Corporation and Continental Can Co. Inc. v. Commission, Case 6/72, E.C.R. 215 (1973).

¹²Merger Control Regulation, *supra* note 4, at art.1, para. 2.

notification if *each* party realizes more than two-thirds of its community-wide turnover in a single member state.

If the transaction falls within the scope of the Merger Regulation, the Commission has exclusive jurisdiction, which means that the merger is not subject to proceedings at the same time under national competition laws. Transactions that fall below the Regulation's thresholds are subject to review under the various merger control laws of Member States.

In 1997, the E.U. amended the Merger Regulation, effective March 1, 1998. It was recognized that multiple notification of the same transaction increases legal uncertainty, effort and cost for companies and can lead to conflicting assessments and that extending the scope of Community merger control to concentrations with a significant impact in several Member States would ensure that a "one-stop shop" system applies. The amendment lowered the threshold for mergers subject to Commission jurisdiction which affected at least three Member States.¹³

The E.U. notification must be filed not more than one week after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.¹⁴ As in the United States, failure to file notification of a merger with Community dimension (or to provide accurate information in such a filing) can result in substantial fines.¹⁵

A merger or acquisition will be deemed compatible with the Common Market if it does not create or strengthen a dominant position that, as a result, would significantly impede effective competition in the E.U. The Commission only initiates an investigation if it has "serious doubts" that the proposed merger is a concentration that is permitted under the Merger Regulation. The Commission may then grant either outright or conditional

¹³Concentrations will be notifiable to the E.U. if the parties' combined global turnover exceeds ECU2.5 billion (approx. US\$2.75 billion); if each of at least two parties has E.U.-wide turnover exceeding ECU100 million (approx. US\$110 million); if in each of at least three member states the parties' combined turnover exceeds ECU100 million; *and* if in each of the same three states, each of at least two parties has turnover exceeding ECU25 million (approx. US\$27 million). As with the normal threshold rule, the transaction is *not* reportable if each of the parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Council Regulation 1310/97, 1997 O.J. (L180), amending Art. 1, para. 3 of the Merger Control Regulation.

¹⁴*See* Merger Regulation, art. 4, para. 1. The formalities of the notification process are set out in Commission Regulation 2367/90, 1990 O.J. (L 219) 5 (making technical changes to the Merger Regulation). The parties have to submit numerous facts and information by using the "CO" notification form.

¹⁵Fines can range up to ECU50,000 (approx. US\$55,000) for failure to notify or for submission of inaccurate or misleading information. *See* Merger Control Regulation, Art. 14. In addition, the Commission can impose fines of at least ten percent of the aggregate turnover of the firms if they do not comply with decisions made by the Commission.

clearance, or it may prohibit the transaction. In most cases, the Commission gives clearance to the merger.¹⁶

III. FOREIGN STATE COMPETITION LAWS

While the E.U.'s merger control regime may be the most significant and far-reaching of its kind (other than the Clayton and Hart-Scott-Rodino acts), it is by no means the only set of regulations of concern to American firms. Even within the E.U. itself, the policies and enforcement mechanisms of individual member states may apply to corporate activities. The laws of several E.U. member states and the interaction between these laws and the E.U. system itself are, therefore, of more than passing interest to U.S. corporate counsel. In addition, many nations outside the E.U. have adopted merger control regulations. Like the U.S. and E.U., many of these laws have extra-territorial jurisdiction.

Over the past few years, some thirty countries have followed the lead of the U.S. and the E.U. in imposing mandatory notification schemes on mergers, acquisitions, and joint ventures.¹⁷ Nine E.U.-member and a dozen other European countries as well as Canada, Mexico, Brazil, Israel and several Asian countries have enacted such laws.

What follows is a brief summary of the merger laws of selected E.U. member states, including a brief explanation of the relationship between the member's regulations and E.U. rules, and of the laws of several other countries of likely interest to American companies).

A. E.U. Member States

1. *France*

The importance of national competition laws, even within the E.U., is illustrated by the French competition authorities' decision to block Coca-Cola's acquisition of the Orangina soft drink brand from the French company Pernod Ricard in September 1998 and again in November 1999. The

¹⁶In 1998, for example, the Commission received 238 notifications and initiated only 12 Phase II investigations. Of the nine Phase II cases decided in 1998, five involved clearances subject to formal undertakings regarding remedies, and in one other, the Commission took note, in clearing the merger, of certain assurances offered by the parties. In addition, the Commission accepted formal remedies in the first stage of investigation in 12 cases, as permitted by the 1997 amendments to article 6(1)(b). XXVIIITH REPORT ON COMPETITION POLICY 47, (1998).

¹⁷For a more detailed discussion of foreign merger laws, see BAKER & ROWLEY, *INTERNATIONAL MERGERS: THE ANTITRUST PROCESS* (1996 & 1998 Supp.), and JOHN DAVIES, ED., *MERGER CONTROL: THE INTERNATIONAL REGULATION OF MERGERS AND JOINT VENTURES* (1997/1998).

French authorities concluded that the proposed agreement violated French rules on "concentrations and threatened the domestic soft drink market."¹⁸

The source of French antitrust and merger regulation is the Ordinance of December 1, 1986, and its corollary implementing statute, the Decree of December 29, 1986.¹⁹ The Ordinance created a Competition Council, which may receive private referrals or complaints as well as referrals from the Ministry of the Economy. Subject to appellate review in the Court of Appeals of Paris, the Council handles cartel and abuse of dominant position cases.²⁰ Merger cases, however, are the responsibility of the Economics Minister through the Director General for Competition, Consumer Protection, and Repression of Fraud.²¹

Articles 38 and 39 of the Ordinance form the heart of French concentration law. Article 38 provides that any concentration scheme or any type of concentration which reduces competition may be subject to administrative review, if: (a) it could harm competition, particularly by the establishment or reinforcement of a dominant market position²² and (b) the merging parties including entities to which they are "economically linked"²³ either (i) have had more than 25 percent of their aggregate sales or purchases in a relevant national market, or (ii) have had an annual aggregate turnover²⁴ in France of more than seven billion Francs (approximately US\$1.2 billion).²⁵ Article 39 provides that a concentration results from any act, in whatever form, which involves the transfer of property or rights with respect to all or any part of the goods, rights or obligations of an enterprise, or which has as its goal, or has the effect of, permitting an enterprise or a group of enterprises to exercise, directly or indirectly, on one or more enterprises a dominant influence.²⁶

The parties to a concentration have the right to notify the Minister of the Economy of a concentration at any time up to three months before the

¹⁸N.Y. TIMES, Nov. 25, 1999, at C4; N.Y. TIMES, Sept. 18, 1998, at C1.

¹⁹Ordinance No. 86-1243 of December 1, 1986, J.O., 1986, p. 14773, modified by Law No. 96-588 of July 1, 1996, J.O., 1996, p. 9983 [hereinafter 1986 Ordinance]. The Decree of December 29 adds nothing substantive to the Ordinance; it merely establishes administrative procedures and clarifies issues within the Ordinance.

²⁰For more information, see the Competition Council's website (visited Apr. 18, 2000) <<http://www.finances.gouv.fr/conseilconcurrency>>.

²¹For more information, see the Director General's website (visited Apr. 18, 2000) <<http://www.finances.gouv.fr/DGCCRF/index-d.htm>>.

²²1986 Ordinance, art. 38(1).

²³Economically linked entities include parent companies and subsidiaries, the members of corporate groups, companies with common directors and companies that have entered into certain financial and commercial agreements.

²⁴Turnover is roughly equivalent to the proceeds derived from sales less taxes.

²⁵1986 Ordinance, art. 38(2).

²⁶1986 Ordinance, art. 39.

closing date.²⁷ Such notification may contain proposed undertakings by the parties to the concentration to cure potential antitrust concerns.²⁸ Notification is not obligatory;²⁹ however, it does present the advantage of providing some security from a challenge to the legality of a concentration, because the Minister may only object to a concentration within a period of six months following this notification.³⁰ Following notification, the Minister of the Economy has two months to render a decision on the transaction. This time limit may be extended to six months if the Minister decides to request the opinion of the Competition Council.³¹ If a merger is referred to the Council for review, the Minister remains free thereafter to accept or reject the Council's recommendation.³²

2. Italy

Italy is one of the most recent EU member state to adopt national anti-trust legislation.³³ The Italian antitrust scheme is laid out in the Competition and Fair Trading Act³⁴, which closely reflects the principles established in articles 81 and 82.³⁵ The Italian law specifically references the EU law

²⁷ In their notification to the Ministry of the Economy, the parties to a concentration must furnish information and documents about: (1) the concentration, (2) the companies which are party to the transaction or are "economically linked" thereto, (3) the relevant product or service markets, (4) the geographic scope of the markets, (5) the characteristics of the markets, including volume and price trends, the identity of the main competitors and their market shares, and any barriers to market access, (6) the merging parties' operations, including market shares, identity of their principal clients and suppliers, distribution agreements, intellectual property rights, R & D expenditures, and advertising. Decree No. 86-1309 of Dec. 29, 1986, art. 28, J.O., 1986, p. 15775.

²⁸ 1986 Ordinance, *supra* note 19, at art. 40.

²⁹ 1986 Ordinance, *supra* note 19, at art. 70.

³⁰ Even if a concentration has been notified and not challenged, a concentration which results in an abuse of a dominant market position may be challenged at any time. 1986 Ordinance, *supra* note 19, at art. 43.

³¹ 1986 Ordinance, *supra* note 19, at art. 40. The Council applies a balancing test to determine whether the merger's benefits such as efficiency gains outweigh potential anticompetitive harms and must consider various factors including competitiveness of the merging parties in international markets. *Id.*, at art. 41.

³² 1986 Ordinance, *supra* note 19, art. 42(1).

³³ For further information, see the Italian competition authority's website, <<http://www.agcm.it>>.

³⁴ Law No. 287 of October 10, 1990, [hereinafter the Italian Act], available in the Italian competition authority website, (visited Apr. 18, 2000) <<http://www.agcm.it>>.

³⁵ Franco Romani, Commissioner of the Italian Competition Authority, writing on the subject of the similarity between Italy's 1990 law and E.U. law, has noted that, "it was eminently sensible that enterprises should be subject to the same rules independently of the fact that a certain practice may or may not have an effect on trade between member countries." Franco Romani, *The New Italian Antitrust Law*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: EC AND US COMPETITION LAW POLICY 481 (Barry Hawk ed., 1992).

and states that the Italian competition law "shall be interpreted in accordance with the principles of the European Community competition law."³⁶

The Italian Act created the Guarantee Authority of Competition and the Market, an administrative body which is responsible for receiving notifications, providing consultation, and conducting investigations. The Authority has the power to impose fines for serious infractions. The fines range from one to ten percent of the enterprise's turnover. The Act's substantive rules only apply to activities not covered by E.U. regulations, *i.e.*, activities impacting only the Italian market. Where the situation at hand is of Community concern, Italian authorities will forward the matter to the appropriate E.U. authorities. The Act also exempts enterprises which are granted monopoly powers by legislation (defense and telecommunications, for example) as well as the media, banks, and insurance companies, which are subject to industry-specific regulation.

Broadly speaking, the activities prohibited under the Act can be organized into three categories: (1) restrictive practices; (2) abuse of a dominant position; and, (3) concentrations (mergers, takeovers and joint ventures). The Act prohibits (and voids) all agreements which prevent or restrict competition in the national market or a significant portion of the national market. These rules will not be applied, however, where the otherwise prohibited behavior results in a substantial benefit for consumers.

Italy has a compulsory merger notification provision which applies to any merger, takeover or joint venture with an aggregate annual turnover in Italy of more than approximately US\$400 million or if any one of the companies' annual turnover exceeds approximately US\$40 million.

3. Germany

Germany's Act on Restraints of Competition³⁷ ("ARC") was recently modified and amended.³⁸ The changes only took effect on January 1, 1999, so there is as yet little beyond the words of the statute on which to base an interpretation.

Under the revised ARC, a merger can be prohibited only if it is to be expected that it will lead to or reinforce a dominant position in the relevant market and if the parties are unable to demonstrate in a "balancing" test that the transaction leads to improvements in market conditions that outweigh the disadvantages of market dominance.

³⁶ Competition and Fair Trading Act, Law No. 287 of 10 October 1990, sec. 1.4 (visited Apr. 18, 2000) <<http://www.agcm.it/eng/tema0151.htm>>.

³⁷ Act on Restraints of Competition Law of August 26, 1998, v.26.8.1998 (BGBl. I S. 2546).

³⁸ For more information, see the Cartel Office's website: <<http://www.bundeskartellamt.de/english.html>>.

Germany also revised its merger control and notification policies. Post-merger notification has been abolished because all mergers now need to be brought to the attention of the Federal Cartel Office prior to completion of the merger, provided that the relevant thresholds are met. Once the merger has been completed, a formal notice of this fact must be filed with the Federal Cartel Office. Pre-merger notification is required if, in the last business year prior to the transaction, the enterprises involved had a combined global turnover of more than DM1 billion and one or more of the enterprises had a turnover in Germany exceeding DM50 million in the same time period. Specific rules on the calculation of turnover exist for certain industries, such as television, publishing and financial services.

On the other hand, notification is *not* required if one of the enterprises' total turnover was less than DM20 million *or* if the total size of the relevant market during the previous calendar year was less than DM30 million. Likewise, notification is not required unless the merger affects German markets.

Under section 37, notifications are required in a variety of situations involving concentrations, or changes in ownership proportion and control structure, even where control *per se* is not actually achieved. The exact criteria are imprecise, but merger notification may be required for acquisitions of as little as a 20 percent interest, if that acquisition constitutes a competitively significant influence. The merger may not be completed prior to a clearing decision by the Federal Cartel Office. Clearly, if the concentration results in the creation of a dominant position in a relevant market, the proposed transaction will be prohibited, although the Federal Cartel Office has discretion to allow the arrangement subject to compliance with conditions established by the Office. Also, the German Ministry of Economics may overrule a prohibiting decision by the Office if general public policy considerations are in favor of the merger, regardless of its impact on general market conditions.

4. United Kingdom

While the United Kingdom has a highly elaborate and active competition regime,³⁹ its statutory structure is currently in a period of transition. The 1976 Restrictive Trade Practices Act has been replaced by the 1998 Competition Act (the "1998 Act"), which entered into force on March 1, 2000.⁴⁰ The 1998 Act contains transitional provisions that control until the new regulations take effect. The Act will be enforced by the Director General of Fair Trading and the Competition Commission, which replaced the

³⁹For further information, see the Office of Fair Trading's website (visited Apr. 18, 2000) <<http://www.of.t.gov.uk>> and the Competition Commission's website (visited Apr. 18, 2000) <<http://www.mmc.gov.uk>>..

⁴⁰Restrictive Trade Practices Act, 1976 modified by Competition Act 1998.

Monopolies and Mergers Commission. Parties who violate the Act are subject to fines of up to ten percent of annual turnover (in the U.K.), and of course the voiding of any offending agreements and orders to cease and desist violative behavior. It seems likely that third parties will also be able to sue directly for breaches of the Act, but the position is not yet clear. There are no criminal sanctions for violation, unless companies obstruct an investigation or fail to produce required information upon request.

The 1998 Act is modeled after articles 81 and 82. Chapter 1, like article 81, prohibits anti-competitive agreements,⁴¹ while chapter II reflects article 82's prohibition of abuse of dominant position. Despite the intended similarity, however, compliance with E.U. rules does not necessarily translate to compliance with national regulations.

The 1998 Act did not change existing U.K. law on mergers, and in the U.K. proposed mergers may be -- but are not obligated to be -- pre-notified to the Director General of Fair Trading on a prescribed form called a "merger notice."⁴² Where a merger notice has been given to the Director General and no merger reference has been made to the Competition Commission within the period prescribed for consideration of the notice, the merger is essentially exempt from a later attack. The Director General must act within 20 business days beginning on the day after the Director General has received the notice and any fee payable, with possible extensions of up to 25 business days. The prescribed period may be varied by regulations, and details of the prescribed form of merger notice are set out in regulations.

B. North America

As signatories to the North American Free Trade Agreement, the United States, Canada, and Mexico are bound to establish antitrust regimes.⁴³

1. Canada

The primary source of antitrust law in Canada is the Competition Act.⁴⁴ The Act provides for both civil and criminal penalties, enforceable by the

⁴¹ As a general principle, the Act is to be interpreted in a way consistent with the treatment of corresponding questions arising in Community law. *See id.*, sec. 60.

⁴² John S. Bridgeman, Director General of Fair Trading, The New U.K. Competition Act Speech, March 10, 2000, available at (visited Apr. 18, 2000) <<http://www.offt.gov.uk>>; R. Finbow & N. Parr, U.K. Merger Control: Law and Practice (1995) at para. 3.020 et seq.

⁴³ Art. 1501 of the North American Free Trade Agreement ("NAFTA") requires all signatories to "adopt or maintain measures to proscribe anti-competitive business conduct, and ... take appropriate action with respect thereto." North American Free Trade Agreement, art. 1501(1), Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 [hereinafter NAFTA].

Competition Bureau, as well as private actions. The provisions of Canada's original competition law (which predated the Sherman Act by a year) were all of a criminal nature, but the inflexibility of this structure led to substantial amendments in 1977 and 1986. As a result, mergers, monopolies, exclusive dealing, tying arrangements, and a number of other matters are now treated only as civil violations. From a U.S. perspective, however, a surprisingly large amount of business behavior remains criminalized, including horizontal agreements among competitors, price maintenance, price predation, price discrimination, discriminatory promotional allowances, misleading advertising, and other consumer protection matters.

The Canadian Competition Act also contains a significant body of merger regulations, most notably the substantive provisions in section 92 (part VIII) and the pre-merger notification requirements found in part IX.⁴⁵ These two regulations operate independently of one another. In other words, a proposed transaction could be subject to the notification requirements of part IX without triggering section 92's substantive guidelines, or vice-versa.

Substantively, a merger may be voided under section 92 if it is found that the merger prevents or lessens competition, or is likely to do so. Even where this is the case, however, the merger may be allowed if the parties can satisfy the efficiency exception contained in section 96, which entails demonstrating both that the merger will create gains in efficiency which outweigh its anti-competitive effect and that the increased efficiency would not be attained but for the merger.⁴⁶

Part IX of the Act (sections 108 to 123) establishes a mandatory pre-merger notification system. Parties may not close the transaction until the expiration of a waiting period (which varies from seven to twenty-one days).⁴⁷ Unlike the U.S.'s Hart-Scott-Rodino Act, there is no mechanism for mandatory extension of the waiting period to allow further investigation, but it is not unusual for the parties to agree voluntarily to a reasonable extension requested by the Commission. The threshold levels for size of parties and size of transaction which bring a particular transaction within the statute differ among four different categories of transactions identified in the Act: stock purchases, asset acquisitions, amalgamations, and combinations in an unincorporated form (such as joint ventures). It should be noted

⁴⁴Canadian Competition Act, R.S.C. 1985, ch. C-34, as amended [hereinafter Canadian Competition Act]. Section 1.1 of the Act describes its purpose as maintain[ing] and encourag[ing] competition in order to ... ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy....” For more information, see the Canadian competition authority's website <<http://strategis.ic.gc.ca/competition>>.

⁴⁵See *id.* at Part IX.

⁴⁶*Id.* § 96.

⁴⁷Under statutory amendments scheduled to go into effect in 2000, the waiting periods will be extended to 14 to 42 days.

that Section 102 of the Act authorizes the parties to a potential acquisition to seek, and the Commissioner of Competition to issue in appropriate cases, an advanced ruling certificate ("AARC") that there is no basis for challenging the transaction. Since November of 1997, Canada has imposed a US\$25,000 fee in connection with pre-merger notification filings and ARC requests.

2. Mexico

Mexico's competition legislation is the Federal Law on Economic Competition enacted in 1992.⁴⁸ The statute establishes the Federal Competition Commission and authorizes it to investigate potential violations (on its own initiative or upon request of an interested party) and assess penalties, including fines and divestitures.

A "concentration" may be challenged by the Federal Competition Commission if its "purpose or effect is to diminish, impair, or impede competition and free market access regarding equal, similar or substantially related goods or services."⁴⁹ Such a situation will be deemed to exist if the resulting concentration: (1) has the power to fix prices or restrict supply unilaterally, the entity, (2) intends to prevent access by competitors to the relevant market, or (3) facilitates engaging in the sort of monopolistic practices described in Chapter II of the competition law.⁵⁰

Article 20 of the Mexican competition law establishes pre-merger notification requirements for mergers and acquisitions which meet any one of three thresholds:

(1) if the purchase price exceeds 12 million times the minimum general wage in the Federal District (currently about US\$43 million);

(2) if the transaction results in accumulation of 35 percent or more of the assets or shares of a Mexican entity whose assets or sales exceed 12 million times the minimum legal salary in the Federal District; or

(3) if the entities involved have worldwide annual sales or assets exceeding 48 million times the minimum legal salary in the Federal District (currently about US\$171 million) *and* the transaction results in an additional accumulation of assets or capital stock of a Mexican entity exceeding 4.8 million times the minimum legal salary in the Federal District (currently about US\$17 million).

Within 20 days of the notification, the Commission may request additional information, which must in turn be provided by the parties within 15

⁴⁸ Ley Federal de Competencia Economica, Diario Oficial de la Federacion, 24 Dec 1992. The law took effect on June 23, 1993. For more information, see the Mexican competition authority's website (visited Apr. 18, 2000) <<http://cfc.gob.mx>>.

⁴⁹ *Id.* at art. 16 (unofficial translation).

⁵⁰ *Id.* at art. 17.

days.⁵¹ The Commission has 45 days from the date of notification (excluding the time for additional information to be supplied) to make a decision, which may be extended an additional 60 days "in exceptionally complex cases."⁵² If the time limit expires without a decision by the Commission, it is deemed a favorable ruling, and the transaction may proceed and cannot thereafter be contested.⁵³

C. Other Nations

1. Brazil

Brazil has an active competition law regime.⁵⁴ Brazil's enforcement has been rigorous relative to other Latin American nations.⁵⁵ The current competition scheme was passed in 1994 to consolidate existing statutes and to strengthen enforcement.⁵⁶ There are three agencies that take part in anti-trust analysis: the agency responsible for monitoring and curbing potential abuses of economic power is the Conselho Administrativo de Defesa Econômica ("CADE"), an autonomous federal agency under the Ministry of Justice. The two other agencies are: the Secretaria de Acompanhamento Econômico ("SEAE"), a department under the Ministry of Economy, located in Rio de Janeiro, which reviews the cases from an economic viewpoint; and the Secretaria de Direito Econômico ("SDE"), a department under the Ministry of Justice in Brasilia, which reviews the acts and transactions from a legal standpoint.⁵⁷ CADE is the agency responsible for the final review and judgment. In its enforcement functions, SDE has jurisdiction to investigate potential violations against economic policy, being CADE the entity responsible for the final judgment on whether violations have occurred and for the consequent imposition of sanctions, if applicable.

Article 54 of the 1994 law establishes a merger notification system.⁵⁸ In August 1998, CADE adopted a resolution (No. 15) which established a

⁵¹ *Id.* at art. 21 (II). The law provides that this time limit may be extended in duly justified cases. *Id.*

⁵² *Id.* at art. 21 (III), 21 (IV).

⁵³ *Id.* at art. 21 (III), 22 (I).

⁵⁴ For more information, see the Brazilian competition authority's website <<http://mj.gov.br/cade>>.

⁵⁵ Recently, Brazil entered into an antitrust cooperation agreement with the U.S. Department of Justice and the Federal Trade Commission. The new agreement, signed on October 26, 1999, contains provisions for enforcement cooperation and coordination, notification about enforcement actions that may affect the other country, conflict avoidance and consultations with respect to enforcement actions, and effective confidentiality protections.

⁵⁶ Federal Law 8884. Decreto No. 8884, de 11 de junho de 1994, Lex de 6.01.1994 [hereinafter Federal Law].

⁵⁷ William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1092-93 (1998).

⁵⁸ Federal Law, art. 54.

new notification form for all reportable transactions. A transaction may be submitted to CADE before its conclusion, or within 15-business days after the closing, meaning the moment at which the transaction became effective in the relevant market. Resolution No. 15 defines this 15-business day period as starting from the first binding document signed between the parties, except when a modification in the competition relations between the requesting parties or between at least one of them and a third agent occurs at a different time. The interpretation that is being given by CADE members indicates that they consider the trigger day the date on which the relationship between the companies changes from competition to cooperation.

Any transaction involving 20 percent or more of the relevant market or where any party to the transaction has posted gross revenues in the latest year exceeding 400 million Reais (about US\$250 million) must be submitted to CADE for review. In relation to the billing criteria, CADE takes into consideration not only the gross revenues of the undertakings, but of their economic group worldwide. Though rarely invoked in the merger context, firms must also report any transaction that may restrain open competition or advance control of a relevant market, regardless of the size of the parties.

Failure to provide timely information on post-closing submission could result in a fine ranging from 60,000 to 6,000,000 UFIR (roughly US\$35,000 to US\$3,500,000), as well as the opening of an administrative proceeding at SDE. As a result of a new law issued by the Federal Government on January 19, 1999 (Law 9781/99), companies submitting notification to CADE must pay a filing fee of R\$15,000, which corresponds to roughly US\$9,000.

The Council will authorize a transaction that involves a certain degree of market concentration, or that is in any way potentially deleterious to the market, only if the parties can demonstrate: that there will be productivity gains, that the benefits will be distributed evenly among consumers and producers, and that competition will not be reduced substantially in the relevant market. Also, any merger of market-dominant firms intended to reduce production or impede functioning of a competing enterprise is a criminal violation.

By means of Resolution 18, issued on November 25, 1998, CADE grants to every person and/or company, including public entities, the possibility of consulting with the Brazilian antitrust authorities about conduct and/or mergers. The consultation about conduct may relate either to hypothetical practices or to conduct already adopted by the interested parties. The answer to this consultation may determine that: (1) the analyzed conduct does not contravene antitrust legislation; (2) the hypothetical conduct would contravene antitrust legislation; or (3) the adopted conduct does contravene antitrust legislation. In the last scenario, CADE determines whether the file should be sent to SDE, which will then initiate an administrative proceeding.

The consultation about mergers may relate only to hypothetical acts and/or contracts. The answer to this consultation may determine whether

the hypothetical transaction could be approved by CADE or not. Law 9781/99 states that companies submitting to consultation about hypothetical transactions must pay a filing fee of R\$5,000 which corresponds to approximately US\$2,550.

On June 29, 1999, SEAE issued regulation 39, which establishes another notification form for merger notifications. This form is very extensive and must be presented together with the CADE Form established by Resolution 15. On August 11, 1999, SEAE issued regulation 45 which permits SEAE to impose daily fines from 5,000 to 100,000 UFIR (approximately US\$2,500 to 50,000) in case a company omits or refuses to provide SEAE with requested information, presents misleading information or if there is an unjustified delay in the production of requested information.

2. Japan

The Japanese Antimonopoly Act was originally enacted during the American military occupation of Japan following World War II.⁵⁹ It has since been modified on several occasions, but many of its provisions still resemble U.S. antitrust regulations, in theory if not in practice. The Antimonopoly Act is administered by the Japanese Fair Trade Commission ("JFTC").⁶⁰

Under the Antimonopoly Act, a merger or acquisition of stock or assets is prohibited "[w]here the effect may be to substantially restrain competition in any particular field of trade" or "where unfair trade practices were employed in the course of the merger."⁶¹ The JFTC has established guidelines for determining what constitutes a substantial restraint for merger control purposes. Generally, if the market share of an enterprise after the merger or acquisition will exceed 25 percent, the merger is subject to strict review (though such transactions are not *per se* prohibited).

Pursuant to recent amendments to the Antimonopoly Act which became effective January 1, 1999,⁶² pre-merger notification is required for any merger involving Japanese companies in which one company has worldwide assets exceeding Y10 billion (about US\$68 million) and the other

⁵⁹ Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu, [Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade], Act No. 54 of April 14, 1947, 2 BHS No. 2270-79, reprinted in HIOSHI IYORI and AKINORI UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 213-65 (1983) [hereinafter Antimonopoly Act]. See also The Antimonopoly and Fair Trade Maintenance Act of 1947, the current text of which is available in English on the website of the Japan Fair Trade Commission at <www.jftc.admix.go.jp>.

⁶⁰ *Id.* at sec. 27(1), at 237.

⁶¹ Antimonopoly Act, art. 15(1) (merger), 10 (stock), 16 (assets).

⁶² 1998 Amendment Act of the Antimonopoly Act (Law No. 81, 1998) available at <www.jftc.admix.go.jp>.

company has total assets exceeding Y1 billion (about US\$6.8 million).⁶³ In the case of foreign companies, any merger is reportable if one company has sales in Japan greater than Y10 billion and the other has sales in Japan greater than Y1 billion.⁶⁴ Similarly, notification is required whenever a company with worldwide assets exceeding Y10 billion proposes the acquisition of all or a substantial part of the business or assets of a company with sales or assets in Japan exceeding Y1 billion.⁶⁵

After notification, the merger or acquisition may not be completed until the expiration of a 30-day waiting period; however, if the Fair Trade Commission requests additional documentation within the 30-day period, the period during which a recommendation or a decision to initiate hearing proceedings can be issued by the JFTC will be extended.⁶⁶

Stock acquisitions by foreign companies must also be reported to the JFTC within 30 days after reaching certain levels.⁶⁷ This provision applies when a company with total assets of more than Y10 billion (including its parent and subsidiary companies) acquires stock of a Japanese company with total assets of more than Y1 billion or stock of a foreign company with sales in Japan of more than Y1 billion. A report must be filed with the JFTC within 30 days of reaching each of the following levels of ownership of the stock of the acquired company: 10 percent, 25 percent, or 50 percent.

3. *Australia*

The Trade Practices Act of 1974 covers anti-competitive and unfair market practices as well as mergers and acquisitions.⁶⁸ The Australian Competition and Consumer Commission ("ACCC") is responsible for enforcing the Act⁶⁹, though a variety of other agencies and institutions play a roles as well.⁷⁰

⁶³ Antimonopoly Act, art. 15 (2).

⁶⁴ *Id.* at art. 15 (3).

⁶⁵ *Id.* at art. 16.

⁶⁶ *Id.* at art. 15(4), 16.

⁶⁷ *Id.* at art. 10.

⁶⁸ Trade Practices Act 1974, Austl. C. Acts No. 51, 50 (1974), amended by 5 Austl. C. Acts No. 222 (1992) [hereinafter Australia TPA]. Note that the Australia TPA underwent wholesale review in the early 1990's, and was significantly amended in an effort to ensure that no actor could engage in anti-competitive behavior contrary to the public interest and to ensure transparency and appropriate prospective review of activities with such potential. For further information, see the ACCC's website at <<http://www.accc.gov.au>>.

⁶⁹ The ACCC has information-sharing agreements with the U.S., Canada, and the U.K. as well as several other nations.

⁷⁰ For example, the National Competition Council makes recommendations under Part IIIA of the Australia TPA (third party access to nationally significant essential facilities) and the Competition Tribunal deals with applications for review of decisions made by the ACCC with respect to authorization and notification, as well as actions relating to extraterritorial mergers.

Part IV of the Trade Practices Act bars the following anti-competitive practices: anti-competitive agreements and exclusionary provisions, including boycotts (section 45); misuse of market power (section 46); exclusive dealing (section 47); resale price maintenance (section 48); and anticompetitive mergers or acquisitions (sections 50 and 50A).

Sections 50 and 50A of part IV⁷¹ prohibit mergers and acquisitions which would or would likely substantially lessen competition in a substantial market for goods or services. These sections cover acquisition of shares as well as asset acquisition, though they only apply to activities in, or that have an effect upon, substantial markets. There is also an exemption for mergers or acquisitions which provide a public benefit.

There is no required pre-merger notification provision, but parties are encouraged to prospectively inform the ACCC of any proposed merger or acquisition.⁷² The ACCC will then consider the likely effects of the proposed arrangement and offer its opinion on the legality of the arrangement. It should be noted that the notification can be made confidentially, but that the ACCC will not be able to offer formal prospective opinions about arrangements so notified, because a major part of its evaluative process involves seeking input from other market participants.

With respect to all of the above sections, parties can also seek a formal decision (authorization) from the ACCC that a particular proposed transaction or activity does not violate the Act. If such authorization is granted, the party has complete legal immunity with respect to the authorized behavior.⁷³ The test for any authorization is essentially whether the activity or agreement or acquisition benefits the public such that it should be allowed to occur.

Violations of the Act are punishable in the Federal Court by fines, injunctions, damages (pursuant to section 82), divestiture, voiding, specific performance, rescission or variation of agreement. Actions may be brought by either the ACCC or private parties.

4. Russia

Russia's basic antitrust statute -- entitled "On Competition and Limitation of Monopolistic Activities on Commodity Markets" -- was originally

⁷¹ Australia TPA, section 50 governs acquisitions occurring outside Australia that have the effect of substantially lessening competition in a market within Australia. Any individual can bring the matter before the Australian Competition Tribunal and request a declaration that the acquisition has had the effect of substantially lessening competition with no countervailing public benefit.

⁷² Where the acquiring company is a foreign entity, Australia's Foreign Investment Review Board does require pre-merger notification if the parties meet a AUS\$20 million size-of-person test *and* if the aggregate value of the target's Australian operations is at least 50 percent of the target's total assets or the target has an interest in Australian urban land.

⁷³ Australia TPA, at sec. 88-91.

enacted in March 1991 and created the Anti-Monopoly Committee ("AMC") at the federal level.⁷⁴ Local AMC offices were subsequently established in each of Russia's 90-odd territories, called "oblasts." Late in 1998, as part of a restructuring of the Russian government, the AMC was combined with the Russian office responsible for small business into a new Ministry of Anti-Monopoly Policy and Entrepreneurship ("Ministry"). The 1991 act blended U.S. and European Community antitrust concepts in approximately equal proportions, but a major revision to the statute occurred in early 1995. The revised statute brings Russian competition law somewhat closer to the U.S. model.

Articles 17 and 18 create a pre-merger notification system similar to the U.S. Hart-Scott-Rodino Act. These provisions also establishes a post-merger notification requirement for smaller transactions. Under Russian law, companies are required to give advance notice to the AMC when forming trade associations or when making acquisitions over a certain size. One key difference is that, unlike American law, Russian law requires the anti-monopoly authority affirmatively to give permission.⁷⁵

Article 17.1 identifies three situations requiring notification and AMC approval before the transaction can close: (a) the creation or reorganization of a trade association; (b) mergers where the merging companies' aggregate assets exceed approximately US\$1 million;⁷⁶ and (c) the liquidation of a government enterprise whose assets exceed approximately US\$500,000 (if it will lead to the emergence of an entity with a market share in excess of 35 percent). The persons or companies controlling the parties to the transaction must file an application with the AMC that includes information on their main types of activities and the volume of goods or services involved.⁷⁷

The substantive standard for evaluating mergers and other transactions covered by article 17 is set forth in article 17.3 and is similar to that contained in section 7 of the Clayton Act: the AMC may reject the transaction where "it may lead to the emergence or strengthening of the dominant position of the respective organization, and/or to the restriction of competition."

⁷⁴Law of the Russian Soviet Federated Socialist Republic On Competition and Restriction of Monopolistic Activities in Commodity Markets, art. 3, *reprinted in* TRADE & COMMERCIAL LAWS OF THE RUSSIAN FEDERATION: OFFICIAL CODIFICATION & COMMENTARY (Academy of Jurisprudence of the Ministry of Justice of the Russian Federation et. al, eds.) (1994) [hereinafter RSFSR Antimonopoly Law].

⁷⁵Rose Anne Devlin & Sylianos Perrakis, *Legislating Competition Policy in the Russian Federation: A New Challenge for Antitrust Policy*, ANTITRUST BULL. DEC. 22, 1995, at 903.

⁷⁶The monetary thresholds for pre-merger notification as well as monetary levels specified in other sections of the revised law, such as fines and penalties, are expressed in multiples of "minimum wages," a figure periodically established by federal legislation. At the time that the revised anti-monopoly law went into effect, the minimum wage was 48,000 rubles per month (or approximately US\$10).

⁷⁷RSFSR Antimonopoly Law, at art. 17.2.

Article 18 provides separate statutory rules for stock and asset acquisitions, but the notification process and substantive standards are similar to article 17.

With respect to mergers and acquisitions, both articles 17 and 18 permit the AMC to seek the “nullification” of state registration of illegal combinations or transactions in “a court of law.”⁷⁸

IV. CONCLUSION

The key to successful compliance with the antitrust law regime of the United States and the competition law regimes of foreign countries is to understand how the various aspects of any particular international commercial transaction fit into the public policy design of those countries. It is essential to consider the applicable laws at both ends of the international transaction, *i.e.*, both at the U.S. end and at the foreign end. While there are many similarities in substance and procedure among all of these systems, the differences can be significant and can sometimes be outcome determinative.⁷⁹

⁷⁸RSFSR Antimonopoly Law, at art. 17.8-17.9, 18.9.

⁷⁹New York University's Prof. Eleanor Fox, for example, argues in *Antitrust Regulation Across National Borders*, 16 BROOKINGS REV. 30, 30-2 (Winter 1998), that the Boeing/McDonnell Douglas merger was treated differently by the FTC (which allowed it) and E.U. (which challenged it) due to differences in the competition law systems. While U.S. law is concerned with consumer welfare, E.U. law is also concerned with unfair advantages of dominant firms. She argues that, following precedent set by its earlier challenge to the Boeing/de Havilland merger, the E.U. Commission was motivated by concerns about possible future predation by Boeing.

