FEBRUARY 2000

Antitrust Report

The New Premerger Notification Rules for Limited Liability Companies: A Riddle Wrapped in an Enigma Wrapped in the Hart-Scott-Rodino Act

Aaron Xavier Fellmeth

Canada and the European Union Enter Into a New Era of Antitrust Enforcement Cooperation

Omar K. Wakil, John F. Clifford & Nancy Johnson

New Competition Laws In Thailand and Indonesia

LEXIS Publishing™
LEXIS*-NEXIS*MARTINDALE-HUBBELL*
MATTHEW*.MICHIE*.SHEPARD'S

Canada and the European Union Enter Into a New Era of Antitrust Enforcement Cooperation*

Omar K. Wakil, John F. Clifford & Nancy Johnson

Last June, the long-awaited agreement between the European Union and Canada regarding the application of their competition laws entered into force.[1] The new Canada-EU agreement, like the 1991 EU-U.S. and the 1995 Canada-U.S. agreements, is designed to enhance the effectiveness of domestic enforcement and avoid conflict through notification, consultation, and cooperation.[2] The agreement envisions coordinated enforcement activities, exchange of information, and regular meetings to discuss matters of mutual interests. Although it will undoubtedly increase cooperation between Canadian and European competition authorities, the depth of this cooperation may well be limited, at least in the short-term, by legislative restrictions in Canada relating to the disclosure of information to foreign enforcement officials.

TREND TOWARD INTERNATIONAL COOPERATION

Globalization of trade is having a dramatic effect on the ability of national authorities to enforce their competition laws.[3] As Joel I. Klein, head of the U.S. Department of Justice's Antitrust Division has stated:

> [T]he increasing globalization of markets leads to increased complexity in our investigations, making it more difficult, time-consuming, and costly to pursue an investigation to its ultimate conclusion. Often, we must have the assistance of authorities in other countries in order to obtain crucial evidence.[4]

Since the early 1990s, there has been a growing awareness of the need for international cooperation as antitrust problems increasingly transcend national boundaries. Companies find themselves subject to different national antitrust

OMAR K. WAKIL is an associate and JOHN F. CLIFFORD is a partner in the Toronto office of McMillan Binch. Mr. Clifford is a member of the Board of Editors of ANTITRUST REPORT and the co-author of the Canadian coverage in Antitrust Laws and Trade Regulation (2d ed., Matthew Bender). NANCY JOHNSON is an associate in the Brussels office of Skadden, Arps, Slate, Meagher & Flom LLP.

rules, with different procedural and substantive standards, requirements, and time limits. The level of antitrust enforcement varies from one country to another even in the face of comparable conduct. Remedies adopted in one jurisdiction may adversely affect the market in another country, while antitrust authorities may lack the means to effectively regulate practices that affect local conditions of competition but which are organized in third countries.

These various problems can be addressed only through increased cooperation. Recognition of this has resulted in a number of bilateral and multilateral initiatives in the field of international antitrust cooperation.[5] Much work also has been done on the issue of international antitrust cooperation under the aegis of the Organization for Economic Cooperation and Development[6] and the World Trade Organization.[7]

In July 1995, the European Commission published a report commissioned from a group of experts, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules.*[8] The EU group of experts concluded that progress should be made on two parallel fronts: (1) entering into close cooperation between the EU and some of its partners by concluding bilateral agreements, and (2) developing a multilateral framework that would include a minimum set of jointly-agreed competition rules. The report led to the Communication to the Council submitted by Commissioners Sir Leon Brittan and Karel van Miert entitled *Towards an International Framework of Competition Rules*, in which the Commissioners concluded that the adoption of international rules on competition should be considered to guarantee market access, to avoid conflicts of law and jurisdiction, to increase the effectiveness and coherence of the EU's competition policy enforcement, and thereby to strengthen the trading system along the lines of market economies.[9]

The depth of the cooperation between Canada and EU may well be limited in the short-term by legislative restrictions in Canada relating to the disclosure of information to foreign enforcement officials

The detection and prosecution of cartels, the control of mergers, and market-access cases are three particular areas in which enforcement authorities are beginning to rely very heavily upon international cooperation.[10] Indeed, cooperation between enforcement officials is becoming routine in matters involving multiple jurisdictions. Bilateral cooperation agreements are rapidly becoming crucial elements of the effective investigation of anticompetitive acts. The Canada-EU agreement is thus part of a developing trend towards increasing international antitrust cooperation through bilateral arrangements. These

agreements seek not only to avoid conflict in antitrust enforcement, but to enhance the degree to which authorities actively assist each other in the enforcement of their competition laws.

NOTIFICATION

The notification provisions of the Canada-EU agreement (the "Agreement") are intended to ensure that competition authorities in both jurisdictions are aware of each other's enforcement activities at an early stage in order to give the notified authority the opportunity to commence its own investigation or request further assistance from the notifying party. They should also diminish the possibility of conflicts arising as a result of a lack of information.

Provisions in Article II of the Agreement oblige each party to notify the other with respect to any "any enforcement activities that may affect important interests of the other Party: (art. II(1)). The scope of the term "important interests" is clarified in Article II(2), which lists a broad range of enforcement activities which ordinarily will require notification. Included, for example, are those activities "relevant to enforcement activities of the other Party" (art. II(2)(i)). Also included are merger investigations and proceedings where any party to the transaction, or a company controlling a party to the transaction, is incorporated or organized under the laws of the other jurisdiction (art. II(2)(iv)). The Agreement also sets out the stages of an investigation at which further notification ought to be made.

CONSULTATION AND COORDINATION

The central provisions of the Agreement are those relating to increased cooperation between the respective antitrust authorities. These provisions allow either side to ask the other to take antitrust enforcement action against practices that harm the requesting party's interests. The Canadian and European authorities may also request consultations regarding any matter relating to the Agreement; the party to whom the request is made is obliged to "carefully consider the representations" of the party making the request (art.III).

Under the Agreement, Canadian or European officials may request the other party to take action against anticompetitive activities carried out in the territory of the other party that adversely affect the requesting party's important interests. Although compliance with a request is voluntary, the party to whom a request is made is obliged by the Agreement to give it "full and sympathetic" consideration (art. V(3)). These "positive comity" provisions benefit both the requesting party (by ensuring that the authority best-placed to enforce

anticompetitive activity has primary responsibility for enforcement) and the party to whom the request is made (insofar as it becomes aware of anticompetitive activities affecting its consumers). These arrangements can also "defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting and bilateral consultation among competition authorities."[11]

The "positive comity" provisions contained in the Agreement are not, however, as detailed as those contained in the 1998 EU-U.S. agreement, which adds to the parties' 1991 agreement a presumption that positive comity will be used in certain situations and provides details about each party's responsibilities.[12] The head of the Canadian Competition Bureau, the Commissioner of Competition (the "Commissioner"),[13] has publicly expressed interest in the EU-U.S. accord, and has said that he wants "to explore the possibility of refining our [Canada's] positive comity arrangement which clearly has a number of advantages including saving resources by avoiding duplication of effort and avoiding the pitfalls of extraterritorial orders which can effect the enforcement efforts of another jurisdiction."[14] In light of the Commissioner's comments and the agreement, it seems probable that future amendments to the Agreement are likely to contain enhanced positive comity provisions.

AVOIDANCE OF CONFLICT

The Agreement also contains provisions designed to minimize conflicts that may arise in the enforcement of each party's competition laws. Article VI provides that, where the parties have competing interests, each party shall uses its best efforts to accommodate those interests (art. VI(2)). The Article also lists ten factors that the parties must take into consideration throughout all phases of competition enforcement activities. This list clarifies the relevant factors that ought to be considered when the parties are engaged in enforcement activities; the list includes; for example, "the degree to which a remedy, in order to be effective, must be carried out within the other party's territory."

EXCHANGE OF INFORMATION AND CONFIDENTIALITY

The Agreement stipulates that each party will provide the other with information within its possession that the requesting party believes to be relevant to a matter subject of the treaty. Any information received under the Agreement will be used only for the purpose of enforcing competition laws, and "neither Party is required to disclose information where such disclosure is prohibited by the laws of the Party possessing the information" (art. X(2)).

When the competition authorities of both parties are engaged in concurrent enforcement activities, each competition authority is obliged to "ascertain whether the natural or legal persons concerned will consent to the sharing of confidential information" (art. VII(3)). In this regard it is important to note that although Article X requires the parties to use their efforts to maintain the confidentiality of information, the Commissioner *need* not keep confidential information received voluntarily from foreign competition authorities.[15]

Provisions in the agreement providing for the exchange of information are limited, however, by current Canadian legislative restrictions on the disclosure of confidential information. Section 29 of the Competition Act exempts from disclosure information that must, by law, be provided to the Commissioner.[16] There are two exceptions to this rule. First, information may be shared with any other person "for the purposes of the administration and enforcement" of the Act.[17] Second, the Commissioner may share information with other Canadian enforcement agencies. No exception is made with respect to the sharing of information with *foreign* enforcement agencies. Section 29 of the Act does not therefore, explicitly permit the Commissioner to share information with foreign competition authorities.

In July 1994, the Commissioner issued the Draft Information Bulletin *Confidentiality of Information under the Competition Act*, which set forth his interpretation of the Section 29 confidentiality requirements.[18] In the Bulletin, the Commissioner made clear that he will rely on the "administration or enforcement of the Act" exception to permit disclosure of information when disclosure will advance a specific investigation being carried out under the Act. Under the interpretation, the Commissioner would disclose information to elicit additional information from third parties (including competitors) and to obtain enforcement assistance from other enforcement agencies, including antitrust authorities. The Commissioner also noted that information which is not specifically protected under Section 29 will nevertheless be treated as if covered by Section 29.[19] However, in certain specific circumstances, non-Section 29 information may be disclosed to foreign agencies (contrary to the general policy of treating this information as if it were protected by Section 29). Disclosure may be made either at the Commissioner's own initiative (i.e., where information comes to the Commissioner's attention suggesting that competition laws of another country may be violated) or at the request of a foreign antitrust agency under a cooperative treaty to which Canada is party.

Although proposals to amend the Canadian Competition Act that would have allowed greater information sharing between the Commissioner and foreign enforcement agencies have been shelved, new amendments are likely to occur in

the not-too-distant future following the Supreme Court of Canada's decision in the *Schreiber* case.[20] That decision, handed down in May 1998, removed constitutional uncertainties relating to the exchange of information and mutual legal assistance with foreign enforcement agencies. Had the Court affirmed a lower court decision, Canadian competition authorities would have been obliged to obtain court approval before requesting that foreign governments use compulsory powers to gather evidence for Canadian investigations. As expected, the Commissioner responded positively to the *Schreiber* decision, declaring: "[N]ow that we have the Supreme Court's *Schreiber* decision, we will need to address the issue of confidentiality and mutual assistance" in cooperation treaties.[2121]

The European Commission's policy in terms of exchange of information is described in the *Statement of Confidentiality of Information* made by the Commission to the Council during the adoption of the Joint Council and Commission Decision regarding the entry into force of 1991 EU-U.S. agreement.[22] The Commission's Third Report states: "Community law provides a high level of protection to confidential information provided to the Commission, and it will be necessary that any consent obtained is sufficient to discharge the Commission from its obligation of confidentiality . . ."[23]

It seems probable that future amendments to the new EU-Canada agreement are likely to contain enhanced positive comity provisions

Based on its experience under the 1991 EU-U.S. agreement, the European Commission has distinguished between two categories of confidential information.[24] *First*, information acquired by European Commission or provided to it (whether in a notification or in reply to a request for information) and containing business or trade secrets covered by professional secrecy may not be communicated to other authorities. Disclosure is authorized only with the express consent of the source of the confidential business secrets. Waivers have been granted by parties (particularly in merger transactions) to enable the European Commission to communicate business secrets to the U.S. authorities. The European Commission clearly encourages parties to grant such waivers so that it can more effectively cooperate with other agencies. This may, however, place companies in a somewhat difficult situation if they are reluctant (for legitimate business reasons) to have their business secrets communicated to other agencies, as companies may have some concerns that their refusal to grant a waiver could be taken into account by the European Commission in its own analysis in an adverse manner.

Second, information relating generally to the conduct of an investigation that does not contain business or trade secrets covered by professional secrecy must be kept confidential to ensure the proper handling of the investigation. However, this information may be disclosed to authorities provided these authorities are obliged to maintain the confidentiality of the information provided and use the information for the sole purpose of implementing their competition policy. Thus, in deciding what information it can communicate, the Commission will take into account whether the Commissioner can "guarantee" the confidentiality of the information to be provided (art. X).

In practical terms, the European Commission is able to communicate significant information to other authorities despite the above restrictions. This information will include, in particular, the "work product" of Commission officials in terms of the definition of the relevant product and geographic market, anticompetitive behaviour and remedies, as well as general non-public information relating to the conduct of the investigation and timing thereof.[25] The Commission is also able to communicate information considered as being in the public domain.[26]

CONCLUSION

Bilateral agreements cannot, ultimately, overcome substantive differences in competition laws and procedural rules.[27] The much-publicized conflict between European and U.S. authorities in the *Boeing/McDonnell Douglas* case[28] illustrates that serious disputes can arise even between authorities with well-established records of cooperation. Although the *Boeing* case may have demonstrated that "successful cooperation … in bilateral competition agreements depends upon a rigorous economic analysis based upon strictly legal rules," it also emphasized that "there are certain natural limits to this type of *case specific* co-operation."[29] At the heart of the *Boeing* case there was, simply, a substantive difference in the way in which the two competition authorities assessed the proposed merger. And cooperation agreements like the Canada-EU agreement contain "no mechanism for resolving conflicts in cases of substantial divergent of analysis."[30]

In spite of the limits of international cooperation, such cooperation is, undoubtedly, an important element in the effective enforcement of antitrust laws. Public friction between the U.S. and EU authorities in the *Boeing/McDonnell Douglas* case seems to have been very case specific and there is every reason to expect that cooperation will continue to expand in the future among competition authorities around the world.[31] Cases such as the Worldcom/MCI merger are illustrative of the degree of cooperation that can occur between competition authorities. Proceedings in that case were marked by consideration level of

cooperation between the Department of Justice and the European Commission and included exchanges of views on the analytical method to be used, co-ordination of information gathering, and joint meetings and negotiations with the parties.[32]

In light of the growing ability and willingness of antitrust authorities to consult each other, cooperate, and exchange information, companies can no longer assume that authorities will not become aware of the different arguments relating to such issues as market definition, anticompetitive behaviour and remedies have been submitted to different authorities. From a practical point of view, it is therefore important for companies to think out their antitrust defense strategy on a worldwide basis before making notifications or responding to investigations, and to be prepared to explain why differences in local market conditions or procedural or substantive tests support and justify the different arguments submitted.

NOTES

* A version of this article originally appeared in the *ABA International Antitrust Bulletin* (Frank L. Fine, Editor-in-Chief).

[1] Canada-European Communities Agreement Regarding the Application of Their Competition Laws, 17 June 1999. *See Press Release, Prime Minister Announces Canada-EU Agreement on Competition Law* (June 17, 1999).

[2] These purposes are set forth in Article I of the agreement, which declares that the agreement is intended to promote cooperation and coordination between Canadian and European competition authorities and to avoid conflicts arising from the application of their respective laws.

[3] *See generally* Alexander Schaub, *International Co-operation in Antitrust Matters: Making the Point in the Wake of the Boeing/MDD Proceedings*, EC Competition Policy Newsletter, Feb. 1998 (No. 1), at 2, *available at* http://europa.eu.int.

[4] . *International Antitrust Enforcement,* Hearing before the Subcommittee on Antitrust, Business Rights and Competition of the U.S. Senate Committee on the Judiciary (prepared remarks of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice) (Oct. 2, 1998), at 2, *available at* www.usdoj.gov/atr [hereafter Klein Remarks.]

[5] On September 23, 1991, the European Commission signed a bilateral antitrust cooperation agreement with the United States, and on April 10, 1995, the European Commission and Council adopted a joint decision approving the 1991 EU-U.S. Agreement and declaring it applicable from the date of signing. Also in 1995, Canada and the United States entered into an antitrust cooperation agreement. In 1998, the EU and the United States entered into a second, more detailed, antitrust agreement. And in 1999, the United States entered into bilateral agreements with Australia, Brazil, Israel, and Japan. For a discussion of the 1999 agreements, see Daniel G. Swanson, *The Global Reach of U.S. Antitrust Law: 1999 Developments*, Antitrust Rep., Nov. 1999, at 2, 9-15.

[6] *See, e.g.,* Committee on Competition Law & Policy, OECD, *Report on Notification of Transnational Mergers*, DAFFE/CLP(99)10 (1999); Committee on Competition Law and Policy, OECD, *Report on Positive Comity*, DAFFE/CLP(99)2 (1999). Both reports are available at www.oecd.org/daf/clp/reports.htm.

[7] In December 1996, the Ministerial Conference of the WTO decided to set up a working group to study issues relating to the interaction between the trade and competition policy in order to identify any areas that merit further consideration within the WTO framework. This Working Group began its work in July 1997.

[8] The report is *available at* http://europa.eu.int.

[9] COM (96)284, *available at* http://europa.eu.int.

[10] The head of the Canadian Competition Bureau, the Commissioner of Competition, has noted that "[c]ompetition law agencies around the world are increasingly co-operating to combat global cartels … criminal behavior is unacceptable and perpetrators cannot expect to escape sanction in Canada by carrying out their illegal conduct outside the country." *See* Commissioner of Competition, *Press Release, $16 Million in Fines Paid by Archer Daniels Midland for Violations of the Competition Act in the Food and Feed Additive Industries* (May 27, 1998), *available at* http://stragegs,ic.gc.ca.

[11] Klein Remarks, *supra* note 4, at 6.

[12] Under the 1998 EU-U.S. agreement, one party may request that the other take enforcement action against individuals or companies suspected of engaging in anticompetitive activity in the other's territory. Providing certain conditions are met, the requesting party will then suspend or defer its own enforcement action pending the other's investigation. Where the anticompetitive behavior occurs in both jurisdictions, joint enforcement is not only possible, but also probable. The text of the EU-U.S. agreement is available at www.usdoj.gov/atr.

[13] The head of the Canadian Competition Bureau was formerly known as the "Director of Investigation and Research." The title was changed to "Commissioner of Competition" pursuant to Bill C-20, which was passed by the federal Parliament on December 10, 1998.

[14] Von Finckenstein Remarks, *supra* note 10, at 13.

[15] John A. Kazanjian, *My Goodness George, What Are You Telling The Neighbours?*, Competition Law and Competitive Business Practices (Canadian Institute Seminar, Mar. 31, 1995), at 4.

[16] Competition Act, R.S.C. 1985, c. C-34, as amended, *reprinted in* 9 Antitrust Laws and Trade Regulation app. 200-A (2d ed., Matthew Bender).

[17] *Id*.

[18] . *See* John F. Clifford et al., *Canada*, in International Mergers: The Antitrust Process 203 (J. William Rowley, QC & Donald Baker eds., 2d ed. 1996).

[19] Non-Section 29 information includes, *inter alia*, information voluntarily provided to the Competition Bureau by parties subject to an investigation and would include information received from foreign competition authorities.

[20] . [1998] 1 S.C.R. 841.

[21] Von Finckenstein Remarks, *supra* note 10, at 10.

[22] *See Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the Application of the Competition Laws* (period Jan. 1 to Dec. 31, 1997).

[23] *See id*. pt. 3.

[24] *See id*.

[25] *See* Karel van Miert, EC Commissioner, *Transatlantic Relations and Competition Policy*, Speech before the American Chamber of Commerce in Belgium (Nov. 26, 1996), *available at* http://europa.eu.int.

[26] *See* Claude Rakovsky, *The Commission's Cooperation with Third Countries in the Field of Competition*, Speech before the FIW conference (Sept. 18, 1997), *available at* http://europa.eu.int. Rakovsky cites examples relating to the aircraft, alcoholic beverages, and pharmaceuticals industries. When deciding what documents third parties may have access to in EU proceedings, then European Commission has on occasion considered that general industry reports prepared by market research firms that can be purchased by market operators are not business secrets and accordingly, this type of information might also be communicated to other agencies.

[27] A review of substantive and procedural differences in the enforcement of EU and U.S. competition rules may be found in William J. Kolasky & Leon B. Greenfield, *Merger Review in the EU and US: Substantive Convergence and Procedural Dissonance*, Global Competition Rev., Oct./Nov. 1998, at 22-25.

[28] For a discussion of the *Boeing/McDonnell* case, see Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, Antitrust Rep., Nov. 1997, at 19. *See also* Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the World*?, Antitrust Rep., Dec. 1992, at 2.

[29] Schaub, *supra* note 3, at 4. Indeed, the Worldcom/MCI merger is a testament to the degree to which EU and U.S. regulators can cooperate and efficiently resolve mergers which give rise to concerns in multiple jurisdictions.

[30] *Id*.

[31] Klein Remarks, *supra* note 4, at 6.

[32] It is important to note the degree to which the parties involved in the Worldcom/MCI merger cooperated with competition authorities. It was, for instance, with the cooperation of the parties that the agencies involved shared information and held joint messages. Such cooperation, relatively common in merger cases, is unlikely to occur in other areas of international antitrust enforcement, such as cartel prosecution. In such cases the ability of competition authorities to cooperate with each other without the assistance of the parties involved is of the utmost importance.