

WIPO Survey on Intellectual Property, Joint Research and Development Activities and Competition

Prepared by the Secretariat
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Contents

1. Introduction
2. General Overview
3. Questionnaire
4. Replies

I. Introduction

1. In 2013, the Secretariat of the World Intellectual Property Organization (WIPO) circulated a questionnaire among a number of Member States to gather information on their experience in reviewing joint research and development (R&D) projects from a competition law point of view, with particular reference to their intellectual property (IP) component. The survey took inspiration from two of the Development Agenda recommendations, namely:

Recommendation 23 (Cluster B): *To consider how to better promote pro-competitive intellectual property licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs; and*

Recommendation 32 (Cluster C): *To have within WIPO, an opportunity for exchange of national and regional experiences and information on the links between IPRs and competition policies.*

2. Recommendation 23 mentions pro-competitive licensing practices which are (or should be) one of the effects of joint R&D activities. Recommendation 32 encourages the diffusion within WIPO of national and regional experiences concerning IP and competition so that countries with less experience in this field may take advantage of other Member States' expertise in this area.

II. General Overview

3. Research activities and innovation have become essential assets for the competitiveness of most industries in developing, emerging and industrialized economies. As highlighted in a recent report on innovation prepared by WIPO, "*the great majority of research and development (R&D)-intensive firms pursue some form of collaboration*".¹ The increasing importance of joint R&D activities is caused by several factors such as efficiency gains, sharing costs, risks and know-how, taking advantage of complementary assets held by cooperating firms.²

4. Comprehensive data on R&D collaboration and alliances are difficult to gather and there are only a few databases that try to collect consistent information at the international level. This Survey is also a first attempt at trying to collect relevant information on the IP aspects of joint R&D and competition and we hope that further information will be gathered therefore increasing the number of Member States that may wish to contribute to this Survey at a later stage. As an international organization our aim is to collect as many national or regional experiences as possible in order to provide our Member States with a comparative and comprehensive overview that may shed light over this issue. Therefore we would most

¹ World Intellectual Property Organization, "The Changing Face of Innovation", WIPO Publication no. 944E/2001, p. 9; also available at

http://www.wipo.int/export/sites/www/freepublications/en/intproperty/944/wipo_pub_944_2011.pdf

² Id. p.116

welcome both comments to this Survey and complementary information that would make this work more useful and practical.

5. Some jurisdictions (European Union, USA, Canada) have developed guidelines that provide most of the necessary information for companies that are planning to develop joint R&D project on the likely assessment, from a competition point of view, of their collaboration and on how the IP stemming from the cooperation should be used in order not to create potential anti-competitive effects. Some of the relevant factors are the market power of the companies involved and whether the prospective joint R&D will be carried out together by competing firms or by companies at different levels of the R&D/production chain.

6. The table below provides a general overview of the respondents' answers in relation to some of the aspects included in the questionnaire.

| Country | Enforcing Agency (Competition Agency/Agencies) | Definition of Joint R&D Programmes | Limitation of duration of joint R&D projects | Requirement on sharing IP results of joint R&D | Potential efficiencies examined | Ex-ante review of joint R&D | Court/Agency Decisions |
|--------------------------|--|------------------------------------|--|--|---------------------------------|----------------------------------|------------------------|
| Australia | yes | n/a | no | n/a | yes | On demand | n/a |
| Brazil | yes | n/a | n/a | n/a | yes | If part of a merger or voluntary | yes |
| Canada ³ | yes | yes | no | No, special provisions for Govt. funded R&D | yes | If part of a merger or voluntary | yes |
| China | yes | Not in Competition Act | n/a | n/a | yes | n/a | n/a |
| European Union | yes | | no | no | yes | | yes |
| Japan | yes | yes | no | no | yes | If part of a merger or voluntary | n/a |
| Mexico | yes | yes | no | no | yes | If part of a merger or voluntary | yes |
| United States of America | yes | yes | no | No, special provisions for Govt. funded R&D | yes | If part of a merger or voluntary | yes |

A) Definition of Joint R&D Agreements

7. Most national/regional legislation or regulations (sometimes also in the form of guidelines) include a definition of joint R&D agreements. Some of them refer in general to an agreement where two or more parties are involved and where the subject is the joint exploitation of the R&D results (this is the case of the EU, Japan, Mexico) and some others deal more specifically with joint R&D activities among actual and potential competitors as the main focus of a possible antitrust scrutiny (like in the case of the USA). Some jurisdictions do not have specific provisions on the definition of joint R&D agreements in relation to competition rules.

³ Although Canada did not reply directly through the Questionnaire, the Competition Bureau invited the Secretariat to refer to the information contained in their Competitor Collaboration Guidelines, 2009.

B) Who enforces the rules and regulations

8. The competition assessment of joint R&D agreements is generally reviewed by national/regional competition authorities. The IP provisions included in joint R&D agreements are only assessed with reference to their possible effects on the competitive conditions of the affected market(s). Under certain circumstances, Courts may also scrutinize joint R&D agreements and their impact on competition, either as a judicial review of decisions taken by competition authorities (see for instance the case of Brazil) or in case specific agreements challenged by third parties (see for instance the *TYR Sport, Inc. v. Warnaco Swimwear, Inc.* case, mentioned in the USA reply, as well as the European Union (EU) Treaties, Regulations and Notices which are enforced not only by the European Commission and Courts, but also by national competition authorities and Courts).

C) Duration of R&D Projects

9. Question 3 (c) of the questionnaire asks whether there is an explicit limitation to the duration of joint R&D projects. For most respondents the duration of R&D projects is not limited by law or regulations, although it affects their competitive assessment in some jurisdictions. For instance, in the USA, *“the [competition] Agencies consider the duration of the collaboration as one of six factors relevant to assessing whether participants retain the ability and incentive to compete against each other and their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration”*⁴.

10. Although the EU does not specifically limit the duration of R&D projects, Regulation 1217/2010 on block exemptions for R&D agreements (BER) introduces *“a distinction (...) between the treatment of agreements between non-competing undertakings and [of] an agreement between competing ones. Article 4(1) states that, where the parties are not competing undertakings, the exemption shall apply for the duration of the R&D. Where the results are jointly exploited the exemption shall continue to apply for seven years from the time the contract products or contract technologies are first put on the market within the internal market. These rules apply irrespective of the parties' market share. In case, in exceptional circumstances, it would prove necessary to take action in relation to an agreement between non-competing undertakings, this would be done by withdrawal of the BER.*

Article 4(3) provides that, at the end of the seven-year period, the exemption will continue as long as the parties' combined market share does not exceed 25 per cent.

Article 4(2) deals with the position where the parties are competing undertakings. In that case the block exemption (and the exemption for the duration of the R&D + seven year period) applies only if, at the time the parties entered into the agreement, their share of the

⁴ USA Questionnaire, answer to question no. 3. As specified in the Questionnaire, the other five factors are (1) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (2) the extent to which participants retain independent control of assets necessary to compete; (3) the nature and extent of participants' financial interests in the collaboration or in each other; (4) the control of the collaboration's competitively significant decision making; and (5) the likelihood of anticompetitive information sharing.

market for the contract products or contract technologies did not exceed 25 per cent. In the case of paid-for R&D the financing party's market share is also to be taken into account for the purposes of this rule”.

D) The review process

11. Based on the information collected through the questionnaires, competition enforcement agencies consider joint R&D projects and the resulting intellectual property (IP) rights as a positive and efficient way to encourage more innovation and competition in the economy.

12. Some respondents (Mexico, Brazil) underlined the fact that their assessment of joint R&D and their impact on IP development and competition is often carried out as part of their review of proposed mergers that have a significant component of collaborative research.

13. In Brazil, the competition analysis of R&D agreements is carried out following a three-step process. Firstly, *“one of the parties to the contract must hold a dominant position upstream or downstream”*⁵ based on market shares or vertical differentiation. Secondly, there is an analysis of harm to actual or potential competitors by restricting their access to essential inputs or distribution channels. Thirdly, actual or potential efficiencies are weighed against possible anti-competitive effects.

14. For the European Union, which does not examine R&D agreements ex ante, both potential efficiencies and potential harm are part of the review process when joint R&D is assessed. However, according to the EC's answer to the questionnaire *“R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the co-operation have market power on the existing markets and/or competition with respect to innovation is appreciably reduced”*. The EC has also a “rule of reason” approach with reference to the “hard-core” restrictions that may be included in joint R&D agreements (such as restrictions on *“the freedom of the parties to carry out R&D independently or with third parties in an unrelated field at any time”*, or limiting output outside the scope of the R&D agreement). In fact, although unlikely, *“even for those clauses which are considered as by object/hardcore restrictions, it is always possible for the parties to put forward an efficiency defense.”*⁶

15. Also Japan does not have a systematic ex-ante review system for joint R&D agreements, but runs a “Prior Consultation System” which also applies to such agreements at the request of the parties involved in the agreement. Participants' market shares (particularly if they are direct competitors) represent one of the main parameters to assess the relevance and the potential competitive impact of the joint R&D project. A combined market share in the relevant product market of under 20% will not raise any issue under the Japan Antimonopoly Act.⁷ The Japan Fair Trade Commission (JFTC) takes into account potential efficiencies and harms to competition for the assessment of joint R&D agreements. One of the parameters used by the JFTC includes the stage of the R&D project involved in

⁵ Brazil Questionnaire, Answer to questions 6 and 7.

⁶ EC Questionnaire Answers to questions 6 onward.

⁷ Japan Questionnaire, Answers to questions 5 onward.

the agreement: *“If it is a developmental research, since its fruits would have a more direct impact on the product market, it would more likely present a problem under the Antimonopoly Act. On the other hand, if a joint R&D project is made for basic research, which is not intended to develop a specific product, it usually would have little effect on competition in the product market, and is less likely to present a problem under the Antimonopoly Act.”*⁸

16. The USA has a voluntary system of R&D agreements notification⁹ and the national agencies in charge of antitrust enforcement (the Federal Trade Commission and the Department of Justice) have published guidelines that cover R&D activities¹⁰ in connection with antitrust enforcement policies. Such agreements are typically assessed under the rule of reason as this effects-based analysis takes into account the efficiencies and the potential competitive harms of the R&D agreement, recognizing that these agreements have the potential to benefit consumers and the economy at large. Joint R&D agreements may be reviewed both ex-ante and ex-post should their implementation represent a possible violation of competition rules.

17. R&D arrangements may also be assessed as a horizontal merger – in that case the arrangements would be analysed by the national enforcement agencies under the Horizontal Merger Guidelines. Over time, the DOJ has also issued several “business review letters” concerning joint R&D ventures where it expressed the intention not to challenge the proposed collaborative activities.¹¹

18. As with other competition agencies, also in the USA, market shares and market concentration are used as a starting point in assessing the impact of a joint R&D agreement. The analysis may then go further taking into account other factors affecting the competitive environment such as exclusivity, control over assets, financial interests in the collaboration or in other participants, control of the collaboration’s competitively sensitive decision making, the likelihood of anticompetitive information sharing, and the duration of the collaboration. In addition, the competition agencies consider potential entry into the relevant market(s) as well as potential efficiencies and harms.¹² As for the assessment of efficiencies, the US agencies *“do not treat some types of efficiencies as more important than others. . . However, the Agencies consider only cognizable efficiencies”* and *“...efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified”*.¹³

E) International Cooperation

19. Some of the respondents (e.g., China, the European Commission, Mexico and the USA) have in place formal and informal cooperation agreements and arrangements that facilitate the exchange of information on cross-border cases. Such cases may include joint R&D agreements, although the respondents were not in a position to confirm whether international R&D venture are on the increase. Bilateral and multilateral agreements (such

⁸ Ibid. Answer to Question 5.

⁹ USA Questionnaire, Answer to Question 1

¹⁰ Joint DOJ-FTC Antitrust Guidelines for Collaborations Among Competitors, 2000

¹¹ USA Questionnaire, Answer to Request b).

¹² For a full discussion of the parameters used by the US agencies see the USA Questionnaire, Answers to Question 5 onward.

¹³ USA Questionnaire, Answer to Question 7.

as the 2014 OECD Recommendation on Cooperation¹⁴) support the development of suitable legal means to allow the exchange of confidential information and forms of investigative assistance.

¹⁴ <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>

III. Questionnaire

The Intellectual Property and Competition Policy Division of the World Intellectual Property Organization (WIPO) would like to collect data and information on how joint research and development (R&D) agreements¹⁵ are assessed under competition rules in selected jurisdictions. Agreements may occur between actual/potential competitors or among firms at different levels of the production chain.

The survey focuses on collaborations that generate intellectual property (IP) and that may take place at different stages of the innovation process. Therefore, agreements to commercialize IP (such as patent pools and standard setting organizations) are not part of this survey.

In order to collect information for the Survey, we are distributing a questionnaire with a few questions. They are relatively general to allow respondents some flexibility in their answers, with particular reference to recommendations that they may wish to share with countries/jurisdictions. All documents may be submitted in one of the official UN languages (Arabic, Chinese, English, French, Russian and Spanish). In case the information is not available in one of those languages, please send us the document in electronic format and we will arrange for a translation.

Given that the assessment of R&D collaboration evolves over time and presents new challenges, it is our intention to keep the Report updated, through periodic reviews. It is also possible that other WIPO Member States may join this exercise at a later stage.

(a) Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

The texts identified will be listed in the Report.

¹⁵ Such agreements may take the form of contractual partnerships (project-specific and usually limited in time) and equity-based joint ventures that imply a strategic alliance, often through the creation of a joint venture (WIPO, The Changing face of Innovation, 2011, Chapter 3 available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/944/wipo_pub_944_2011.pdf)

If your country/jurisdiction is currently in the process of adopting new provisions and guidelines, please respond based on current law, but indicate when the new provisions and/or guidelines are expected to be enacted or to take effect in your jurisdiction, and what steps remain before they become final. Please also summarize the changes that will be made to the existing law or guidelines in your jurisdiction. This circumstance will be highlighted in the Report.

(b) Please identify and provide us with a copy of Court decisions (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of policy implications and/or of practice relating to joint R&D agreements and activities (in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of five decisions, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

(c) Please answer the following questions:

1. Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.
2. If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.
3. Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?
4. Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?
5. Please indicate whether your authorities review joint R&D agreements only for potential efficiencies¹⁶ and harms to competition or whether they also review for

¹⁶ "Efficiencies" here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call "social efficiencies", which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade and job creation.

other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:

- i. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.
 - ii. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?
 - iii. If your country reviews R&D agreements *ex ante*, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?
 - iv. In the past five years, how many joint R&D agreements did the relevant agencies/authorities within your jurisdiction review per year?
 - v. In the past five years, how many joint R&D agreements were found to be in (potential) violation of applicable competition law (antitrust law) rules and were therefore amended, withdrawn, or terminated? Please summarize the basis for concluding that there was a violation and whether the agreement was ultimately amended, withdrawn, or terminated.
6. Are market shares of relevance when reviewing joint R&D agreements?
- i. How does the reviewing authority determine and evaluate market shares?
 - ii. Is there a "safe harbour" for joint R & D agreements falling below certain market share thresholds?
7. For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?
- i. If you answered yes, what types of efficiencies and harms would you consider when determining whether a joint R&D agreement lessens, or is likely to lessen, competition?
 - ii. Are some efficiency aspects more important than others? If so, please explain which ones are more important and why.

- iii. What is the outcome if the effects of a joint R&D agreement are competitively neutral? Is the agreement cleared to proceed or found not to violate the law?
8. Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?
- i. If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?
9. In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing? Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?

IV. Replies

AUSTRALIA

ACCC brief response to the WIPO questionnaire on joint R & D activities

The Australian Competition and Consumer Commission (**ACCC**) is an independent statutory authority responsible for the enforcement of Australia's antitrust law, the *Competition and Consumer Act 2010 (The Act)*.

Any competition issues in relation joint R & D are the responsibility of the ACCC and are assessed under the Act under the general competition provisions of the Act. Therefore:

- There is no definition contained in the Act of joint R & D agreements;
- There is no limitation placed upon length of joint R & D agreements; and
- There is no requirement that IP rights be shared among parties or third parties.

All of these issues would be a matter for the parties when negotiating and entering the agreement.

Intellectual property exemption in the Act

Section 51(3) of the Act states:

- 51 (3) A contravention of a provision of this Part other than sections 46, 46A or 48 shall not be taken to be committed by reason of:
- (a) The imposing of, or giving effect to, a condition of:
 - i. A licence granted by the proprietor, licensee or owner of a patent, of a registered design of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or a person who has applied for a patent or for the registration of a design; or
 - ii. An assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;to the extent that the condition relates to:
 - iii. The invention to which the patent or application for a patent relates or the articles made by the use of that invention;
 - iv. Goods in respect of which the design is, or is proposed to be, registered and to which it applied;
 - v. The work or other subject matter in which the copyright subsists; or
 - vi. The eligible layout in which the EL rights subsist;
 - (b) the inclusion in a contract, arrangement or understanding authorizing the use of the certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to of such a provision such a provision; or
 - (c) the inclusion in a contract, arrangement or understanding between:
 - i. the registered proprietor of a trade mark other than a certification trade mark; and
 - ii. a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to of the provisions to that extent.

Section 51(3) recognises that conflict can arise between the protection of and enjoyment of proprietary rights in intellectual property and the provisions of the Act. The section removes the application of all of the competition provisions other than those relating to misuse of market power and resale price maintenance in relation to certain provisions in licences and assignments of trade marks, patents, registered designs, copyright or protected rights in circuit layout.

The exemption is not absolute. It only applies:

- in relation to patents, registered designs, copyright or protected circuit layouts, to the extent that the condition which would otherwise breach the Act 'relates to' the relevant patented invention, goods to which the registered design is to be applied, the subject matter of the copyright and/or the protected circuit layout;
- in relation to certification trademarks, to authorisation in any contract, arrangement or understanding of use in accordance with Pt XI of the *Trade Marks Act 1995*; and
- in relation to other trade marks, to provisions in contracts, arrangements and understandings between registered proprietors of the trade mark or registered users under Pt IX of the *Trade Marks Act 1995*, to the extent that they relate to the kinds, qualities or standards of goods bearing the mark.

The term 'relate to' is quite vague. A condition is likely to relate to an invention if it has some connection with the invention, but in the context of an exemption provision like section 51(3) it is likely to be interpreted narrowly. However, we are not aware of this provision being considered by a court.

To the extent that the above exemption does not apply to competition concerns in relation to the joint R & D agreements the normal anti-trust provisions contained in Part IV of the Act apply.

Antitrust provisions of the Act

Part IV of the Act prohibits certain practices that limit or prevent competition, including:

- Cartel conduct, including price fixing, market sharing, bid rigging and output restriction agreements;
- Other anticompetitive agreements that are likely to substantially lessen competition in a market;
- Collective boycotts;
- Exclusive dealing;
- Resale price maintenance (imposition of minimum resale prices); and
- Misuse of market power

Further information about the conduct that is prohibited by Part IV of the Act is available on the ACCC's website: <http://www.accc.gov.au/business/anti-competitive-behaviour>

Authorisation of anticompetitive conduct

Businesses that wish to engage in certain anti-competitive arrangements or conduct can seek an exemption from the ACCC. An exemption provides protection from legal action under the Act when such arrangements or conduct results in a net public benefit.

The ACCC can 'authorise' businesses to engage in anti-competitive arrangements or conduct when it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment. Authorisation provides protection from legal action under the Act.

The ACCC may, if the relevant public benefit test is met, authorise conduct that might constitute:

- a cartel provision
- an exclusionary provision (primary boycott)
- an anti-competitive agreement
- a secondary boycott
- exclusive dealing
- resale price maintenance; and
- anti-competitive disclosures of pricing and other information.

The ACCC's authorisation guidelines (<http://www.accc.gov.au/publications/authorisation-guidelines-2013>) provide detailed information about the factors that the ACCC considers, the evaluation criteria and the process.

BRAZIL

(a) Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

The texts identified will be listed in the Report.

If your country/jurisdiction is currently in the process of adopting new provisions and guidelines, please respond based on current law, but indicate when the new provisions and/or guidelines are expected to be enacted or to take effect in your jurisdiction, and what steps remain before they become final. Please also summarize the changes that will be made to the existing law or guidelines in your jurisdiction. This circumstance will be highlighted in the Report.

Response: The Brazilian Competition Law does not have a section exclusively dedicated to R&D agreements. Its provisions on R&D joint activities and IP rights are very specific. Nevertheless, it is important to note that it considers associative agreements (a category within which R&D agreements might fall) a form of merger, which must be notified to CADE if some conditions are met. Therefore, besides indicating the specific provisions on R&D agreements and on IP, we include below the provisions of the law on notification of associative agreements, as well as the Resolution recently enacted by CADE on this issue.

LAW Nº 12.529 OF NOVEMBER 30, 2011.

CHAPTER II

VIOLATIONS

Art. 36. The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved:

(...)

XIV - to monopolize or prevent the exploitation of industrial or intellectual property rights or technology;

...

XIX - to abusively exercise or exploit intellectual or industrial property rights, technology or trademark.

CHAPTER III

PENALTIES

...

Art. 38. Without prejudice to the penalties set forth in Article 37 of this Law, when so required according to the seriousness of the facts or public interest, one or more of the following penalties may be imposed:

(...)

IV - recommendation to the respective public agencies so that:

a) a compulsory license over the intellectual property rights held by the wrongdoer be granted, when the violation is related to the use of that right;

(...)

Section II

Administrative Proceeding in the Tribunal

Art. 61. During the judgment of the petition for the approval of the act of economic concentration, the Tribunal may fully approve it, reject it or partially approve it, in which case it will determine the restrictions to be observed as conditions to validate the act.

§ 1 The Tribunal shall determine the applicable restrictions in order to mitigate occasional negative effects of the act of economic concentration over the affected relevant markets.

§ 2 The restrictions mentioned in § 1 of this article include:

(...)

V – compulsory licensing of intellectual property rights; and

(...)

TITLE VII CONCENTRATION CONTROL CHAPTER I CONCENTRATION ACTS

Art. 90. For the purposes of Article 88 of this Law, a concentration act shall be carried out when:

(...)

IV - two (2) or more companies enter into an associative contract, consortium or joint venture.

(b) Please identify and provide us with a copy of Court decisions (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of policy implications and/or of practice relating to joint R&D agreements and activities (in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of five decisions, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

| Case No. | Type of Case | Summary |
|---|-------------------------------------|--|
| <u>08012.000140/2002-21</u> | Acts and Contracts under Article 54 | Merger. Acquisition by the Littlejohn Group of the Goodyear Group's specialty chemicals businesses, including the French undertaking Goodyear Chemicals Europe, together with operational assets and intellectual property rights belonging to Goodyear Tire & Rubber. Operation provided for in Article 54(3) of Law No. 8.884/94. Turnover of applicant groups higher than US\$ 400 million. Timely submission. No impacts in terms of horizontal concentration or vertical integration. No anti-competitive effects generated by the operation. Approved without restriction. |
| <u>08012.005787/2002-49</u> | Acts and Contracts under Article 54 | Merger. Acquisition of Illbruck's assets and intellectual property rights by Sonex. Mere substitution of economic agent. Operation falling within the scope of Article 54(3) of Law No. 8.884/94, in terms of the applicants' turnover. Timely operation. Approved without restriction. |
| <u>08012.000876/2006-22</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Bausch & Lomb of certain intangible assets relating to one portion of the operations of Surgin. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. National market in microkeratomes and instruments used in cataract and vitreoretinal surgery. Negligible increase in degree of concentration. Favourable opinions from SEAE, SDE and CADE's Attorney-General's Office. Approved without restriction. VOTE. The acquisition by Bausch & Lomb of certain intangible assets relating to one portion of the operations of Surgin, including intellectual property, certain lists of buyers, government licences and approvals relating to the business described in the contract, is submitted for the approval of this Council. Since the market share |

| | | |
|---|-------------------------------------|---|
| | | resulting from the operation was over 20%, this merger is acknowledged as constituting an operation covered by the provisions of Operation provided for Article 54(3) of Law No. 8.884/94. The merger [...] |
| <u>08012.001214/2006-70</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Lucent Technologies, Inc. of certain assets and assumption of obligations of Riverstone Networks, Inc. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. No relevant market affected. Favourable opinions from SEAE, SDE and CADE's Attorney-General's Office. Approved without restriction. VOTE. The acquisition by Lucent Technologies, Inc. of certain assets and the assumption of obligations of Riverstone Networks, Inc., is submitted for the approval of this Council. The assets acquired and the obligations assumed involve Riverstone's products, intellectual property rights, some contracts and receivables, tangible assets, accounts payable and other obligations accumulated. Since the applicants' turnover in Brazil was higher than R\$ 400 million, this merger is acknowledged as constituting an operation provided for in Article 54(3) of Law No. 8.884/94. The merger has been notified to the Economic Law Office and [...] |
| <u>08012.000206/2006-14</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Asahi Kasei Group of the Lanxess group's Dorlastan Fibers Business. Worldwide operation with limited effects in Brazil. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. Brazilian elastic fibres market. Negligible horizontal concentration. Favourable opinions from SEAE, SDE and CADE's Attorney-General's Office. Approved without restriction. VOTE 1. Initial considerations. The acquisition by the Asahi Kasei Fibers Corporation, at global level, of the Lanxess group's elastic fibres business. The assets involved in this transaction include factories, know-how and intellectual property, including the Dolarstan® brand, together with a 100% stake in Dorlastan Fibers LLC, a North-American private limited company with factories in the United States and in Germany. It can also be reported that the original proof [...] |
| <u>08012.001576/2006-61</u> | Acts and Contracts under | Merger. Summary procedure. Acquisition. Operation covered by the provisions of Article 54(3) of Law No. 8.884/94 – turnover. Hearings. Timely |

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| | Article 54 | <p>submission. Filing fee collected. No horizontal overlaps or vertical relationships in Brazilian territory. No damage to competition. Approved without restriction. VOTE 1. As stated in the report, this is an operation carried out abroad; it consists in the acquisition by E. I. du Pont de Nemours and Company ("Du Pont") of the intangible assets relating to the Picoxystrobin fungicide belonging to Syngenta Limited ("Syngenta"). The assets include all intellectual property rights, product registrations, commercial information, licences, efficiency data, inventory and contracts transferred relating to the business. In Brazil, the operation involves Syngenta Proteção e Cultivos Ltda and DuPont do Brasil S.A. This undertaking, following the registration of [...]</p> |
| <p><u>08012.010910/2005-96</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Notified act carried out abroad. Acquisition by DuPont Deutschland GmbH of Pedex & Co. GmbH's monofilaments business. Part involved has turnover higher than R\$ 400 million in Brazilian territory. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. No indication of opposition to the operation. No damage to competition in Brazilian territory. Approved without restriction. VOTE 1. On 15 December 2005 the purchase agreement ("Kaufvertrag") signed on 26 October 2005 by these companies was submitted to the Brazilian Antitrust System by DuPont Deutschland GmbH ("DUPONT"), DuPont do Brasil S.A. ("DP BRASIL") and Pedex & Co. GmbH ("PEDEX"). The act notified provides for the acquisition by DUPONT of PEDEX's monofilaments business (including, among the assets acquired, customer list, intellectual property and physical and personal assets, all located in Germany). 2. The [...]</p> |
| <p><u>08012.000164/2006-11</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Acquisition of Lanxess Deutschland by Kemira OYJ. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. Brazilian market for retention agents. Horizontal concentration. Negligible increase in the degree of concentration. Favourable opinions from SEAE, SDE and CADE's Attorney-General's Office. Approved without restriction. VOTE. This Council is invited to assess the operation whereby Kemira OYJ wishes to acquire (either directly or through the intermediary of its subsidiaries) LXS and its subsidiaries, including the Brazilian subsidiary, LANXESS Indústria de Produtos Químicos e Plásticos Ltda. Included in the</p> |

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| | | <p>operation are all the assets (apart from real estate) that represent the operations and activities of the chemicals division for Papel Lanxess, encompassing all the fixed tangible and intangible assets, intellectual property rights, know-how, raw materials, commercial receivables and other related rights, exclusively and predominant[...]</p> |
| <p><u>08012.002412/2006-51</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Operation within Brazil. Acquisition by Panseg, an undertaking belonging to the Sílvia Santos Group, of all the client's operational assets. The main operational assets to be acquired by Panseg include the "Vale-Desconto" and "Vale-Saúde" products, the database management software, the intellectual property rights and the customers and partners database. Operation provided for in Article 54(3) of Law No. 8.884/94. Summary procedure. Timely submission. No indication of opposition to the operation. No damage to competition. Convergence of opinion between the Secretariat for Economic Monitoring within the Ministry of Finance (SEAE/MF), the Economic Law Office within the Ministry of Justice (SDE/MJ) and CADE's Attorney-General's Office. Operation approved without restriction. VOTE 1. RE OPERATION As set out in the report, this entails the acquisition by Panseg, an undertaking belonging to the Sílvia Santos Group, of all the asset[...]</p> |
| <p><u>08012.001253/2006-77</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Operation at international level. Joint appraisal procedure. Acquisition by Degussa AG of the Dow Chemical Company's super absorbent polymers (SAP) business unit. Timely submission. No indication of opposition to the operation. No damage to competition. Convergence of opinion between the Secretariat for Economic Monitoring within the Ministry of Finance (SEAE/MF), the Economic Law Office within the Ministry of Justice (SDE/MJ) and CADE's Attorney-General's Office. Operation approved without restriction. VOTE 1. RE OPERATION As set out in the report, this is the acquisition by Degussa AG (Degussa) of the Dow Chemical Company's super absorbent polymers business unit. The operation includes a production plant, located in the European Union, various international contracts signed with customers and intellectual property rights. The operation will be conducted abroad, with effects in Brazil. A presentation [...]</p> |

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| <p><u>08012.008794/1999-27</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger – Article 54(3) of Law No. 8.884/94. Acquisition by Cisco of the intellectual property rights relating to certain products (routers and switches) for computer networks developed and sold, to date, by the Hardware Division of the International Business Machines Corporation. 1. Relevant market: Brazilian market in active components for data transmission. 2. Market share changed from 49.3% to 50.1%. No barriers to entry. Approved without restriction.</p> |
| <p><u>08012.008943/2008-19</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Acquisition of all the intellectual property rights belonging to Brasil Global Cosméticos Ltda., to NY Looks Ltda and to Mr Alexandre de Andrade Romero by Hypermarcas S.A. Brazilian markets for shampoos, conditioners and 2-in-1 products, and body moisturizers. Operation covered by the provisions of Article 54(3) of Law No. 8.884/94 – turnover. Timely submission. Filing fee collected. No harm to competition. Approved without restriction, in line with the opinion of the Secretariat for Economic Monitoring (SEAE).</p> |
| <p><u>08012.003973/2000-81</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Acquisition by Newell Rubbermaid Inc. (“Newell”) of the Gillette Company’s writing materials division, worldwide. In Brazil, Newell, through its Brazilian subsidiary, has acquired from Gillette’s Brazilian subsidiary (Gillette do Brasil Ltda) the assets consisting of the writing materials business, including intellectual property rights, inventory, machines and equipment. There is horizontal concentration in the writing materials segment, in particular in relation to propelling pencils, ballpoint pens, fountain pens and rubber erasers. Relevant market: Brazilian market in writing materials. Slight increase in market share. Competitive markets. Presence of strong competitors. Low barriers to the entry of new competitors. No vertical integration. Timely submission. Approved without restriction.</p> |
| <p><u>08012.000233/2007-60</u></p> | <p>Acts and Contracts under Article 54</p> | <p>Merger. Operation carried out in Brazil, with the assignment of intellectual property rights in Argentina. Acquisition by Datasul S.A. of intellectual property rights relating to software, brands and contracts with customers belonging to Meya do Brasil Serviços de Informática Ltda and Meya Argentina S.A. No indication of opposition to the approval of the merger. Timely submission. No damage to competition. Approved without</p> |

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| | | restriction. |
| <u>08012.000793/2007-14</u> | Acts and Contracts under Article 54 | Merger. Fast-track procedure. Falls within the scope of Article 16 of CADE Resolution No. 12/98. Merger covered by Article 54(3) of Law 8.884/1994, in terms of the applicants' turnover. Timely submission. Acquisition by Hypermarcas Industrial Ltda of the assets and rights, including intellectual property rights and commercial information, equipment and contracts of the Sweeteners Division belonging to Boehringer Ingelheim of Brasil Química e Farmacêutica Ltda, which encompasses the products produced and marketed under the FINN brand. Five-year non-competition clause. No vertical integration or horizontal concentration. Approved without restriction. |
| <u>08012.014701/2007-83</u> | Acts and Contracts under Article 54 | Merger. Merger covered by Article 54(3) of Law 8.884/1994 in terms of Datasul's share of the Brazilian ERP market being approximately 20%. Acquisition by Datasul S.A. of the intellectual property rights to the software, methodology and procedures of Dados S.A.'s processing division, Bonagura Processamento, and signing of the call option contract whereby Datasul S.A. will acquire Bonagura's undertakings. Non-competition clause in compliance with CADE precedents. Filing fee collected. Timely submission. Operation cannot generate anti-competitive effects. Approved without restriction. |
| <u>08012.010683/2005-07</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Submarino S.A. of all the shares making up the share capital of Ingresso.com. Operation provided for in Article 54(3) of Law No. 8.884/94. Summary procedure. Timely submission. No indication of opposition to the operation. No damage to competition. Convergence of opinion between the Secretariat for Monitoring within the Ministry of Finance (SEAE/MF), the Economic Law Office and CADE's Attorney-General's Office. Approved without restriction. VOTE As stated in the report, the acts constitute the indirect acquisition of all the shares making up the share capital of Ingresso.com by the Submarino group, together with all the intellectual property rights relating to the various kinds of software used by Ingresso.com in the provision of its services. Submarino S.A. is an undertaking that operates in the remote retailing sector, in particular online retail and telesales. |

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| | | Although the undertaking operates in a range of markets, until [...] |
| <u>08012.009013/1999-49</u> | Acts and Contracts under Article 54 | <p>Merger involving the acquisition by ITW Chemical Products Ltda (ITW) of all the assets, customer list, intellectual property, etc., used in the Maintenance, Repair and Other similar (MRO) business of Morganite do Brasil. The operation was agreed abroad by means of a sales contract signed on 01/09/1999 between Illinois Tool Works Inc., the ITW group's parent company, and Morgan Crucible Company plc, parent company of the Morgan group. Relevant markets in Brazil: specialty lubricants and oils for cutting, stamping and wire drawing relating to the maintenance, repair and other similar activities acquired by Morganite. There is little replacement by these two groups of products, either on the supply side, as they have different manufacturing processes, or on the demand side, as the specialty lubricants are used in the external lubrication of equipment as the cutting oils for wire drawing and stamping in metallurgical moulding processes. The implementation of this transaction will not result in an increase in concentration in the relevant market, since ITW was not active in it before the transaction, so this is merely the substitution of one economic agent for another in controlling the business. Morganite's shares in the relevant markets are small – 15% for specialty lubricants and 1% for cutting, wire-drawing and stamping oils – which means that potential anti-competition effects are negligible. Markets with low entry barriers. Pursuant to Article 54 of Law No. 8.884/94, the operation generates no anti-competitive effects and cannot lead to the domination of relevant markets. Merger approved without restriction.</p> |
| <u>08012.005322/2005-31</u> | Acts and Contracts under Article 54 | <p>Merger. Acquisition by ARMKEL BRASIL COSMÉTICOS LTDA of any and all forms of intellectual property concerning the DepiRoll brand, such as brands, patents, industrial designs and know-how, among others, previously belonging to DEVINTEX COSMÉTICOS LTDA. Brazilian market for depilatory products. Turnover below R\$ 400 million in Brazil. Favourable opinion from SEAE. Adjudication not recommended by SDE and CADE's Attorney-General's Office. The operation does not fall within the scope of the provisions set out in the</p> |

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| | | introductory clause or paragraph (3) of Article 54 of Law No. 8.884/94. It was voted not to adjudicate. Case closed without prejudice. |
| <u>08012.003574/2003-63</u> | Acts and Contracts under Article 54 | Merger. Acquisition, worldwide, by Siemens of the Small Gas Turbines (SGT), Medium Gas Turbines (MGT) and Industrial Steam Turbines (IST) businesses. Siemens will acquire ALSTOM's production units for the above-mentioned turbines, in addition to the assets, employees, intellectual property and know-how associated with the business. Relevant global market in 1-100-MW industrial steam turbines. Horizontal concentration making the unilateral or coordinated abuse of a dominant position impossible. Operation covered by Article 54 of Law No. 8.884/94. Compliance re turnover of the groups and market concentration. The operation generates no harmful effects on competition in the markets concerned. Timely submission. Approved without restriction. |
| <u>08012.000797/2010-06</u> | Acts and Contracts under Article 54 | Merger. Contract for the purchase and sale of assets – genetic material and intellectual property rights. Relevant asset. Operation covered by Article 54(3) of Law No. 8.884/94 – turnover. Hearing. Timely submission. Filing fee collected. Market: biotechnology research and innovation. Sector: soya strains and crops. No damage to competition. Approved without restriction. |
| <u>08012.008115/2003-76</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Pfizer Animal Health of the assets and intellectual property rights relating to certain vaccines and an immunomodulator, designed for animal health, belonging to Bayer AG. Operation involving a group with a turnover in Brazil above R\$ 400 million. Timely submission. Relevant national market in subclass 01B vaccines and subclass 01A10 immunomodulators. No horizontal concentration or vertical integration. Substitution of an economic agent. No substantial change in the markets analysed. Operation assessed and approved without restriction. |
| <u>08012.008595/2002-94</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Siol Alimentos Ltda of certain tangible and intangible assets, such as the equipment, manufacturing process and formulas used by Unilever Bestfoods Brasil Ltda in the production of hydrogenated vegetable fat, together with all the intellectual property rights relating to the "Saúde" brand. Operation falling within the scope of Article 54(3) of Law No. 8.884/94 – |

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| | | turnover. Compliance with the requirement laid down in Law No. 10.149/00. Timeliness. No damage to competition. Convergence of opinion between the SEAE/MF, SDE/MJ, ProCADE and MPF. Analysis pursuant to Article 50 of Law No. 9.784/99 read in conjunction with Article 16 of CADE Resolution No. 12/98. Approved without restriction. |
| <u>08012.009459/2003-01</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Siol Alimentos Ltda of certain tangible and intangible assets, such as the equipment, manufacturing process and formulas used by Unilever Bestfoods Brasil Ltda in the production of hydrogenated vegetable fat, together with all the intellectual property rights relating to the "Saúde" brand. Operation falling within the scope of Article 54(3) of Law No. 8.884/94 – turnover. Compliance with the requirement laid down in Law No. 10.149/00. Timeliness. No damage to competition. Convergence of opinion between the SEAE/MF, SDE/MJ, ProCADE and MPF. Analysis pursuant to Article 50 of Law No. 9.784/99 read in conjunction with Article 16 of CADE Resolution No. 12/98. Approved without restriction. |
| <u>08012.002856/2004-24</u> | Acts and Contracts under Article 54 | Merger. Acquisition by The Gillette Company group of the assets of Den-Mat Corporation corresponding to the following businesses: oral hygiene consumer products and brightening and whitening oral hygiene products for consumers and for professional use, including Rembrandt, together with the intellectual property rights in some brands. Brazilian toothpaste market. Horizontal concentration not capable of generating anti-competitive effects given the negligible value of the applicants' sales in the Brazilian toothpaste market in 2003. Approved without restriction. |
| <u>08012.009457/2003-11</u> | Acts and Contracts under Article 54 | Merger. Global transaction. Joint venture contract ("JVCo") signed between 3COM and Huawei, which have licensed non-exclusive intellectual property rights for the JVCo. The JVCo is to develop and produce Lan switches and Wan routers. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. No indication of opposition to the operation. No damage to competition. Approved without restriction. VOTE Taking into account: (i) Article 50(1) of Law No. 9.784/99; (ii) Article 16 of CADE Resolution No. 12 of 31 March 1998, amended by CADE Resolution No. 22 of 1 November 2000; (iii) the unanimous position of the |

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| | | Secretariat for Economic Monitoring (SEAE), the Economic Law Office (SDE), CADE's attorney-general and the Federal Public Prosecutor's Office in favour of the unrestricted approval of the operation; and (iv) the fact that this operation was submitted in a timely fashion. Approval of the [...] |
| <u>08012.005228/2004-09</u> | Acts and Contracts under Article 54 | Merger. Acquisition of Singer N.V. by Ksin Holdings, Ltd. Summary procedure. Relevant market: sewing machines and related accessories. Operation falling within the scope of Article 54(3) of Law No. 8.884/94 – turnover. Compliance with the requirement laid down in CADE Resolution No. 25/02. Timeliness. No damage to competition. Convergence of opinion between the SEAE/MF, SDE/MJ, ProCADE and MPF. Analysis pursuant to Article 50 of Law No. 9.784/99 read in conjunction with Article 16 of CADE Resolution No. 12/98. Approved without restriction. VOTE. As described in the report, this is the acquisition by Ksin Holdings, Ltd., belonging to the Kohlberg Group, of shares, assets and obligations of the companies belonging to the Singer group, leaders in the global sewing-machine business, and of the intellectual property rights relating to the Singer brand. Because of the turnover criterion, the merger was submitted to the Brazilian Antitrust System (SBDC). |
| <u>08012.004341/2004-69</u> | Acts and Contracts under Article 54 | Merger. Falls within the scope of Article 54(3) of Law No. 8.884/94, in terms of the applicants' turnover. Timely submission. Relevant national market: sorghum, sunflower and rapeseed oil seeds. Operation cannot generate anti-competitive effects. Approved without restriction. VOTE I- RE OPERATION. This is a transaction carried out between Syngenta Crop Protection ("Syngenta"), Fox Paine & Company, LLC ("Fox Paine") and Advanta B.V. ("Advanta"), whereby the first two companies had acquired certain assets belonging to Advanta. On 11 May 2004, with the signing of the purchase agreement, Syngenta acquired and kept the maize, soya and cereals seed businesses in North America, and one undertaking that operates in the European Union, Advanta Technology Limited, which holds certain intellectual property rights (Canadian and North American maize idioplasma, database [...]) |
| <u>08012.009380/2004-52</u> | Acts and Contracts | Merger. Acquisition by the Apollo Group's Resolution Specialty Materials (RSM) of the Glydexe |

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| | under Article 54 | division for glycidyl ester, produced by the Exxon Mobil Chemical Company. Under the above-mentioned contract RSM will acquire Glydextx's customer portfolio, signed contracts and related intellectual property rights. Market: epoxy resin chemicals and correlated chemical products. Timely submission. Approved without restriction, pursuant to Article 16 of CADE Resolution No. 12 of 31 March 1998. VOTE Taking into account: (i) Article 50 of Law No. 9784/1999; (ii) Article 16 of CADE Resolution No. 12 of 31 March 1998, amended by CADE Resolution No. 22 of 1 November 2000; (iii) the unanimous opinions of the Secretariat for Economic Monitoring (SEAE), the Economic Law Office (SDE), CADE's Attorney-General's Office (ProCADE) and the Federal Public Prosecutor's Office in favour of approval without restriction and (iv) the opera... [...] |
| <u>08012.010295/2004-37</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Dystar, through Hochwaldhäuser Vermögensverwaltungsgesellschaft mbH (NewCo), of factories, machines, equipment and customers, together with goodwill, intellectual property rights, licences and other intangible assets and the shares in Rotta GmbH i.l.'s subsidiaries in Turkey, France, Italy, China and Brazil. Applicants' turnover in Brazilian territory below R\$ 400 million. Review of CADE's traditional case-law. The criterion laid down in Article 54(3) of Law No. 8.884/94 takes into account the gross annual turnover recorded exclusively in Brazilian territory by the undertakings or group of undertakings taking part in the merger. Precedent for CADE's new interpretation: Merger No. 08012.002992/2004-14, Rapporteur: Mr Roberto Pfeiffer (Council member). Not covered by Article 54(3) read in conjunction with Article 2 of Law No. 8.884/94. Case dismissed without prejudice. Operation not adjudicated. [...] |
| <u>08012.001907/2004-09</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Atlas Copco AB of Ingersoll-Rand Company Limited's "Negócio de Soluções em Perfuração". Operation falling within the scope of Article 54(3) of Law No. 8.884/94 – turnover. Filing fee collected. Timeliness. No damage to competition. Convergence of opinion between the SEAE/MF, SDE/MJ, ProCADE and MPF. Analysis pursuant to Article 50 of Law No. 9.784/99. Approved without restriction. VOTE As stated in the report, this is a global operation in which Atlas |

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| | | Copco AB ("Atlas Copco") is to acquire from Ingersoll-Rand Company Limited ("Ingersoll-Rand") the assets, properties, rights, privileges (including real estate, intellectual property, contracts, permissions, equipment, stock, finished goods and debts) of "Negócio de Soluções em Perfuração" (Drilling Solutions Business – "DSB"), including the production and distribution of drilling equipment for the surface mining, surface exploration, oil and gas and extraction industries and [...] |
| <u>08012.010538/2009-41</u> | Acts and Contracts under Article 54 | Merger. Acquisition by 3M of brands and patents belonging to Becton. Intellectual property without use for approximately eight years. Not adjudicated. |
| <u>08012.001212/2002-57</u> | Acts and Contracts under Article 54 | Merger. Acquisition by Aventis of assets, belonging to The Kingsford Products Company and its affiliates, which are used primarily or exclusively in Kingsford's professional pest control business, including the rights to MaxForce® products and intellectual property relating to it. Operation provided for in Article 54(3) of Law No. 8.884/94. Timely submission. Brazilian healthcare insecticides market. Horizontal concentration. Existence of generics and substitute products. Favourable opinions from SEAE, SDE and CADE's Attorney-General's Office. Approved without restriction. |

(c) Please answer the following questions:

1. Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.

Response: the antitrust agency handles exclusively competition issues. Intellectual property issues are handled by CADE only as far as they concern competition.

2. If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.

N/A

3. Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?

N/A

4. Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?

N/A

5. Please indicate whether your authorities review joint R&D agreements only for potential efficiencies¹⁷ and harms to competition or whether they also review for other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:

- i. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.

Response: Since the enactment of the new law in 2012, all mergers are analyzed *ex ante*. In this sense, since then, all IP agreements that are relevant to competition according to the competition legislation are analyzed by CADE in within this system.

- ii. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?

¹⁷ "Efficiencies" here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call "social efficiencies", which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade and job creation.

Response: CADE's General Superintendence may be contacted by parties willing answers for such questions preliminarily to the formal notification. Recently, CADE has enacted a resolution (Resolution nº 12/2015) that sets out the rules on the consultation procedure, provided by the Law 12.529/2011, whereby parties can consult CADE's Tribunal on the interpretation of the competition law, including in merger transactions¹⁸.

- iii. If your country reviews R&D agreements *ex ante*, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?

Response: Brazil's competition law provides that Cade may review mergers that do not fall within the notification thresholds established by the law, within one year as of the respective date of consummation. However, it does not have any specific provisions on R&D agreements. On the other hand, if an R&D agreement falls within the legal threshold for notification and is not duly notified to CADE, besides the *ex post* review of the transaction, parties may have to pay a fine for gun jumping.

- iv. In the past five years, how many joint R&D agreements did the relevant agencies/authorities within your jurisdiction review per year?

Response: We do not have such numbers.

- v. In the past five years, how many joint R&D agreements were found to be in (potential) violation of applicable competition law (antitrust law) rules and were therefore amended, withdrawn, or terminated? Please summarize the basis for concluding that there was a violation and whether the agreement was ultimately amended, withdrawn, or terminated.

Response: We do not have such numbers.

6. Are market shares of relevance when reviewing joint R&D agreements?

Yes

¹⁸ A R&D agreement may be considered an associative contract, which is, in its turn, a form of merger.

- i. How does the reviewing authority determine and evaluate market shares?

Response: For notification purposes, the relevance of market shares in R&D agreements is defined by CADE's Resolution No. 10, approved in November 2014. The resolution sets out the situations in which notification to the agency is required for associative agreements. According to the resolution, associative agreements are those in force for a period longer than two years, in which there is horizontal or vertical cooperation or risk sharing that represent a relationship of interdependence among the contracting parties. The resolution also defines that a relationship of interdependence fits into two different hypothesis. When companies are horizontally related in the object of the contract, interdependence occurs if the joint participation of the companies in the market affected by the contract equals or exceeds 20% of the market share. When companies are vertically related in the object of the contract, on the other hand, interdependence occurs if at least one of them holds a participation of 30% or more in the affected markets. In this case, the resolution requires, additionally, that at least one of the following conditions is met: (i) the contract establishes revenue or loss sharing; (ii) the contract results in a relationship of exclusivity. If a R&D agreement falls within the thresholds listed above, it is considered an associative agreement and, thus, must be notified to CADE.

When analyzing associative agreements regarding vertical restraints, jurisprudence shows that CADE adopts a three-step approach. First, one of the parties to the contract must hold dominant position upstream or downstream, generally presumed by high market share or vertical differentiation, in the case of differentiated product markets. Second, the vertical restraint in itself must be sufficient to impose harm to actual or potential competitors, through the restriction of access to inputs or distribution channels. Third and finally, the vertical control efficiencies are enough to outweigh the harm to competition. In its analysis, CADE takes into consideration a proper balance between the conduct's efficiencies and its negative anticompetitive effects, and assesses if potential market closure proves to be a feasible and rational strategy.

- ii. Is there a "safe harbour" for joint R & D agreements falling below certain market share thresholds?

Response: If an R&D agreement does not fall within the criteria established by Resolution nº 10, it does not need to be notified as a merger to CADE.

7. For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?

Yes.

- i. If you answered yes, what types of efficiencies and harms would you consider when determining whether a joint R&D agreement lessens, or is likely to lessen, competition?

Response: Brazilian competition law provides that mergers involving elimination of competition on a substantial portion of the relevant market, which could create or strengthen a dominant position or that can result in the domination of the relevant market of goods or services shall be prohibited. On the other hand, it also provides that such mergers may be permitted, provided that they are within the limits strictly necessary to achieve the following objectives: increasing productivity or competitiveness; improving the quality of goods or services; encouraging efficiency and technological or economic development. The law also requires, in that case, that a relevant part of the resulting benefits are transferred to consumers.

- ii. Are some efficiency aspects more important than others? If so, please explain which ones are more important and why.

Response: Please refer to the answers of questions number 7i.

- iii. What is the outcome if the effects of a joint R&D agreement are competitively neutral? Is the agreement cleared to proceed or found not to violate the law?

Response: Please refer to the answers of questions number 7i.

8. Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?

Please refer to the answers of questions number 7i.

- i. If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?

In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing? Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?

N/A

CHINA

Following is our feedback to questions that are related to our Administration's competence:

a) Provision of the Anti-Monopoly Law. The Anti-Monopoly Law regulates competition in the market, and Article 55 of the Law provides protection against conducts to eliminate or restrict market competition through abusing IP rights.

Article 55 reads: "This law is not applicable to conducts by undertakings to implement their intellectual property rights in accordance with relevant IP laws and administrative regulations; however, this law is applicable to the conduct by undertakings to eliminate or restrict market competition by abusing intellectual property rights."

Please see the attached full text of the Law.

There is no provision for joint R&D in either the Anti-Monopoly Law or the Law Against Unfair Competition.

C)1 Article 55 of the Anti-Monopoly Law is enforced by the competition authority.

Questionnaire

(a) Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

- Chapter 3 of the [Guidelines on Horizontal Cooperation Agreements](#)¹⁹ deals with agreements that have as their center of gravity R&D. Chapter 3.2 deals with market definition in R&D cases, first in relation to existing product and technology markets and then in relation to markets for innovation, also referred to as 'R&D efforts'; chapter 3.3 considers the assessment of R&D agreements under Article 101(1) TFEU and chapter 3.4 discusses the application of Article 101(3) TFEU. Chapter 3.5 provides five examples of how Article 101 would apply to various types of agreement.
- [Block exemption](#) is conferred on some R&D agreements by Regulation 1217/2010²⁰ (hereafter the Block Exemption Regulation or "BER"). It entered into force on 1 January 2011 and will expire on 31 December 2022. Recital 2 refers specifically to Article 179(2) TFEU, which calls upon the Union to encourage undertakings, including small and medium-sized ones, in their R&D activities and to support efforts on their part to cooperate with one another. As regards rights generated by joint R&D, for example Article 3 (providing conditions for exemption) is relevant. Article 3 provides the general principle that all parties should have full access to the final result of the joint research including resulting IP and know-how (and also sets out the exceptions to this principle). See further below Section 4.

If your country/jurisdiction is currently in the process of **adopting new provisions and guidelines**, please respond based on current law, but indicate when the new provisions and/or guidelines are expected to be enacted or to take effect in your jurisdiction, and what steps remain before they become final. Please also summarize the changes that will be made to the existing law or guidelines in your jurisdiction. This circumstance will be highlighted in the Report.

¹⁹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [Official Journal C 11 of 14.1.2011]

²⁰ OJ [2010] L 335/36; see 'The block exemption for research and development agreements: Regulation 1217/2010

(b) Please identify and provide us with a copy of **Court decisions** (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of **policy implications and/or of practice relating to joint R&D agreements and activities** (in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of **five decisions**, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

There are to our knowledge no cases from the Court of Justice of the European Union which directly concern joint R&D agreements.

(c) Please answer the following questions:

- 1 Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.

The European Commission as well as the national competition authorities and national courts enforce the rules mentioned under a).

- 2 If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.

Art 1 of the BER

For the purposes of this Regulation, the following definitions shall apply:

(a) 'research and development agreement' means an agreement entered into between two or more parties which relate to the conditions under which those parties pursue:

(i) joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;

(ii) joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;

(iii) joint research and development of contract products or contract technologies excluding joint exploitation of the results;

(iv) paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;

(v) joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties; or

(vi) paid-for research and development of contract products or contract technologies excluding joint exploitation of the results"

Chapter 3.1 of the Guidelines on Horizontal Cooperation Agreements

"R&D agreements vary in form and scope. They range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development and marketing of completely new products. They may take the form of a co-operation agreement or of a jointly controlled company. This chapter applies to all forms of R&D agreements, including related agreements concerning the production or commercialisation of the R&D results".

- 3 Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?

Within the framework of the BER for R&D agreements, Article 4 of Regulation 1217/2010 deals with the duration of the exemption. It should be read in conjunction with recitals 13 to 16. A distinction is made between the treatment of agreements between non-competing undertakings and an agreement between competing ones.

Article 4(1) states that, where the parties are not competing undertakings, the exemption shall apply for the duration of the R&D. Where the results are jointly exploited the exemption shall continue to apply for seven years from the time the contract products or contract technologies are first put on the market within the internal market. These rules apply irrespective of the parties' market share. In case, in exceptional circumstances, it would prove necessary to take action in relation to an agreement between non-competing undertakings, this would be done by withdrawal of the BER.

Article 4(3) provides that, at the end of the seven-year period, the exemption will continue as long as the parties' combined market share does not exceed 25 per cent.

Article 4(2) deals with the position where the parties are competing undertakings. In that case the block exemption (and the exemption for the duration of the R&D + seven year period) applies only if, at the time the parties entered into the agreement, their share of the market for the contract products or contract technologies did not exceed 25 per cent. In the case of paid-for R&D the financing party's market share is also to be taken into account for the purposes of this rule.

- 4 Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?

In order to benefit from the exemption provided in article 2 of the BER, article 3.2 sets as a condition that:

"The research and development agreement must stipulate that all the parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available. Where the parties limit their rights of exploitation in accordance with this

Regulation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research. The research and development agreement may foresee that the parties compensate each other for giving access to the results for the purposes of further research or exploitation, but the compensation must not be so high as to effectively impede such access. "

Article 3.3 of the BER states:

Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results. The research and development agreement may foresee that the parties compensate each other for giving access to their pre-existing know-how, but the compensation must not be so high as to effectively impede such access.

Finally according to article 6 of the BER "*The exemption provided for in Article 2 shall not apply to the following obligations contained in research and development agreements: the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies unless the agreement provides for the exploitation of the results of the joint research and development or paid-for research and development by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.*"

- 5 Please indicate whether your authorities review joint R&D agreements only for potential efficiencies²¹ and harms to competition or whether they also review for other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:
 - a. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.

DG Competition does not review R&D agreements *ex ante*.

²¹ "Efficiencies" here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call "social efficiencies", which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade and job creation.

- b. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?

Following modernisation of EU competition law in 2004, the notification system (where companies notified agreements to the Commission) was removed. However, the Commission may, in its discretion, issue so called Guidance letters on novel issues (see Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty [Official Journal C 101, 27.04.2004, p. 78-80]). This Notice sets out the conditions under which the Commission may issue informal guidance letters.

However, so far, no guidance letters have been issued by the Commission.

Also, according to Article 10 of Regulation 1/2003, the Commission may find that Article 101 EC is not applicable to an agreement either because the conditions of Article 101(1) TFEU are not fulfilled, or because the criteria of Article 101(3) TFEU are satisfied. This clearance decision of a declaratory nature can only be made by the Commission on its own initiative, not on request of the parties concerning an agreement. The Commission has not, up to now, taken any decisions based on Article 10 of Regulation 1/2003.

- c. If your country reviews R&D agreements *ex ante*, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?

N/A

- d. In the past five years, how many joint R&D agreements did the relevant agencies/authorities within your jurisdiction review per year?

N/A

- e. In the past five years, how many joint R&D agreements were found to be in (potential) violation of applicable competition law (antitrust law) rules and were therefore amended, withdrawn, or terminated? Please summarize the basis for concluding that there was a violation and whether the agreement was ultimately amended, withdrawn, or terminated.

N/A

6 Are market shares of relevance when reviewing joint R&D agreements?

- a. How does the reviewing authority determine and evaluate market shares?

Paragraphs 123 to 126 of the Guidelines discuss how market shares should be calculated in the case of R&D agreements, and in particular the different approaches to be taken when dealing with innovation and entirely new products as opposed to the improvement of existing ones:

123. The calculation of market shares, both for the purposes of the R&D Block Exemption Regulation and of these guidelines, has to reflect the distinction between existing markets and competition in innovation. At the beginning of an R&D co-operation the reference point is the existing market for products capable of being improved, substituted or replaced by the products under development. If the R&D agreement only aims at improving or refining existing products, that market includes the products directly concerned by the R&D. Market shares can thus be calculated on the basis of the sales value of the existing products.

124. If the R&D aims at replacing an existing product, the new product will, if successful, become a substitute for the existing products. To assess the competitive position of the parties, it is again possible to calculate market shares on the basis of the sales value of the existing products. Consequently, the R&D Block Exemption Regulation bases its exemption of those situations on the market share in the relevant market for the products capable of being improved, substituted or replaced by the contract products (1). To fall under the R&D Block Exemption Regulation, that market share may not exceed 25 % (2).

125. For technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not very practical way to proceed because of lack of clear information on royalties, the use of royalty free cross-licensing, etc. An alternative approach is to calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets. Under that approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed (3). Also for that market the share may not exceed 25 % (irrespective of the calculation method used) for the benefits of the R&D Block Exemption Regulation to apply

As explained in question c (3), market shares are particularly important when considering the application of the R&D block exemption and its duration.

- b. Is there a “safe harbour” for joint R & D agreements falling below certain market share thresholds?

25% see above.

- 7 For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?
 - a. If you answered yes, what types of efficiencies and harms would you consider when determining whether a joint R&D agreement lessens, or is likely to lessen, competition?

Potential harm

R&D co-operation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or worse products, coming to the market later than they otherwise would. Secondly, on product or technology markets the R&D co-operation may reduce significantly competition between the parties outside the scope of the agreement or it may make anti-competitive coordination on those markets likely, thereby leading to higher prices. A foreclosure problem may arise in the context of co-operation involving at least one player with a significant degree of market power (which does not necessarily amount to dominance) for a key technology and the exclusive exploitation of the results.

R&D agreements restrict competition by object if they do not truly concern joint R&D, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.

Potential efficiencies

Many R&D agreements – with or without joint exploitation of possible results – bring about efficiency gains by combining complementary skills and assets, thus resulting in improved or new products and technologies being developed and marketed more rapidly than would

otherwise be the case. R&D agreements may also lead to a wider dissemination of knowledge, which may trigger further innovation. R&D agreements may also give rise to cost reductions.

R&D co-operation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely gives rise to restrictive effects on competition within the meaning of Article 101(1). Those pure R&D agreements can only cause a competition problem if competition with respect to innovation is appreciably reduced, leaving only a limited number of credible competing R&D poles.

R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the co-operation have market power on the existing markets and/or competition with respect to innovation is appreciably reduced.

See other explanation on competitive harm for R&D agreements in paragraphs 127 to 140 of the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements.

Agreements falling outside the R&D Block Exemption Regulation because the combined market share of the parties exceeds 25 % do not necessarily give rise to restrictive effects on competition. However the stronger the combined position of the parties on existing markets and/or the more competition in innovation is restricted, the more likely it is that the R&D agreement can cause restrictive effects on competition.

- b. Are some efficiency aspects more important than others? If so, please explain which ones are more important and why.

There are no particular efficiencies which are more important than others when assessing a joint R&D arrangement under 101.

- c. What is the outcome if the effects of a joint R&D agreement are competitively neutral? Is the agreement cleared to proceed or found not to violate the law?

If the effects of the joint R&D agreement would be competitively neutral the agreement would not be considered contrary to EU competition law. In other words, it is enough that the efficiencies (Article 101(3)) outbalance the negative effects (under 101(1)).

- 8 Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?

No. Even for those clauses which are considered as by object/hardcore restrictions, it is always possible for the parties to put forward an efficiency defense under Article 101(3). The conditions of Article 101(3) are however not likely to be fulfilled in such a scenario.

- a. If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?

As set out above, also for hardcore/by object restrictions, Article 101(3) can be invoked as a defence. However, the Block Exemption lists a number of hardcore restrictions which, if included in the agreement, take the whole agreement outside the scope of the block exemption. As explained in the recital 15 of the BER, these restrictions are all severe restrictions of competition and the Regulation "*should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a research and development agreement*"

These restrictions include (see article 5 of the BER):

- restricting the freedom of the parties to carry out R&D independently or with third parties in an unrelated field at any time;
- restricting the freedom of the parties to carry out R&D in the same or related field after the completion of the relevant joint R&D;
- limiting outputs or sales of a party except that the agreement can restrict the freedom of a party to manufacture products or supply services which compete with the products or services developed under the R&D agreement, but only for the term that the parties have agreed to jointly exploit those results;
- restricting active sales of products or services developed under the R&D agreement except where the parties have divided territories between themselves; or
- stopping a party from granting licences to exploit the results of the R&D unless the agreement enables at least one party to exploit the results and the results are actually exploited. This can be achieved by providing for any licence to become non-exclusive in the event that results are not exploited.

An exhaustive list of the hardcore restrictions is set out in the Block Exemption

- 9 In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing? Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?

N/A

* o *

Questionnaire

(a) Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

The texts identified will be listed in the Report.

If your country/jurisdiction is currently in the process of adopting new provisions and guidelines, please respond based on current law, but indicate when the new provisions and/or guidelines are expected to be enacted or to take effect in your jurisdiction, and what steps remain before they become final. Please also summarize the changes that will be made to the existing law or guidelines in your jurisdiction. This circumstance will be highlighted in the Report.

The Japan Fair Trade Commission (“JFTC”) published “Guidelines Concerning Joint Research and Development under the Antimonopoly Act” in 1993 with the purpose of clarification of the JFTC's general policy on application of the Antimonopoly Act (“AMA”) to arrangements for joint undertaking of R&D projects and their implementation.

- Guidelines Concerning Joint Research and Development under the Antimonopoly Act

http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/jointresearch.pdf

- The Antimonopoly Act (AMA) related provisions: Article 2,3,8,10,19

http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html

(b) Please identify and provide us with a copy of Court decisions (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of policy implications and/or of practice relating to joint R&D agreements and activities (in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of five decisions, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

We have no such decisions.

(c) Please answer the following questions:

- 1. Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.**

They are enforced by competition agency.

- 2. If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.**

The Guidelines Concerning Joint Research and Development under the Antimonopoly Act (hereinafter referred to as "guidelines") contain the definition as follows;

Guideline –Introduction–

2. Coverage of the Guidelines and Timing in Passing Judgment

(1) The "joint R&D" projects to which the Guidelines are applicable are conducts of "joint undertaking of R&D with the participation of multiple firms". Thus, in respect of participation in joint R&D, the Guidelines are applicable to attempts in which "more than one firm" participate. The Guidelines are applicable to any such conduct as far as it may affect the Japanese market, irrespective of whether the participants are domestic or foreign firms.

(2) Whereas the way in which R&D is "jointly undertaken" may be (i) the sharing of R&D activities among the participants, (ii) the joint establishment of an organization to carry out R&D activities by the participants, (iii) undertaking of R&D activities by a trade association, or (iv) an arrangement under which mainly one party provides the funds and the other engages in actual R&D activities (excluded are such cases where only one participant engages in R&D activities and the other acquires all the R&D fruits for a certain remuneration, and is considered to be a contract or the like where the purpose is simply in the development of technology and does not have the nature of a joint conduct between firms), the Guidelines are applicable to any of these conceivable ways.

(3) Whereas R&D projects, in respect of their character, may be roughly classified into basic, applied and developmental researches, the Guidelines are applicable to joint R&D projects on any of these researches.

(4) In principle, it is at the time of the conclusion of a contract on the joint R&D project that judgment is passed regarding problems relating to the joint R&D under the Antimonopoly Act. However, if the handling of the fruits of the joint R&D, etc. cannot be prescribed at that time, judgment will be passed regarding problems under the Antimonopoly Act at the time handling arrangements on such aspects are made.

3. Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?

No.

4. Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?

There is no such requirement in the AMA.

5. Please indicate whether your authorities review joint R&D agreements only for potential efficiencies²² and harms to competition or whether they also review for other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:

When the JFTC reviews joint R&D agreements, it takes into account only potential efficiencies and harms to competition. The guidelines explain as follows;

-Guideline No2-2

2. Matters to be Considered When Making Judgments

(1) Regarding the problem of undertaking R&D jointly, judgment will be made case-by-case, and giving due consideration to the pro-competitive effect, whether or not the problem would cause substantial restraint of competition in

²² "Efficiencies" here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call "social efficiencies", which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade and job creation.

the technology or product market. In passing judgment, the following matters will be comprehensively taken into consideration.

{1} Number of Participants and Their Market Shares

In passing judgment as to whether or not a given joint undertaking of R&D presents a problem under the Antimonopoly Act, the number of participating firms and their shares and positions in the market are taken into account.

Generally speaking, the greater the market shares of the participants and the greater the number of firms excelling in business capabilities including the technological development capability among participants, the more likelihood of the joint conduct to present a problem under the Antimonopoly Act or, conversely, the smaller the market shares of the participants and the smaller their number, the less likelihood of the joint conduct to present a problem under the Antimonopoly Act.

For instance, a joint R&D project among competing firms in the market for a product is undertaken to improve the product or to develop an alternative to the product. If the combined market share of the said product of the participants is no more than 20%, it will usually present no problem under the Antimonopoly Act.

Furthermore, even if the total of the said market share exceeds 20%, it does not right away pose a problem. Judgment will be made by comprehensively, taking into consideration matters from {1} through {4}.

As a market relevant to a joint undertaking of R&D, apart from the product, it is possible to consider a technology market in which the technology itself is an object of transaction. In passing judgment on restriction of competition in the technology market, it will not depend on the market share, etc. of the said product of the participants, but on the standard of whether or not there are appropriate numbers of units to undertake R&D in the said technology market. In such a case, since technologies cost less to transfer and are objects of international transactions, when considering either actual or potential units to undertake R&D, not only domestic but also foreign firms would have to be taken into account and, normally, there are a substantial number of units to undertake R&D, and in that case, the undertaking is less likely to present a problem under the Antimonopoly Act.

{2} Character of Research

R&D projects can be classified into basic, applied and development researches as different stages of a comprehensive research work. And these differences in character are an important criterion in passing judgment as to

whether the impact of a given joint R&D project on competition in the product market is direct or indirect.

If it is a developmental research, since its fruits would have a more direct impact on the product market, it would more likely present a problem under the Antimonopoly Act. On the other hand, if a joint R&D project is made for basic research, which is not intended to develop a specific product, it usually would have little effect on competition in the product market, and is less likely to present a problem under the Antimonopoly Act.

{3} Need for Joint Undertaking

Where the risks involved or the cost of a research project are too great to be borne by a single firm, or where the firm undertaking the R&D project finds a strong need among other reasons, for joint undertaking with other firm or firms in view of the limitation of its accumulated technological resources, technological development potential and so forth, joint undertaking of the R&D project is considered necessary for the achievement of the objective of the R&D project, such undertaking is less likely to present a problem under the Antimonopoly Act.

Moreover, a joint R&D project intended to address so-called external factors, such as developing an environmental or safety measure, may not in itself immediately exclude the possibility for such project to pose a problem under the Antimonopoly Act. However, taking into account cost, risk, and so forth, related to research, it may not be so easy to carry it out alone. In such a case, it is less likely to pose a problem' under the Antimonopoly Act.

{4} Range of Objects, Duration, etc.

The range of objects, duration, etc. of the joint R&D project are also taken into account in assessing its impact on competition in the market. In other words, where the range of objects, duration, etc. are clearly defined, its impact on competition in the market will be less than where they are more extensively stipulated than necessary.

(2) Moreover, even if the problems mentioned above do not arise, should the total market share of the participants be fairly high, and in starting a joint R&D project to develop technology indispensable for business linked to unification of standards or to standardization, a firm is restricted from participating and as a result, finds difficulty in carrying on business activities and be exposed to danger of being excluded from the market. In such a case

and as an exception, undertaking such R&D jointly could pose a problem under the Antimonopoly Act (Private Monopolization, etc.).

For example, regarding a joint R&D project in which the combined market share of the participants is fairly high, the fruits of said R&D, assessed by the substance of the R&D, might very possibly be actually standardized in the business field concerned. Should this joint R&D project be difficult to be carried out by an individual firm, and if such standardization contributes to rationalizing production and distribution; does not harm the interests of the consumer; and does not restrict the R&D, production, and sales activities of the product without the use of the technology concerned, the undertaking of R&D jointly will be permitted.

Even in such a case, if a firm is restricted from participating in said joint R&D project; restricted from access (rational terms for utilization of the results, availability of information on the results, etc., hereinafter referred to as Access); and finds difficulty in its business activities as it has no other possible means to do business. As a result, if there is danger of the firm being excluded from the market, it would pose a problem under the Antimonopoly Act.

However, if the firm that is restricted from participating in the said joint R&D project is guaranteed Access to the results which may not make the firm's business activities so difficult, it would not pose a problem under the Antimonopoly Act.

- i. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.**

The JFTC has no formal prior review procedure for joint R&D agreements.

- ii. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?**

Yes.

It is not specific system for Joint R&D agreements but for general competition issues. The JFTC has "Prior Consultation System", in which it provides consultation

for enterprise and trade association about whether planned action are going to do have any problem under the AMA and The Subcontract Act. The JFTC also accepts general consultation by enterprises.

- iii. **If your country reviews R&D agreements *ex ante*, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?**

N/A

- iv. **In the past five years, how many joint R&D agreements did the relevant agencies/authorities within your jurisdiction review per year?**

N/A

- v. **In the past five years, how many joint R&D agreements were found to be in (potential) violation of applicable competition law (antitrust law) rules and were therefore amended, withdrawn, or terminated? Please summarize the basis for concluding that there was a violation and whether the agreement was ultimately amended, withdrawn, or terminated.**

N/A

6. Are market shares of relevance when reviewing joint R&D agreements?

Yes.

- i. **How does the reviewing authority determine and evaluate market shares? As detailed below, the guidelines refer to “market shares” as one of the factor to be considered when the JFTC reviews whether or not joint R&D agreements would cause substantial restraint of competition.**

-Guideline No1-2{1}

{1} Number of Participants and Their Market Shares

In passing judgment as to whether or not a given joint undertaking of R&D presents a problem under the Antimonopoly Act, the number of participating firms and their shares and positions in the market are taken into account.

Generally speaking, the greater the market shares of the participants and the greater the number of firms excelling in business capabilities including the technological development capability among participants, the more likelihood of the joint conduct to present a problem under the Antimonopoly Act or, conversely, the smaller the market shares of the participants and the smaller

their number, the less likelihood of the joint conduct to present a problem under the Antimonopoly Act.

For instance, a joint R&D project among competing firms in the market for a product is undertaken to improve the product or to develop an alternative to the product. If the combined market share of the said product of the participants is no more than 20%, it will usually present no problem under the Antimonopoly Act.

Furthermore, even if the total of the said market share exceeds 20%, it does not right away pose a problem. Judgment will be made by comprehensively, taking into consideration matters from {1} through {4}.

ii. Is there a “safe harbour” for joint R & D agreements falling below certain market share thresholds?

Yes.

The Guidelines have the safe harbor for joint R&D project which is undertaken to improve the product or to develop an alternative to the product among competing firms in the market for a product as follows;

-Guideline No1-2{1}

For instance, a joint R&D project among competing firms in the market for a product, is undertaken to improve the product or to develop an alternative to the product. If the combined market share of the said product of the participants is no more than 20%, it will usually present no problem under the Antimonopoly Act. Furthermore, even if the total of the said market share exceeds 20%, it does not right away pose a problem. Judgment will be made by comprehensively, taking into consideration matters from {1} through {4}.

7. For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?

See the answer of Q5.

- i. **If you answered yes, what types of efficiencies and harms would you consider when determining whether a joint R&D agreement lessens, or is likely to lessen, competition?**

See the answer of Q5.

- ii. **Are some efficiency aspects more important than others? If so, please explain which ones are more important and why.**

See the answer of Q5.

- iii. **What is the outcome if the effects of a joint R&D agreement are competitively neutral? Is the agreement cleared to proceed or found not to violate the law?**

See the answer of Q5.

8. **Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?**

No.

Just for reference, the guidelines provide examples of conduct relating to the implementation of a joint R&D project which are highly likely to fall under unfair trade practices. But it does not mean that pro-competitive effects are never taken into consideration in such cases.

-Guideline No.2-2 (excerpted version)

(1) Matters Concerning the Implementation of the Joint R&D Project

(c) Matters which are highly likely to fall under unfair trade practices

{1} Restrictions on R&D on theme other than that of the joint R&D project (except in the case of (1)-(a)-{8} and {9})

{2} Restrictions on R&D on the same theme as that of the joint R&D project after the completion of the said joint R&D project (except in the case of (1)-(a)-(9))

Restrictions such as {1} and {2} above may unjustly restrict R&D activities by the participants and are regarded as being highly likely to impede fair competition (General Designations: Article 12 [Dealing on Restrictive Terms]).

{3} Restrictions on the use of existing technologies by any participant or on granting of license of such technologies to a third party

{4} Restrictions on the production and sales activities by any participant with respect to any competing product or the like other than the products based on the fruits of the joint R&D project.

Restrictions such as {3} and {4} above that are not deemed necessary for the implementation of the joint R&D project are regarded as being highly likely to impede fair competition (General Designations: Article 12 [Dealing on Restrictive Terms]).

(2) Matters Concerning the Technology which is a Fruit of the Joint R&D Project

(b) Matters which are highly likely to fall under unfair trade practices

{1} Restrictions on R&D activities utilizing the fruits

Such a restriction unjustly restricts R&D activities by the participants, may reduce competition in the market, and is regarded as being highly likely to impede fair competition (General Designations: Article 12 [Dealing on Restrictive Terms]).

{2} Calling for the obligation to transfer inventions, etc. that would improve the fruits to other participants or to permit the implementation thereof by other participants on an exclusive basis

Such a restriction weakens the incentive for R&D activities by the participants to improve the fruits, may reduce competition in the market, and would be regarded as being highly likely to impede fair competition (General Designations: Article 12 [Dealing on Restrictive Terms]).

(3) Matters Concerning Products Utilizing the Technology which is a Fruit of the

Joint R&D Project

(c) Matters which are highly likely to fall under unfair trade practices

{1} Restrictions on the sales prices to a third party, of the products based on the fruits

Such a restriction would deprive any participant subject to the restrictions of its freedom of pricing, which is its important means of competition, and is regarded as being highly likely to impede fair competition (General Designations: Article 12 [Dealing on Restrictive Terms]).

- i. **If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?**

N/A

9. **In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing? Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?**

The JFTC has no information on the number of international joint R&D agreements that may fall under scrutiny increasing.

Also, we have no such mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements.

MEXICO

Questionnaire

Questionnaire

(a) Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

The texts identified will be listed in the Report.

If your country/jurisdiction is currently in the process of adopting new provisions and guidelines, please respond based on current law, but indicate when the new provisions and/or guidelines are expected to be enacted or to take effect in your jurisdiction, and what steps remain before they become final. Please also summarize the changes that will be made to the existing law or guidelines in your jurisdiction. This circumstance will be highlighted in the Report.

Legal Framework

1. On June 12th 2013, a series of reforms to the Constitution of the United Mexican States regarding competition and telecommunications came into force.²³
2. On May 23rd 2014, a new Federal Economic Competition Law (FECL or Law) was published in the Federal Official Gazette to further implement the constitutional amendments.^{24,25,26}
3. The Law, which entered into force on July 7th 2014, is the result of a Presidential Initiative sent to Congress in February 2014 and of all modifications approved by both the Senate and the Chamber of Deputies.
4. In line with the 2013 Constitutional Reform regarding Economic Competition and with the enactment of the new Federal Economic Competition Law in July 2014, COFECE designed new Regulatory Provisions that were published in the Official Federal Gazette in November 2014. These provisions develop, complement, and detail the substantive and procedural reach of the law. This helps create predictable conditions and generates legal certainty regarding the authority's actions and decisions.
5. It is also important to emphasize that the stated constitutional reform also created the Federal Telecommunications Institute²⁷ (IFT) as a constitutionally autonomous entity in charge of

²³ Decree amending and supplementing various provisions of Articles 6., 7., 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United States of Mexico as regards competition and telecommunications, available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

²⁴ Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/FECL.pdf>

²⁵ The new FECL came into force on July 7, 2014

²⁶ Both COFECE and IFT are responsible for enforcing the competition law.

competition enforcement for the broadcasting and telecommunications sectors in Mexico, and in this sense IFT enforces the FECL with regard to the sectors entrusted to it by the constitution, including reviewing concentrations (as shall be defined)²⁸.

Relationship between competition and intellectual property (IP) in Mexico.

6. The relationship between the legal framework of competition and intellectual property is established in the Constitution.
7. Article 28 of the Constitution prohibits monopolies and monopolistic practices in the terms and conditions set by law. The same article also states that privileges granted to authors and artists to produce their works and those granted to inventors and improvers for the exclusive use of their inventions and improvements are not monopolies.
8. The Industrial Property Law (IPL)²⁹ follows from that article and grants the innovator the exclusive right to economically exploit their innovation for a period of time.
9. These exclusive rights are granted through patents and registrations:
 - a) Inventions.³⁰
 - Granting patents (Article 16 of the IPA)
 - Registration of utility models (Article 27 of the IPL)
 - Registration of Industrial Designs (designs and models) (Article 31 of the IPA)
 - Registration of designs of integrated circuits (Article 178 *bis* of the IPL)
 - b) Trademarks and other distinctive signs:
 - Trademarks (Article 87 of the IPA)
 - Registration of collective marks (Article 96)
 - Registration of trade notices (Article 99)
 - Publication of trade names (Article 106)
 - Declaration of protection of designation of origin (Article 157)
10. The validity of the exclusive right to exploit an invention is 20 years and non-renewable (Article 23); and in the case of exploitation of utility models and industrial designs, the term is 10 years non-renewable (Article 29). Industrial design protection is for 15 years, while for the integrated circuits it is 10 years without extension. Marks, collective marks, trade notices and trade names are protected for a period of 10 years.
11. The IPL affords the following privileges to the holder of a patent (Article 25):
 - If the object of the patent is a product, the right to prevent others from making, using, selling, offering for sale or importing the patented product without their consent;

²⁷ IFETEL's role relates closely to COFECE's regarding competition policy due to the fact the FECL provides for the agencies' enforcement capabilities and legal standards.

²⁸ CPEUM, Article 28, Paragraph 16.

²⁹ Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/50.pdf>

³⁰ Invention: all human creation that allows the transformation of matter or energy for its use in order to satisfy some need or to solve a specific technical problem or to help improve prior art (Article 15 of the IPL).

- If the object of the patent is a process, the right to prevent others from using that process and from using, selling, offering for sale or importing the product obtained directly by that process without their consent.
12. Likewise, the Federal Copyright Act (LFDA)³¹ grants protection so that the creators of literary and artistic works can enjoy exclusive privileges and prerogatives, perpetual personhood and time-bound assets (Article 11 of the LFDA).
 13. The FECL provides that the privileges granted to authors and artists to produce their work and those granted to inventors and improvers are granted for the exclusive use of their inventions or improvements are not considered monopolies. However, the FECL also notes that economic agents who enjoy the aforementioned protection are subject to the provisions of competition law when the acts are not expressly encompassed by the protection provided for in Article 28 of the Constitution.
 14. Although there is a perceived dissonance between competition law and intellectual property law, they are not contradictory. The decisions by COFECE and IFT have construed intellectual property as an important element of competition, for example, when COFECE considers that the brand is important not only for competition but also to prevent piracy.³² Brands have also been relevant in the determination of the relevant market and substantial power. On occasions, COFECE has ordered the divestiture of a trademark under which the goods covered by the mark involve a high degree of market concentration.³³
 15. As set out in Article 59 of the FECL, to determine whether an economic agent has substantial power in the relevant market or to rule on competition conditions, the following should be considered: the existence of barriers to entry and elements that may alter both those barriers and the offers of other competitors.
 16. Meanwhile, the IPL notes that the Mexican Institute of Industrial Property may declare the registration and compulsory use of trademarks for any product or service or prohibit or regulate the use of trademarks, registered or not, either by its own decision or at the behest of the COFECE or IFT when: (a) the use of the mark is an element associated with monopolistic, oligopolistic or unfair competition practices, seriously distorting the production, distribution and marketing of certain products or services; (b) the use of the mark would prevent the distribution, production or marketing of goods and efficient services; and (c) the use of trademarks prevents, hinders or makes more expensive access to products in cases of national emergency and throughout the emergency, the supply or distribution of goods or basic services for the population.

Joint business activities and the merger regime in Mexico

17. For the purposes of the FECL, a concentration is understood as a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other Economic Agent.

³¹ Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/122.pdf>

³² For example, *Artículos Deportivos Gutiérrez v. Compañía Manufacturera La Jolla*, Case No. DE-13-2000, available at: <http://www.cfc.gob.mx/images/stories/Publicaciones/Gacetas/09eneroabril2001/g9-4investigaciones.pdf>

³³ For example, the concentration of Pfizer and Nestlé, Case No. CNT-035-2012, available at: <http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Concentraciones/V453/25/1722580.pdf>

See press release on conditions governing the approval of the transaction for sale of exclusive licenses of Pfizer brands in Mexico, available at: <http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2013/CFC-05-2013.pdf>

18. In this sense, joint activities between competitors present an interesting issue for the Mexican competition regime. Differently to other countries' frameworks, in Mexico there are no exception provisions which would allow firms to be exempted from the FECL's application, joint activities which imply the elements to be considered as a concentration must be reviewed by COFECE or IFT, correspondingly, under the concentrations regime. Consequently, the joint activities agreement in question would need to imply analogous aspects to any of the following:
- a. a merger or acquisition of stock or assets;
 - b. the establishment of a long term relationship transcending the limits of a commercial relationship;
 - c. the possibility to influence a firm's strategic direction or appointment of board members or officers to the other firm; and
 - d. the transfer of *de facto* physical control of assets or the possibility of deciding over them, among other aspects.
19. In joint activities agreements, COFECE has analysed the issue of determining whether a said act constitutes a concentration. In particular, COFECE has been compelled to rule on the possibility of commercial contracts constituting concentration and held that some situations transcend the legal and economic links that define mergers or acquisitions. It has also held that these situations lead to unique behaviour between economic agents and that in order to determine whether such uniqueness exists, in addition to determining the existence of mechanisms of association, it is necessary to prove that one agent has *de facto* influence on the strategies of the other agent and that this results in the loss of freedom of action of one of them, with an effect on their behaviour in the market.
20. Considering the foregoing, the concentrations that exceed one of the following thresholds must be authorized by COFECE or IFT, correspondingly, before their execution³⁴:
- I.** When the originating act or sequence of acts, notwithstanding the place of performance, are worth within Mexican territory, directly or indirectly, an amount in excess to the equivalent of eighteen million times the current daily general minimum wage in the Federal District (approximately USD\$ 85,836,734.00);
 - II.** When the originating act or sequence of acts, imply the accumulation of thirty-five percent or more of the assets or stock of an Economic Agent, whose annual sales originating in Mexican territory or assets in the country, are worth an amount in excess of the equivalent of eighteen million times the current daily general minimum wage in the Federal District (USD\$ 85,836,734.00.), or
 - III.** When the originating act or sequence of acts, imply an accumulation within Mexican territory of assets or capital stock in excess of the equivalent to eight million four hundred thousand times the current daily general minimum wage in the Federal District, and two or more of the Economic Agents participating in the concentration have annual sales originating in Mexican territory or assets in Mexican territory which are worth, jointly or separately, an amount in excess of forty eight million times the current daily general minimum wage in the Federal District (USD\$ 40,057,142.00 and USD\$ 228,897,959.00³⁵, respectively).

These thresholds provide for three multidimensional criteria under which notification is compulsory:

³⁴ FECL, Article 86.

³⁵ Approximate calculations based upon the exchange from the Mexican Central Bank (15.00 pesos for 1 US dollar) (Available at www.banxico.org.mx)

1. Financial value of the transaction.
2. Control over an agent of a certain size or financial importance.
3. Financial value and participation of agents with a certain size or financial importance.

(b) Please identify and provide us with a copy of Court decisions (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of policy implications and/or of practice relating to joint R&D agreements and activities) in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of five decisions, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

The information which was previously provided by the Commission corresponds to cases concerning competition in the telecommunications and broadcasting sectors. Although these cases are important because of their IP related component, they are no longer cases which are followed or enforced by COFECE due to the new distribution in competition policy enforcement described in paragraph 5 above.

(c) Please answer the following questions:

10. Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.

The above measures are the result of the implementation of the FECL by COFECE or IFT, correspondingly.

11. If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.

See paragraph 18.

12. Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?

No.

13. Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?

No.

14. Please indicate whether your authorities review joint R&D agreements only for potential efficiencies³⁶ and harms to competition or whether they also review for other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:

21. An important element to note regarding efficiencies in Mexican competition policy is the fact that the FECL provides that its purpose is to promote, protect and guarantee free market access and economic competition, as well as to prevent, investigate, combat, prosecute effectively, severely punish and eliminate monopolies, monopolistic practices, unlawful concentrations, barriers to entry and economic competition, as well as other restrictions to the **efficient operation of markets**. In other words, COFECE and IFT, correspondingly, are charged with ensuring economic efficiency in the markets and may not consider other effects or elements.

i. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.

22. In Mexico, concentration review (pursuant to the definition provided in paragraph 16) is carried out *ex ante* by COFECE or IFT correspondingly, regarding all those acts or transaction which surpass the thresholds described in paragraph 19.

23. Article 87 of the FECL provides that Economic Agents must obtain authorization for conducting a concentration, prior to performing any of the following:

- I.** Perfecting the legal act in accordance with the applicable legislation, or, if the case may be, fulfilling the condition precedent to which said act is subject;
- II.** The direct or indirect acquisition or exercise of factual or legal control of another Economic Agent, or the factual or legal acquisition of another Economic Agent's assets, trust participation, partnership interest or stock;
- III.** The execution of a concentration agreement among the involved Economic Agents, or
- IV.** Regarding a sequence of acts, the culmination of the last one, due to which the amounts provided in the previous article are surpassed.

Concentrations resulting from legal acts executed abroad must be notified before having legal or material effects in Mexican territory.

24. In this sense, it is important to remark that along with the competition policy reform process, the procedure for notifying a concentrations was modified in 2014. Previously the Commission could issue an order not to consummate a concentration until it was authorized (“...*within ten days of the submission of the notification of the concentration, the Commission may order the economic agents involved in the transaction to refrain from consummation until the Commission issues a favourable decision...*”) however, if the Commission did not issue the stop order then the parties could consummate the transaction. The FECL's current concentration regime prohibits the legal acts concerning a concentration to be registered in the corporate ledgers, formalized under a public deed nor registered in the Public Commercial Registry until COFECE or IFT, correspondingly, have issued their authorization³⁷.

³⁶“Efficiencies” here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call “social efficiencies”, which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade and job creation.

³⁷ Paragraph 3 of article 86 of the FECL.

- ii. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?**

25. COFECE's policy is to accept all formal and informal inquiries and clarify any doubts that individuals might have concerning transactions. In particular, COFECE encourages contact between interested parties and the agency prior to the notification of concentrations in order to allay concerns and expedite the processing of notifications.

26. Any individual or undertaking, including public agencies, can make inquiries regarding competition and free market access issues. Inquiries may relate to specific and hypothetical situations or conceptual aspects. In the case of concentrations, the majority of processed queries concern the possible obligation to notify a transaction.

27. Furthermore, the FECL provides for a procedure before COFECE or IFT correspondingly, for requesting formal opinions and general guidance in matters of free market access and economic competition³⁸.

- iii. *If your country reviews R&D agreements ex ante, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?***

28. Yes. Concentrations not requiring prior notification to the Commission may be investigated within a year after their execution³⁹. Likewise, the law provides for concentrations to be authorized subject to conditions. If this be the case, COFECE will continue to oversee their compliance in the markets raising competition concerns⁴⁰.

15. *Are market shares of relevance when reviewing joint R&D agreements?*

29. No. market shares themselves are not a determining factor when analysing concentrations. Pursuant to Article 63 of the FECL, to assess whether a concentration should not be authorized or should be punished in terms of this Law, the following factors shall be considered:

- I.** The relevant market, in the terms established in this Law;
- II.** The identification of the main Economic Agents that supply the market in question, an analysis of their power in the relevant market according to this Law, and the degree of concentration in said market;
- III.** The effects of the merger in the relevant market concerning other competitors or consumers of the good or service, as well as regarding other related markets and Economic Agents;
- IV.** The equity participation of the involved parties in other Economic Agents, and the equity participation of other Economic Agents in the parties involved in the merger, provided these economic agents engage, directly or indirectly, in the relevant market or

³⁸ Article 104 of the FECL.

³⁹ Article 65 of the FECL.

⁴⁰ Article 91 of the FECL.

its related markets. When it is not possible to identify such participation, this circumstance must be fully justified;

- V. The information provided by the Economic Agents to demonstrate greater market efficiency as a result of the merger and which will impact favourably on the process of competition and free market access; and
- VI. Other criteria or analytic instruments provided in the Regulatory Provisions and the technical criteria.

30. Article 59 of the FECL establishes that in determining whether an economic agent has substantial power in the relevant market, the following, *inter alia*, should be considered: their participation in the market and whether they can fix prices or restrict supply in the relevant market for themselves without competing agents being able currently or potentially to offset such power.

31. Thus, the shares, reflecting the structure of the market, are one of the elements to be considered for determining the possible substantial power resulting from a concentration.

i. How does the reviewing authority determine and evaluate market shares?

32. To determine the market share referred to in Article 59 of the FECL, the following will be taken into account: indicators of sales, number of customers, capacity or any other factor that is deemed relevant.

ii. Is there a “safe harbor” for joint R & D agreements falling below certain market share thresholds?

33. The element which triggers an obligation to notify a transaction is the surpassing of the thresholds provided under article 86 of the FECL (see paragraph 20). Market shares themselves are not an element which trigger notification. In acknowledgement that many transactions which exceed the thresholds under article 86 may not have negative effects on competition, the FECL provides for a simplified notification procedure under article 92, expressly gathering the case in which an agent increases its relative participation, without attaining more power to influence in the undertaking’s operation, administration, strategy.

16. For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?

34. Yes. For all concentrations efficiencies and harms to competition are part of the assessment process. Efficiencies claimed in merger review, which must be provided by the parties, seem geared towards technical efficiencies, with the exception perhaps of the first efficiency mentioned in the Regulatory Provisions which addresses permanent savings obtained through permanent increases in productivity. In this case, the first efficiency considered by COFECE in merger review cases is a dynamic one, which highlights the importance placed by the Commission on the possibility of productivity growth brought about by a merger. Since the 2013 constitutional reform, COFECE has obtained more enforcement powers through changes to its law, has increased technical expertise and is pushing to develop this expertise both within and outside

COFECE. Therefore, the Commission is building its capacity so efficiency arguments can be the basis for its decision making.

35. In connection with the preceding paragraph, Article 14 of the Regulatory Provisions provides that a merger will achieve greater market efficiency and favourably impact upon the competition process and free market access, when undertakings show that the contributions to consumer welfare that will result from the concentration will permanently exceed its anticompetitive effects. Among other gains for economic agents are: savings in resources which would constantly produce the same amount of the good at a lower cost, or more of the good at the same cost; reduction in costs for the joint production of two or more goods or services; a significant reduction in administrative costs; the transfer of production technology or market knowledge; and a fall in the cost of production or marketing⁴¹.
36. Economic agents have the right to argue efficiency gains when, in their opinion, this may contribute to a favourable decision by COFECE. However, if they choose to argue efficiency gains, these should be detailed, quantified and credited.

17. Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?

- i. If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?**

37. In any concentration procedure, COFECE undertakes a competition analysis and, in this sense, any R&D agreement exceeding the legal thresholds and falling under the criteria for being considered a concentration would have to be notified and analysed as such.
38. Furthermore, in Mexico absolute monopolistic practices (horizontal agreements) are considered *per se* illegal pursuant to the following:

Article 53 of the FECL. Absolute monopolistic practices are considered illegal, and these consist of contracts, agreements, arrangements or combinations amongst competing Economic Agents, which have as their purpose or effect any of the following:

- I.** To fix, raise, co-ordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets;
- II.** To establish an obligation not to produce, process, distribute, market or acquire but only a restricted or limited amount of goods, or the provision or transaction of a limited or restricted number, volume or frequency of services;
- III.** To divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, time spans or spaces;
- IV.** To establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls, and
- V.** To exchange information for the purposes or effects referred to in the previous subsections.

⁴¹ Regulatory Provision available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5367678&fecha=10/11/2014.

39. In this sense, joint R&D agreements which do not constitute concentrations, would need to observe article 56 regarding its specific clauses and especially if the activities involved concern competing economic agents.

18. In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing?

40. Information not available.

Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?

41. Cooperation between competition authorities is necessary to prevent, eliminate and combat anti-competitive behaviour in the global economy. Globalization has expanded the geographic scope of competition. This results, for example, in concentrations affecting two or more jurisdictions and there is more scope for anti-competitive conduct to have cross boundary effects.

42. These changes reveal the limitations of existing national laws in dealing with the effects of anti-competitive behaviour in world markets. In this regard, cooperation between COFECE and other competition authorities, through the conclusion of international treaties and cooperation agreements, facilitates effective and efficient enforcement of competition legislation and therefore helps to preserve best competition practices in the markets.

43. Within the framework of these agreements, it is possible for COFECE's to hold talks with their counterparts in other jurisdictions on general aspects of any concentration.

UNITED STATES OF AMERICA

WIPO Intellectual Property and Competition Policy Division

Questionnaire Regarding Application of Competition Law to

Joint Research and Development Agreements

RESPONSE OF THE DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION AND PATENT AND TRADEMARK OFFICE OF THE UNITED STATES

January 27, 2014

The U.S. Federal Trade Commission (“FTC”), the Antitrust Division of the U.S. Department of Justice (“DOJ”) (collectively, the “Agencies”), and the U.S. Patent and Trademark Office submit the following response to the Intellectual Property and Competition Policy Division of the World Intellectual Property Organization (“WIPO”) questionnaire on joint research and development (“R&D”) agreements.

REQUEST (a)

Please indicate and provide us with a copy of the statutory provisions and guidelines that deal with joint R&D activities and competition law (or antitrust law) in your country/jurisdiction, underlining the provisions that may deal directly with IP (for instance when competition assessment may be affected by how IP rights generated by joint R&D activities are shared among participants). Sources may include IP Acts, Competition Law or Antitrust or Anti-Monopoly Acts; special statutes, regulations, or guidelines; or any other type of government measure of general application – even when they serve as recommendations only.

RESPONSE TO REQUEST (a):

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, apply to joint R&D activities. Section 1 of the Sherman Act prohibits unreasonable contracts, combinations, or conspiracies in restraint of trade. Section 2 of the Sherman Act governs monopolization, attempts to monopolize, or conspiracies to monopolize any part of trade or commerce. Section 5 of the FTC Act prohibits, among other things, “unfair methods of competition.” The formation of a joint venture through the creation of a new entity is also subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, where the parties acquire voting securities in that entity.

In addition, the National Cooperative Research and Production Act (“NCRPA”) provides that a research and production “joint venture,” as defined by the Act (see below Response to Question #2), will not be treated illegal *per se* but will “be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition.”¹ The Act also creates a limitation on liability in

¹ To help ensure that the threat of antitrust liability would not unduly discourage firms from forming R&D joint ventures, Congress enacted the National Cooperative Research Act of 1984. In 1993, Congress expanded the NCRPA to include production joint ventures and retitled the amended act the NCRPA. See *generally* National

private antitrust actions for research and production joint ventures covered by the Act when the parties to a qualifying agreement notify the FTC and DOJ through an established procedure. The filing of a notification is voluntary. The notification must disclose the identity of the parties to the venture and the nature and objective of the venture. The DOJ then publishes a notice in the *Federal Register*, available to the public, identifying the parties to the venture and, in general terms, the venture's area of planned activity.

The Agencies have also published guidelines covering joint R&D activities: the *Joint DOJ-FTC Antitrust Guidelines for Collaborations Among Competitors* (2000) ("*Collaboration Guidelines*").² The Guidelines state the Agencies' antitrust enforcement policies with respect to competitor collaborations, including joint R&D activities. The relevant portions include Sections 2.1, 2.2, 3.31(a), 3.35, and 4.3

In addition, under certain circumstances, the Agencies will treat a joint R&D arrangement as a horizontal merger "and analyze the collaboration pursuant to the *Joint DOJ-FTC Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms." *Collaboration Guidelines* § 1.3 (footnotes omitted).³

REQUEST (b):

Please identify and provide us with a copy of Court decisions (or reference number for downloading purposes) issued in your country/jurisdiction which you consider most relevant in terms both of policy implications and/or of practice relating to joint R&D agreements and activities (in particular among competitors but not restricted to those) that may also have an IP component. We would appreciate if you could identify a maximum of five decisions, unless you consider that there are more than five relevant decisions. A brief note explaining why you identified those decisions would be greatly appreciated.

RESPONSE TO REQUEST (b):

In the United States, joint venture agreements are typically analyzed under the rule of reason.⁴ This approach is appropriate because when businesses collaborate "to perform . . . one or more business functions, such as production, distribution, marketing, purchasing or R&D" the joint venture may

Cooperative Research and Production Act, Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301- 4305), as amended by the National Cooperative Research and Production Act ("*NCRPA*") of 1993, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title15/pdf/USCODE-2012-title15-chap69.pdf>

² U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter "*COLLABORATION GUIDELINES*"].

³ See also U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

⁴ The NCRPA specifically provides that "[i]n any action under the antitrust laws ... the conduct of any person in making or performing a contract to carry out a joint venture [as defined in 15 U.S.C. § 4301] ... shall not be deemed illegal per se." 15 U.S.C. § 4302.

potentially benefit consumers by “expanding output, reducing price, or enhancing quality, service, or innovation.” *Collaboration Guidelines* § 3.2. For example, in *Addamax Corp. v. Open Software Foundation*, the court of appeals refused to apply the *per se* rule to a joint R&D venture in the computer industry, holding that “[w]here the venture is producing a new product[,] . . . there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort (*e.g.*, the joint venture’s decision as to the price at which it will purchase inputs) is evaluated under the rule of reason.⁵” Similarly, in *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, the district court rejected a competitor’s challenge that an R&D joint venture was an illegal restraint because, among other things, the companies kept secret what each learned through the joint venture. The court held that “[s]ecrecy is a necessary part of the collaboration; if the results were immediately made public, the manufacturer would have no incentive to expend the time and effort to collaborate.”⁶

In addition, the DOJ has issued a number of business review letters indicating that it did not intend to challenge R&D joint ventures.⁷ Indeed, the DOJ frequently receives requests for business reviews of proposed joint ventures. The joint ventures analyzed in these letters created various structural safeguards concerning the exchange of competitively sensitive information so as not to facilitate collusion among members and, to varying degrees, left oversight of the projects in the hands of independent researchers, had generally open membership, and were committed to dissemination of the accrued knowledge.⁸

QUESTION #1:

Indicate whether the measures identified under a) are enforced by a competition/antitrust agency, an intellectual property agency, or another agency or authority.

⁵ *Addamax Corp. v. Open Software Foundation*, 152 F.3d 48, 52 (1st Cir. 1998).

⁶ *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 814 (C.D. Cal. 2010).

⁷ Persons or entities concerned about the antitrust implications of proposed business conduct may ask the DOJ for a statement of its current enforcement intentions with respect to the conduct pursuant to the DOJ’s Business Review Procedure. See 28 C.F.R. § 50.6 (2012), available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title28-vol2/pdf/CFR-2012-title28-vol2-sec50-6.pdf>. After a review of the materials submitted concerning the proposed conduct, the DOJ will respond to the request in one of three ways: (1) the DOJ does not presently intend to bring an enforcement action against the conduct; (2) the DOJ declines to state its enforcement intentions (*i.e.*, the DOJ could sue if the proposed conduct happens); and (3) the DOJ will sue if the proposed conduct happens. See Introduction to Antitrust Division Business Reviews, ANTITRUST DIV., U.S. DEP’T OF JUSTICE, available at <http://www.justice.gov/atr/public/busreview/276833.pdf>.

⁸ See, *e.g.*, Letter from Thomas O. Barnett, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Rufus W. Oliver, Counsel, Univ. of Tex. at Austin, (Aug. 23, 2007), available at <http://www.justice.gov/atr/public/busreview/225511.htm> (no intention to challenge R&D joint venture formed by five petroleum companies and two oilfield service firms to develop the use of nanotechnology in oil and gas exploration and production); Letter from Joel I. Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to David William Livingston, V.P., Corp. Sec’y & Counsel, American Heart Ass’n, 98-95 (Mar. 20, 1998), available at <http://www.justice.gov/atr/public/busreview/1608.htm> (no intention to challenge R&D joint venture when “the knowledge obtained from the research funded by the [joint venture] [would] be published and otherwise made public, rather than used privately by the [venture members].”); Letter from Charles F. Rule, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Roger Falkowski, Counsel, Ingersoll-Rand Company, 1985 DOJBRL LEXIS 14 (July 15, 1985) (no intention to challenge R&D joint venture, known as the Pump Research and Development Committee, formed by the four U.S. manufacturers of centrifugal pumps used by electric utilities with the purpose of conducting basic research into the reliability and performance of such pumps).

RESPONSE TO #1:

The statutory provisions identified in the response to (a), above, are enforced by the U.S. competition agencies. The DOJ enforces the Sherman and Clayton Acts, while the FTC enforces the FTC and Clayton Acts (both the Sherman Act and Clayton Act may also be enforced by State Attorneys General and private parties). The NCRPA is administered by the DOJ and FTC.

The Guidelines identified in the response to (a), above, state the antitrust enforcement policies of the Agencies. By providing this guidance, the Agencies hope to assist businesses in assessing whether the Agencies will challenge specific joint R&D activities. The Agencies will challenge unlawful agreements, evaluating each case in light of its own facts and applying the analytical framework set forth in these Guidelines reasonably and flexibly.

QUESTION #2:

If applicable laws, regulations, or guidelines contain a definition of joint R&D agreements please provide it below indicating its source.

RESPONSE TO #2:

The *Collaboration Guidelines* define a “competitor collaboration,” which includes joint R&D activities, as:

a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. Competitors encompasses both actual and potential competitors. Competitor collaborations involve one or more business activities, such as research and development (“R&D”), production, marketing, distribution, sales or purchasing.⁹

⁹ COLLABORATION GUIDELINES, supra note 2, §1.1 (some footnotes omitted); see also id. at n.6 “Firms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present. A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitive significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter.” The NCRPA defines a joint venture that is entitled to the Act’s protections to include any group of activities by two or more persons for the purpose of:

- (A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts;
- (B) the development or testing of basic engineering techniques;
- (C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes;
- (D) the production of a product, process, or service;
- (E) the testing in connection with the production of a product, process, or service by such venture;
- (F) the collection, exchange, and analysis of research or production information; or
- (G) any combination of the purposes specified in subparagraphs (A), (B), (C), (D), (E), and (F), and may include the establishment and operation of facilities for the conducting of such venture, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture

15 U.S.C. § 4301(a)(6).

The Agencies distinguish mergers from competitor collaborations. The Agencies explain in Section 1.3 of the *Collaboration Guidelines* that “[t]he competitive effects from competitor collaborations may differ from those of mergers due to a number of factors.” For example, most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants. Similarly, mergers are designed to be permanent, while competitor collaborations are more typically of limited duration, and thus participants in the collaboration typically remain potential competitors, even if they are not actual competitors for certain purposes (e.g., R&D) during the collaboration.

QUESTION #3:

Do applicable laws, regulations, or guidelines contain a limitation regarding the duration of joint R&D projects?

RESPONSE TO #3:

No. The applicable laws, regulations, and Guidelines do not contain specific limitations on duration of joint R&D agreements. However, when evaluating the competitive effects of a joint R&D agreement, the Agencies consider the duration of the collaboration as one of six factors relevant to assessing whether participants retain the ability and incentive to compete against each other and their collaboration. “In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.” *Collaboration Guidelines* § 3.34(f).¹⁰ In addition, the duration of a joint R&D arrangement can determine whether it is analyzed as a competitor collaboration or a merger. As explained in the *Collaboration Guidelines*, one factor the Agencies consider in determining whether to treat a joint R&D agreement as a horizontal merger is if the collaboration does not terminate within a sufficiently limited period by its own specific and express terms. *Id.* § 1.3.

QUESTION #4:

Is there a requirement in applicable laws, regulations, or guidelines that IP rights resulting from the joint R&D efforts need to be shared among the parties of the joint R&D agreement or third parties? If so, does such a requirement continue after the expiry of the agreement (for instance in case of government funded R&D)?

RESPONSE TO #4:

No. The applicable antitrust laws, regulations, and Guidelines do not require that IP rights resulting from joint R&D efforts be shared either among the parties forming the agreement or with third

¹⁰ The other five factors are (1) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (2) the extent to which participants retain independent control of assets necessary to compete; (3) the nature and extent of participants’ financial interests in the collaboration or in each other; (4) the control of the collaboration’s competitively significant decision making; and (5) the likelihood of anticompetitive information sharing. COLLABORATION GUIDELINES, *supra* note 2, § 3.4 (a-f).

parties.¹¹ The parties to the agreement are free to establish the terms of sharing. However, with respect to government funded R&D, although the competition laws do not create any sharing requirements, there may be specific contractual or other requirements for sharing. For example, patent legislation in the United States, called the Bayh-Dole Act of 1980,¹² allows universities, small businesses, and non-profit corporations to retain title to inventions made through federally funded research programs.

QUESTION #5:

Please indicate whether your authorities review joint R&D agreements only for potential efficiencies¹³ and harms to competition or whether they also review for other effects before their implementation (either as part of a registration process or *ex officio*) and, if this is the case, explain the evaluation criteria and process:

REPOSE TO #5:

The Agencies review joint R&D agreements for overall competitive effects, including both potential efficiencies (as defined in the question) and anticompetitive effects. The Agencies may conduct such a review *ex ante*, either on their own initiative or at the parties' request, as described below. The possibility of *ex ante* review does not limit the Agencies' authority to review both the formation of and conduct under ongoing joint R&D ventures where they believe that the formation and/or conduct constitute a possible violation of the competition laws.

i. If your country reviews joint R&D agreements *ex ante*, which agency or authority carries out that examination: the IP office, the competition authority, or other authority? Alternatively do multiple agencies/authorities carry out the review? Is there a registration/application process or is the review done on the agency's/authority's own initiative? Please explain your answer.

Ex ante review of joint R&D agreements is not required in the United States and there is no formal mechanism for review of all joint R&D agreements entered into within our jurisdiction. The Agencies may on their own initiative review a joint R&D agreement either *ex ante* or after the agreement has been implemented to evaluate whether it harms competition.

Depending on the value of the transaction and the size of the parties, as measured by their sales and assets, the formation of a joint venture may be subject to the premerger notification requirements

¹¹ See, e.g., *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 814 (C.D. Cal. 2010) ("Secrecy is a necessary part of the collaboration; if the results were immediately made public, the manufacturer would have no incentive to expend the time and effort to collaborate.").

¹² Pub. L. No. 96-517, 94 Stat. 3018 (codified as amended at 35 U.S.C. §§ 200-212), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title35/pdf/USCODE-2011-title35-partII-chap18.pdf>.

¹³ "Efficiencies" here are those facts or circumstances that positively affect consumer welfare, and are distinct from what some call "social efficiencies," which do not necessarily lead to increased consumer welfare, such as fairness, freedom of trade, and job creation. [N.B. This footnote is part of the original Questionnaire; it was not added by the Agencies.]

of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”).¹⁴ In those circumstances, one of the Agencies reviews the proposed joint venture to determine whether it was likely to violate the Clayton Act, Sherman Act, or FTC Act.

In addition, the NCRPA allows parties to joint venture agreements, as defined by the Act (see definition reproduced above in Response to Question #2), to file a notification of the venture with the DOJ and the FTC, as set forth above in the Agencies’ response to Request (a) above. The filing of such a notification enables the Agencies to evaluate whether the agreement may harm competition.

ii. Does your jurisdiction have a voluntary examination procedure by which the entities planning to enter into a joint R&D agreement may seek an advisory opinion or similar statement on whether the agreement may violate any competition law or regulation?

Yes, entities may request an advisory opinion from the FTC¹⁵ or a statement of the DOJ’s enforcement intentions regarding a proposed joint R&D agreement.¹⁶

iii. If your country reviews R&D agreements *ex ante*, may it also review the operation of the agreement after it has begun to determine whether it violates the competition law?

Yes, the Agencies may review joint R&D agreements both *ex ante* and after the venture has begun to determine whether the formation of the venture and/or conduct following formation violates the competition laws. The Agencies assess whether the formation of the venture or conduct violates Section 1 or 2 of the Sherman Act, Section 5 of the FTC Act, or Section 7 of the Clayton Act, as applicable.

iv. In the past five years, how many joint R&D agreements did the relevant agencies/authorities within your jurisdiction review per year?

For the past five fiscal years (October 1, 2008 to September 30, 2013), the DOJ received 62 NCPRA filings qualifying as research joint ventures under NCPRA. In addition, the DOJ evaluated five business review requests that involved joint ventures, but none of them concerned “joint R&D agreements.” The DOJ concluded that it did not currently intend to challenge any of these joint ventures. The FTC did not review any joint R&D agreements during this same period.

¹⁴ 15 U.S.C. § 18a; 16 C.F.R. § 801.40, modified, 66 Fed. Reg. 8680 (FTC Feb. 1, 2001) (governing reportability of joint ventures formed as a corporation), available at <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=c39545bbddb7638055e2d701e0608a4&rgn=div5&view=text&node=16:1.0.1.8.86&idno=16#16:1.0.1.8.86.0.40.17>. See also 16 C.F.R. § 801.50 (governing reportability of unincorporated joint ventures).

¹⁵ See Fed. Trade Comm’n, Advisory Opinions, Policy, 16 C.F.R. §1.1 (2012), available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title16-vol1/pdf/CFR-2012-title16-vol1-part1-subpartA.pdf>.

¹⁶ For a description of the Division’s Business Review Procedures, see *supra* note 7.

v. In the past five years, how many joint R&D agreements were found to be in (potential) violation of applicable competition law (antitrust law) rules and were therefore amended, withdrawn, or terminated? Please summarize the basis for concluding that there was a violation and whether the agreement was ultimately amended, withdrawn, or terminated.

The Agencies did not identify any such agreements.

QUESTION #6:

Are market shares of relevance when reviewing joint R&D agreements?

i. How does the reviewing authority determine and evaluate market shares?

ii. Is there a “safe harbour” for joint R & D agreements falling below certain market share thresholds?

RESPONSE TO #6:

Yes, the Agencies normally consider measures of market shares and market concentration as part of their evaluation of the competitive effects of a joint R&D arrangement. However, market share provides only a starting point (or one relevant factor) for evaluating the competitive effects of the relevant arrangement, and is considered in conjunction with other reasonably available and reliable evidence. *See Collaboration Guidelines* § 3.34. The Agencies also examine other factors, including the following factors relevant to the ability and incentive of the participants and the collaboration to compete: (1) exclusivity, (2) control over assets, (3) financial interests in the collaboration or in other participants, (4) control of the collaboration’s competitively sensitive decision making, (5) likelihood of anticompetitive information sharing, and (6) duration of the collaboration. *Collaboration Guidelines* § 3.34. The Agencies also evaluate whether entry would be timely, likely, and sufficient to deter or counteract any anticompetitive harms. *Id.* § 3.35. In addition, the Agencies assess any other market circumstances that may foster or impede anticompetitive harms.

i. The Agencies have various tools to gather evidence regarding market shares, including subpoena powers and other authority to compel the production of information, data, and other evidence. When available data permit, the Agencies normally calculate market shares for all firms that currently produce products in the relevant market. The Agencies also calculate market shares for other market participants, if this can be done reliably, to reflect their competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm’s historical market share overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably. *Horizontal Merger Guidelines* § 5.2.

ii. The *Collaboration Guidelines* articulate two safety zones: one applicable to any competitor collaboration, and another applicable to R&D collaborations whose competitive effects are analyzed within an innovation market. Under the first, “[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.” *Collaboration Guidelines* § 4.2. Under the second, “[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration.” *Id.* at § 4.3.¹⁷ The Agencies emphasize that competitor collaborations are not anticompetitive merely because they fall outside the safety zones. “Indeed, many competitor collaborations falling outside the safety zones are procompetitive or competitively neutral.” *Id.* § 4.1. The Agencies analyze arrangements outside the safety zones under the rule of reason and based on the principles outlined in Section 3 of the *Collaboration Guidelines*.

The antitrust safety zones do not apply to agreements that are *per se* illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied. *See also* Response to Question #8 below (explaining the types of agreements that are treated as *per se* illegal in the United States).

QUESTION #7:

For joint R&D agreements, are potential efficiencies and harms to competition part of the assessment process?

- i. If you answered yes, what types of efficiencies and harms would you consider when determining whether a joint R&D agreement lessens, or is likely to lessen, competition?**
- ii. Are some efficiency aspects more important than others? If so, please explain which ones are more important and why.**
- iii. What is the outcome if the effects of a joint R&D agreement are competitively neutral? Is the agreement cleared to proceed or found not to violate the law?**

RESPONSE TO #7:

¹⁷ “If a competitor collaboration may have competitive effects on innovation that cannot be adequately addressed through the analysis of goods or technology markets, the Agencies may define and analyze an innovation market as described in Section 3.2.3 of the [1995 IP Licensing Guidelines]. An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.” COLLABORATION GUIDELINES, *supra* note 2, § 3.32(c).

Yes, the Agencies evaluate both potential efficiencies and harms to competition as part of their assessment of joint R&D agreements.

i. Joint R&D agreements “may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms.” *Collaboration Guidelines* § 2.2. For example, “agreements may limit independent decision making” or combine the control of or financial interest “in competitively sensitive variables, or may otherwise reduce the participants’ ability or incentive to compete independently.” *Id.* Joint R&D agreements “also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.” *Id.*

Examples of efficiencies of joint R&D agreements include enabling firms “to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would [otherwise] be possible.” *Id.* § 2.1. Efficiency gains from joint R&D agreements “often stem from combinations of different capabilities or resources.” *Id.* For example, two firms may be able to combine their research activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. *Id.* Such efficiencies can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products. *Id.* § 3.36.

“The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be ‘reasonably necessary’ without being essential.” *Id.* § 3.36(b). “The reasonable necessity of an agreement may depend upon the market context, the duration of the agreement,” and “on whether it deters individual participants from undertaking free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies.” *Id.* and Ex. 10. If the participants to a collaboration could have achieved “similar efficiencies by practical, significantly less restrictive means, then the Agencies could conclude that the relevant agreement is not reasonably necessary to” achieve the stated efficiencies. However, “the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.” *Id.* § 3.36(b).

ii. The Agencies do not treat some types of efficiencies as more important than others. However, the Agencies consider only cognizable efficiencies, which are “efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means. . . . Cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies.” *Id.* § 3.36. Moreover, “[p]articipants must substantiate efficiency claims so that the [Agencies] can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration’s or its participants’ ability and incentive to compete; and why the relevant agreement is reasonably necessary to achieve the claimed efficiencies. Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified.” *Id.* § 3.36(a).

iii. If the Agencies conclude that a joint R&D agreement is competitively neutral, then they would not take action against the agreement or would allow it to proceed. Only if the Agencies conclude that the agreement has anticompetitive effects that outweigh procompetitive benefits will they take action against the parties to the agreement.

QUESTION #8:

Are there clauses in joint R&D agreements (in particular concerning IP rights) that should be identified as creating restrictions so harmful to competition that they would be deemed unlawful and invalid, and would not trigger any examination of possible efficiencies?

i. If you answered yes, could you please identify, even if not exhaustively, what clauses would qualify as unlawful and invalid restrictions and explain why they are considered *per se* illegal?

RESPONSE TO #8:

Yes. “Agreements of a type that always or almost always tend to raise price or reduce output are *per se* illegal. . . . Typically, these are agreements not to compete on price or output. Types of agreements that have been held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.” Collaboration Guidelines § 3.2.¹⁸ Accordingly, the Agencies would potentially not consider efficiencies if an agreement contained clauses implementing agreements of these types. “If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered *per se* illegal.” *Id.* and Ex. 4.¹⁹ “The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation. The integration must be of the type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis [discussed] in Section 3.36” of the *Collaboration Guidelines* (see Response to #7, above). “Such procompetitive benefits may enhance the participants’ ability or incentives to compete and thus may offset an agreement’s anticompetitive tendencies.” *See id.* Exs. 5-7.

¹⁸ But see DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY §2.3 (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm> (“field-of-use, territorial, and other limitations found in intellectual property licenses that may serve procompetitive ends by allowing the licensor to exploit its intellectual property as efficiently and effectively as possible.”).

¹⁹ See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006) (*per se* liability is reserved for “plainly anticompetitive” agreements that require no elaborate study to establish their illegality); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (“A *per se* approach may apply to joint ventures in at least two situations: (1) where a joint venture is essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit to society, see *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir.1998); and (2) where a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition, see *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir.1985).”).

QUESTION #9:

In your experience, is the number of international joint R&D agreements that fall under scrutiny increasing? Does your relevant agency/authority have mechanisms of international cooperation with other national competition authorities to cooperate on assessing such cross-border joint R&D agreements, in particular among actual or potential competitors?

RESPONSE TO #9:

Regarding the first question, the Agencies do not track whether the joint R&D agreements they review are international in scope.

As to the second question, yes, both Agencies cooperate with foreign competition agencies, potentially including on cross-border joint R&D agreements, through formal and informal agreements and arrangements, although cooperation also takes place in their absence. The United States has bilateral cooperation agreements with nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and Chile's competition enforcement agency, the Fiscalía Nacional Económica (2011).²⁰ The U.S. antitrust agencies entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009, with the three Chinese antitrust agencies in July 2011, and with the Indian competition authorities in September 2012. In addition, the Agencies operate pursuant to the Recommendation of the Organization for Economic Cooperation and Development ("OECD") on international competition cooperation. The OECD Recommendation and bilateral agreements generally provide for notification of enforcement matters that implicate the other party's interests, investigative assistance through sharing non-confidential information, traditional and positive comity, and consultation to address disputes. Pursuant to these agreements, or often without an agreement, DOJ and FTC staff cooperate with foreign agencies on individual cases including, potentially, cross-border joint R&D agreements.

²⁰ International Competition and Consumer Protection Cooperation Agreements, FED. TRADE COMM'N, available at <http://www.ftc.gov/oia/agreements.shtm>.