

# McMILLAN BINCH LLP

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**SUBMISSION TO THE PUBLIC POLICY FORUM  
REGARDING PROPOSALS TO AMEND THE *COMPETITION ACT*  
CONTAINED IN GOVERNMENT OF CANADA DISCUSSION PAPER ENTITLED**

**“OPTIONS FOR AMENDING THE *COMPETITION ACT*:  
FOSTERING A COMPETITIVE MARKETPLACE”**

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Submitted by McMillan Binch LLP  
on behalf of the Competition Policy Group

30 September 2003

**Air Canada  
Alcan Aluminium Limited  
BCE Inc.  
BP Canada Energy Company  
The Coca-Cola Company  
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## EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. The Competition Policy Group supports changes to the *Competition Act* that will promote efficiency and reduce unnecessary burdens on Canadian businesses in order to enhance Canada's competitive advantage in a technologically dynamic global economy. The amendments to the pricing provisions proposed in the June 2003 *Discussion Paper* entitled "Options for Amending the *Competition Act*: Fostering a Competitive Marketplace" will have this effect. However, three of the other proposed changes would run counter to this objective.

### *Penalties and Damages for Reviewable Practices*

2. The proposals to establish large penalties and/or private damage actions in respect of abuse of dominance and other reviewable practices should not be pursued. Real problems that would warrant a fundamental redesign of the reviewable practices regime have not been demonstrated, nor is there clear evidence that such proposals would benefit the Canadian economy.
3. The main reasons for this conclusion are that:
  - (i) Reviewable practices were purposely designed to focus on prohibition or other *remedial* orders to restore competition when the *public interest in competition* is injured. They have provided an economically sound and flexible basis for addressing monopolization issues for over 25 years. It is neither necessary nor desirable to convert them into *serious quasi-criminal offences* and/or *private competition law torts*.
  - (ii) The proposals are based on an incorrect assumption that additional deterrence of "violations" is necessary or desirable. In fact, the commonplace ordinary commercial activities covered by the reviewable practices are almost always pro-competitive and the enforcement history demonstrates that penalties and/or damages are not required to address the very rare instances (less than 1% of the situations brought to the attention of the Competition Bureau) where such conduct may be anti-competitive.
  - (iii) Exposure to penalties and/or private damage awards is certain to have a harmful chilling effect on Canadian business decision-making over a wide front of marketing, distribution and other commercial activity.
4. If penalties were to be introduced, they should only be obtainable by the Commissioner (not private plaintiffs) and should be limited to the \$100,000 (first instance) / \$200,000 (for subsequent orders) maximum applicable to deceptive marketing practices in Part VII.1 of the *Act*. When coupled with simplification of the proposed penalty criteria, this would conform with the stated objective of focusing on *promotion of compliance* rather than punishment.

5. If private damage awards were to be established (contrary to the safeguard commitments made by the Commissioner of Competition and Minister of Industry when the Bill C-23 amendments were developed), they should only be available for the period following the *date of an application to the Competition Tribunal* (on a contested, not a consent, basis as contemplated in the *Discussion Paper*) in order to avoid unfairly penalizing firms that were engaged in activity that was *reviewable* rather than *unlawful*.

### ***Competitor Agreements***

6. The proposals relating to the redesign of the conspiracy offence should not be pursued. Real problems that would warrant a fundamental redesign of the current conspiracy offence have not been demonstrated, nor is there clear evidence that such proposals would benefit the Canadian economy.
7. The main reasons for this conclusion are that:
  - (i) The “chilling effect” which is alleged to exist for strategic alliances is not a significant practical problem and could be addressed more effectively through a simple revision to enforcement guidelines which is already underway.
  - (ii) The proposals will significantly *increase*, not reduce, chilling effects because the definitions of price-fixing, market allocation and output restriction are overly broad.
  - (iii) Canada is a world leader in cartel enforcement with an effective law that complies fully with the OECD’s *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*.
  - (iv) The international trend is *away from “per se”* rules in favour of greater reliance on “rule of reason” standards of the sort found in the current *Competition Act*.
  - (v) The changes will destabilize more than a century of competition law jurisprudence in Canada, including the enormously successful enforcement track record since the law was clarified and enforcement techniques were improved in the early 1990s. Large fines paid by multinational companies as well as convictions of numerous domestic and foreign executives would not have been achieved (89% success rate in cartel cases since 1992) if the law was ineffective.
8. If changes were to be made to the conspiracy offence, the proposals should be revised in the following ways to reduce their over-inclusiveness:
  - (i) The offence should only apply to actual competitors, because persons who “could reasonably be expected to compete with each other” is too broad and uncertain to provide an appropriate standard for a serious criminal offence.
  - (ii) The reference to persons who “compete with each other” should be qualified by the phrase “in respect of the product which is the subject of the agreement or

arrangement” in order to avoid catching activities which are not potential horizontal cartel agreements.

- (iii) The definitions of price-fixing, market allocation and output restriction need to be narrowed in order to remove over-inclusiveness.
  - (iv) The ancillary restraints defence should be based on a reasonable supporting relationship to a non-cartel principal agreement and should not contain a reverse onus.
  - (v) The existing defences in section 45(3) (product standards, credit information, R&D, advertising, environmental measures, *etc.*) should not be removed since they would be even more relevant and appropriate for exemption from a *per se* offence than they already are in respect of the current conspiracy offence.
  - (vi) A defence for agreements between persons with minor market positions should be added (along the lines of the Bill C-472 proposal, but with a 35% rather than 25% safe harbour).
9. If a new reviewable practice is introduced for competitor agreements, it should incorporate a “no duplicate proceedings” clause to prevent challenge and review of competitor agreements under multiple provisions (*eg* merger, abuse, proposed strategic alliances provision) of the *Act*. Any new provision should include an efficiencies component which follows the model used in merger review.
10. If clearance certificates are to be introduced, they should be obtainable for both proposed and existing agreements. For a clearance regime to be useful to Canadian businesses, it would need to address key issues such as speed, cost-effectiveness and confidentiality.

### ***Reform of the Pricing Offences***

11. The proposals to repeal the price discrimination and discriminatory promotional allowances offences should be implemented since the current provisions are widely acknowledged not to be based on a sound economic foundation.
12. The proposal to address predatory pricing under the reviewable practice of abuse of dominance and to remove the separate criminal predation offence should be implemented because:
- (i) criminal law is ill-suited to deal with low pricing (which is usually beneficial to customers); and
  - (ii) abuse of dominance provides the appropriate legal and economic framework for addressing the rare situations when such conduct becomes anti-competitive.

***Industry Studies***

13. The Minister of Industry and Competition Commissioner should not be empowered to requisition industry studies from the CITT. The Commissioner already has the widest possible powers of inquiry in respect of any potential issue covered by the *Competition Act*. Further powers that would not be constrained by the due process requirements of the *Act* are unnecessary and undesirable. Such studies would be irrelevant to the enforcement of the *Competition Act*, may be politically-motivated, and would impose unnecessary costs and burdens on Canadian companies.

## INTRODUCTORY COMMENTS

### *The Competition Policy Group*

This submission has been prepared on behalf of 10 Canadian corporations representing a cross-section of industries.<sup>1</sup> The “Competition Policy Group” was established in 1970 to provide input regarding proposed amendments to the *Combines Investigation Act*. It has participated actively in prior reform proposals<sup>2</sup> and welcomes the opportunity to provide input in respect of the issues raised in the *Discussion Paper*.<sup>3</sup> As in the past, this submission focuses on those issues which the Group considers to be most significant. Accordingly, it addresses many but not all of the questions posed in the *Discussion Paper* and includes other general comments which the Group considers relevant.

### *Are Changes Necessary or Desirable?*

When the Director of Investigation and Research initiated the Bill C-20 round of amendments in 1995, he observed that “for the most part, the *Act* is working well and the approach it represents is fundamentally sound”.<sup>4</sup> The Competition Policy Group agreed with that assessment and believes it continues to be accurate today.

The Minister of Industry has emphasized the importance of framework laws as a source of comparative advantage or disadvantages for Canada.<sup>5</sup> A sound *Competition Act* will provide comparative advantage for Canada if it promotes efficiency and avoids unnecessary chilling effects and burdens for Canadian businesses. While some of the proposed amendments in the *Discussion Paper* would advance Canada’s comparative advantage through economically sound and effective competition laws, there are important areas where the changes would be contrary to this objective.

### *The Importance of Caution*

Changes to the law are inevitably tested in the courts, especially so when changes are fundamental. The complexity of the competition laws makes it hard to predict the outcome

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<sup>1</sup> The members of the Group are Air Canada; Alcan Aluminium Limited; BCE Inc.; BP Canada Energy Company; Dupont Canada Inc.; The Coca-Cola Company; Ford Motor Company of Canada, Limited; General Electric Canada Inc.; General Motors of Canada Limited; IBM Canada Limited; Imperial Oil Limited; and Petro-Canada.

<sup>2</sup> The Group provided input to the government regarding the various proposals leading to the enactment of the “Stage I” amendments in 1976, the “Stage II” amendments in 1986, Bill C-20 in 1999 and Bill C-23 in 2002.

<sup>3</sup> Government of Canada, “Discussion Paper - Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” (June, 2003) [hereinafter, the “*Discussion Paper*”].

<sup>4</sup> Competition Bureau, “Discussion Paper — Competition Act Amendments” (Ottawa: Queen’s Printer, 1995) at i.

<sup>5</sup> Hon. J. Manley, Speaking Notes, “Address to the Canadian Bar Association Annual Competition Law Conference” (Aylmer, Quebec, September 29, 1995).

of such litigation.<sup>6</sup> Thus *Competition Act* amendments will result in uncertainty in an important area of economic framework law and the possibility of decisions which would be disadvantageous to the Canadian economy. Such risks can only be worth considering where there is clear *evidence* that the current law is not working and that the changes proposed will improve Canada's marketplace rules.

This submission focuses on the four aspects of the *Discussion Paper* which would have particularly far-reaching implications for the efficiency and competitiveness of Canadian businesses: introduction of administrative monetary penalties and damages for abuse of dominance and most other reviewable practices (referred to in the *Discussion Paper* as "Strengthening the Civil Provisions"); a new regime for competitor agreements; the reform of the pricing offences; and industry studies. Because of the potential for harm from changes made in response to theoretical arguments which may not take account of the real-world commercial environment facing Canadian businesses, the Group urges caution in respect of all but the pricing reforms. The axiom "if it ain't broke, don't fix it" remains as valid today as ever.

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<sup>6</sup> A recent example is the *Superior Propane* litigation, in which two Competition Tribunal hearings and two appellate court judgements have rendered the merger efficiency defence provisions in the *Competition Act* virtually unworkable for both private parties and the Competition Bureau: see *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2003), 23 C.P.R. (4<sup>th</sup>) 316 (F.C.A.), *aff'd* (2002) 18 C.P.R. (4<sup>th</sup>) 417 (Comp. Trib.); and *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.), *rev'd* 11 C.P.R. (4<sup>th</sup>) 289 (F.C.A.).

## “STRENGTHENING THE CIVIL PROVISIONS”

### GENERAL COMMENTS — PENALTIES AND DAMAGES

The title of this section of the *Discussion Paper* suggests that the reviewable practices in Part VIII of the *Competition Act*<sup>7</sup> are weak and ineffective. In fact, there is no evidence that such provisions are inadequate. To the contrary, the Competition Bureau (the “Bureau”) has a strong record of obtaining remedial commitments or orders in those rare cases where anti-competitive effects are occurring. Adding penalty and/or damage exposures would simply place additional hurdles in the path to international competitiveness for Canadian businesses and chill commonplace activities that are normally welfare-enhancing for the Canadian economy.

#### *Principles Underlying The Current “Reviewable Practices” Regime*

The concept of non-criminal reviewable practices was introduced into the *Combines Investigation Act* in 1976 and was expanded in the 1986 Stage II amendments.<sup>8</sup> It gives Canada one of the most enlightened competition laws in the world in the areas of distribution practices and other ordinary commercial conduct.<sup>9</sup> The recognition that such conduct is only anti-competitive in the rare situations where there are monopolization/market power risks, and otherwise is usually efficiency-enhancing and pro-competitive, is consistent with modern economic thought,<sup>10</sup> and has been recognized as such by Canadian courts.<sup>11</sup>

The fundamental principle is that a reviewable practice is lawful unless and until the Competition Tribunal has been satisfied on evidence presented by the Bureau (or in certain cases private plaintiffs) that specific conduct should be prohibited in a particular marketplace situation. The Bureau plays a vital role in screening out meritless complaints and focussing on the few cases where the *public interest* in competitive markets may be threatened. This gives Canadian businesses valuable flexibility to compete vigorously and efficiently.

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<sup>7</sup> *Competition Act*, R.S.C. 1985, c. C-34, Part VIII.

<sup>8</sup> See S.C. 1974-75-76, c. 76; and R.S.C. 1985, c. C-34.

<sup>9</sup> For a detailed analysis of the Economic Council of Canada study and other historical developments leading to the enactment of the reviewable practices framework, see *Should Reviewable Practices Be Turned Into Competition Torts?*, Report Prepared for the Competition Policy Group (October, 2001) at 37-38 and 179-189 [hereinafter, the “CPG Report”].

<sup>10</sup> See, eg, D.W. Carlton & J.M. Perloff, *Modern Industrial Organization* (New York: Harper Collins, 2<sup>nd</sup> ed., 1994) at 54 and, more generally, chapters 13 and 20; J. Church & R. Ware, *Industrial Organization — A Strategic Approach* (Toronto: Irwin McGraw Hill, 2000) at chapters 19 and 23; and G. Draper and D. West, “Evaluating Challenges to Non-Price Vertical Restraints” 19 *Can. Compet. Rec.* 4 (1999-2000) at 86ff.

<sup>11</sup> See, eg, *Harbord Insurance Services Ltd. v. Insurance Corporation of British Columbia* (1993), 9 B.L.R. (2d) 81 at para. 12 (B.C.S.C.) (“the practices of ‘exclusive dealing’, ‘market restriction’ and ‘tied selling’, in the absence of legislation prohibiting them, are legitimate, are lawful and *prima facie* not contrary to public policy”); *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.* (1990), 40 C.P.R. (3d) 1 at 55 (F.C.T.D.) (“[...] abuse of dominant position in the *Competition Act* is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the *Act* [...]”); and *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 61 C.P.R. (3d) 204 at 213 (Ont. Div. Ct.) (“[...] s. 75(1) does not proscribe any conduct and, therefore, can neither be ‘breached’ or ‘violated’”).

The *Discussion Paper* proposes a fundamental reworking of this carefully crafted legal framework. Introducing penalties and/or damages for abuse of dominance as well as refusals to deal, tied selling, market restriction and exclusive dealing<sup>12</sup> would convert these reviewable practices into *quasi-criminal offences* and/or *private-interest-oriented competition law torts*.<sup>13</sup>

### ***Is There a Problem Which Needs to be Addressed?***

Most commercial conduct which fits into the definitions of exclusive dealing, market restriction, tied selling or other reviewable practices is never brought to the attention of the Bureau because it is not even plausibly anti-competitive. The Bureau receives an average of about 630 complaints per year related to these provisions of the *Act*. However, those which raise genuine concerns regarding the public interest in competition are exceedingly rare: less than 1% of complaints are found by the Bureau to merit Competition Tribunal proceedings or alternative case resolutions.<sup>14</sup>

While conduct which warrants action under the *Act* arises infrequently, the history of cases brought before the Competition Tribunal demonstrates that the Bureau is very successful in obtaining remedies when necessary. Seven contested proceedings have been completed since 1986<sup>15</sup> with the Bureau succeeding on two of the three refusal to supply cases<sup>16</sup> and, in large part, on the four abuse of dominance / tied selling / exclusive dealing cases.<sup>17</sup>

### ***Chilling Effects Would Increase***

For the reasons outlined below, when the uncertainty of fact-intensive competition litigation is supplemented by potentially ruinous penalties and/or damage awards, it

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<sup>12</sup> *Competition Act*, ss. 75 and 77-79.

<sup>13</sup> This would be in addition to the existing common law remedies in tort for breach of contract, restraint of trade, conspiracy to injure, inducing breach of contract, interference with economic relations, wrongful termination of a dealer or distributor, passing-off, injurious falsehood (unfair competition through defamation) and breach of confidence.

<sup>14</sup> See Appendix A, which summarizes Bureau enforcement statistics for 1992-2002.

<sup>15</sup> An additional case related to alleged predatory conduct by Air Canada is currently before the Tribunal: see *Canada (Commissioner of Competition) v. Air Canada*, CT-2001/002. On July 22, 2003, the Tribunal released its Reasons and Findings for “Phase I” of the application, in which it agreed with the Commissioner and concluded that Air Canada had operated flights on the Toronto-Moncton and Montreal-Halifax routes at fares that did not cover its avoidable cost. “Phase II” of the proceeding will consider the remaining elements of the abuse provision (eg whether or not a “practice” of anti-competitive effects has been demonstrated, leading to a substantial lessening of competition).

<sup>16</sup> See *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), aff’d (1991), 38 C.P.R. (3d) 25; and *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.). *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, (1997), 78 C.P.R. (3d) 321 (Comp. Trib.), was dismissed based on a jurisdictional challenge.

<sup>17</sup> Two of the abuse of dominance cases included overlapping allegations of tied selling: see *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); and *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), C.P.R. (3d) 1 (Comp. Trib.). Another involved a parallel pleading of exclusive dealing: see *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1996), 64 C.P.R. (3d) 216 (Comp. Trib.). The fourth case was *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

can be expected that many firms will abandon conduct which is neutral or pro-competitive. (Such exposures would also provide the Bureau with enormous and unfair leverage that could be used to extract concessions in cases where the conduct may not be anti-competitive.) This will affect all firms, although small and medium-sized enterprises will be particularly susceptible because the overall exposure could easily represent a large fraction of their total assets or equity.

## **RESPONSES TO SPECIFIC QUESTIONS**

### ***Administrative Monetary Penalties***

1. *Do you agree the Competition Tribunal should have the ability to impose AMPs when firms contravene the sections listed above [ie ss. 75, 76, 77, 79, 81]? Why or why not?*

No.

As noted above, firms do not “contravene” the provisions in Part VIII of the *Act*. These “reviewable practices” were deliberately designed to focus on the ability to provide remedies in the rare cases where anti-competitive conduct is occurring. Indeed, as one commentator has noted,

[t]he genius of the *Competition Act* is that it recognizes that reviewable conduct is ambiguous as to its economic consequences. This ambiguity of benefit associated with most aspects of vertical conduct gave rise to an enforcement regime *expressly and explicitly designed to minimize the chilling effect on pro-competitive conduct*, or conduct which is at least not substantially anti-competitive.<sup>18</sup>

The proposed reforms would fundamentally change these provisions into extremely serious quasi-criminal offences.<sup>19</sup>

The term “AMP” is a misleading euphemism in this context. The existing maximum fine of \$100,000 (\$200,000 for subsequent orders against the same party) for deceptive marketing practices in Part VII.1 of the *Act*<sup>20</sup> is an AMP. However, the maximum “AMP” for abuse of dominance by an airline is \$15 million — 50% higher than the very substantial \$10 million maximum for the most serious criminal offence (conspiracy) in the *Act*.<sup>21</sup>

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<sup>18</sup> J.B. Musgrove, “Remedies for Reviewable Conduct: Adjusting the Balance” 16 Can. Comp. Rec. 2 (1995) 34 at 46 (emphasis added).

<sup>19</sup> In addition, even if damages were left out of the regime, the introduction of penalties would undoubtedly cause plaintiffs to attempt to overturn the well-settled law that a reviewable practice does not constitute the legal violation needed to invoke common law torts such as interference with economic relations or conspiracy. See, eg, *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 23 O.R. (3d) 766; *Polaroid Canada Inc. v. Continent-Wide Enterprises Ltd.* (1994), 59 C.P.R. (3d) 257 (Ont. Gen. Div.); and *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia* (1993), 13 C.C.L.I. (2d) 262.

<sup>20</sup> *Competition Act*, s.74.1(1)(c).

<sup>21</sup> *Competition Act*, ss. 79(3.1) and 45(1).

The suggestion that the Competition Tribunal be given the power to impose unlimited fines<sup>22</sup> would be even further removed from the concept of an AMP. The absence of a modest maximum fine is also incompatible with the proposed provision indicating that the purpose of AMP orders would be to promote compliance rather than to punish.<sup>23</sup>

As a practical matter, penalties would have a substantial chilling effect on the enormous range of day-to-day commercial activity covered by the major reviewable practices:

- **Tied Selling** — This reviewable practice is broadly defined to include all sorts of package deals and bundling arrangements (eg combo meals at fast food restaurants, vacation packages, many bonus offers for consumer products, discounts for distributors/dealers which carry multiple products from a single supplier, various types of co-branding or co-promotion arrangements, etc). Such offers are usually very beneficial to, and are often requested by, customers.
- **Market Restriction** — This reviewable practice encompasses virtually all contractual limits on the geographic territory or customers to which a distributor, dealer or franchisee may sell products or services. As such, it goes to the core of the design of distribution strategies in any industry where regional/local interaction with customers is required. Moreover, such territories are often put in place to provide the distributor/dealer/franchisee with valuable protection for the investments it will make in selling a particular manufacturer's brand of products to customers.
- **Exclusive Dealing** — This reviewable practice covers almost any type of exclusivity arrangement between suppliers and their distributors/dealers/franchisees. As with territory clauses, such arrangements are frequently used to develop distribution systems in which supplier and customer incentives are aligned to achieve mutually beneficial business objectives.
- **Refusal to Deal** — This reviewable practice is potentially applicable to the termination of any distribution, dealer or other supply relationship. In addition, it can be used to force the creation of a supply relationship where none exists — an extreme intrusion on the autonomy of businesses to determine how they will market their products and services. The private interests of the parties to such relationships are already covered by various contract and tort provisions of common law, and it is highly unusual that

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<sup>22</sup> *Discussion Paper*, Appendix 1, Draft New 107.1(1).

<sup>23</sup> *Ibid.*, Draft News. 107.1(3).

such a termination in any way affects the public interest in competitive markets.<sup>24</sup>

- Other Activities Covered by Abuse of Dominance — This broad reviewable practice is potentially applicable to any commercial activity engaged in by firms with a large market position that may negatively affect their rivals. Some of the specific examples listed in the *Act* include freight equalization, the use of “scarce” facilities or resources also required by a competitor, exclusive supply arrangements, *etc.* In addition, contractual practices such as most-favoured-nation clauses, meet-or-release clauses, non-competition clauses, rights-of-first refusal and evergreen renewal provisions have been subject to review. However, these commonplace practices are normally pro-competitive and indeed are frequently requested by customers.<sup>25</sup>

Making these reviewable practices subject to penalties would dramatically change the legal risk analysis for businesses. The possibility of substantial financial exposures would cause firms not to pursue some activities that might be the subject of competitor complaints, even though they are likely to be defensible.

It is also notable that the United States does not normally employ penalties to deal with comparable issues under its monopolization law. For example, major recent proceedings involving Microsoft and also the VISA and Mastercard networks were entirely focussed on the same types of prohibition or other remedial orders related to contractual and business practices that are the focus of the reviewable practices provisions in Part VIII.<sup>26</sup>

2. *Should AMPs be imposed at the discretion of the Competition Tribunal? Why or why not? Should there be a statutory maximum such as currently exists in subsection 79(3.1) (a maximum of \$15 million)? If not, what alternative would you suggest?*

If, notwithstanding the foregoing, AMPs are to be imposed, the Competition Tribunal’s discretion should be subject to a modest cap which is consistent with the asserted

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<sup>24</sup> Refusal to supply is an exception to the common law rule that manufacturers or traders may choose who they sell to in the marketplace (see, *eg*, *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1987) (U.S.S.C.) at 321-322. See also W. Grover, “Refusals to Deal” 12 *Can. Compet. Rec.* 2 (1991) 34 at 38:

The law recognizes that a supplier has the right to terminate a dealer who is not adequately representing his product. For example, a supplier of high-quality heating equipment could terminate a dealer who did not provide adequate service after installation. The law also recognizes the right of a businessman to change distribution procedure, even though this means reducing the number of dealers.

<sup>25</sup> The Competition Tribunal has recognized that a market-based economy is predicated on, and generally benefits from, aggressive competition — “seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off”: *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), C.P.R. (3d) 1 (Comp. Trib.) at 196.

<sup>26</sup> See, *eg*, *United States v. Visa U.S.A., Inc.*; *Visa International Corp.*; and *Mastercard International, Incorporated*, Docket No. 02-6074/02-6076/02-6078 (2d Cir. 2003); and *United States v. Microsoft Corporation*, Final Judgement, November 12, 2002 (D.C. Dist. Ct., 2002).

objective of focusing on compliance rather than punishment<sup>27</sup>. This could be achieved by extending the \$100,000/\$200,000 maximum for deceptive marketing practices<sup>28</sup> to Part VIII as well. Multi-million dollar or unlimited fines should be reserved only for the most serious criminal offences under the *Act* or the *Criminal Code*. Applying fines of this magnitude to Part VIII of the *Act* would be totally inappropriate and tantamount to treating reviewable practices as criminal offences, with equivalent punitive effects and stigma.

3. *Do you agree that the proposed criteria for assessing AMPs as outlined in the draft provision in subsection 107.1(2) are appropriate? Should other criteria be added to guide the Tribunal's assessment? If so, which criteria do you suggest?*

The criteria appear to include items with a punishment focus,<sup>29</sup> contrary to the requirement in proposed section 107.1(3) that an AMP order is to focus on promoting compliance with the *Act*. In particular, the references to “vulnerability of the class of persons adversely affected”, “injury to competition in the relevant market” and “the volume of gross sales affected” should be deleted to remove this punitive focus. Similarly, the clause which refers to “any other relevant factor”<sup>30</sup> should be limited by adding the phrase “[...] related to the promotion of conformity with this Part”.

4. *Should the general regime for AMPs also apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?*

It would be inappropriate to extend an AMP regime to foreign-directed refusals to supply when neither the Bureau, the *Industry Committee Report*<sup>31</sup> nor the *Discussion Paper* has indicated any need, benefit or other reason for such a change.

6. *Do you have additional comments?*

It appears that private plaintiffs would have the same opportunity as the Commissioner to seek to have AMPs imposed.<sup>32</sup> This would be highly unusual — normally public officials are entrusted with the responsibility of seeking penalties related to enforcement of public laws. It would be of particular concern in the context of these provisions because of their susceptibility to self-interested private litigation by competitors or other marketplace

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<sup>27</sup> *Discussion Paper*, Appendix 1, Draft New s. 107.1(3).

<sup>28</sup> *Competition Act*, s. 74.1(1)(c).

<sup>29</sup> *Discussion Paper*, Appendix 1, Draft New ss. 107.1(2)(b), (c) and (d).

<sup>30</sup> *Ibid.*, Draft New s. 107.1(2)(g).

<sup>31</sup> House of Commons, Standing Committee on Industry, Science and Technology, “A Plan to Modernize Canada’s Competition Regime” (April, 2002) [hereinafter, the “*Industry Committee Report*”].

<sup>32</sup> See *Discussion Paper*, Appendix 1, Draft New s. 107.1(1), which states that “where the Tribunal makes an order under section 75, 76, 77, 79, 79.11 or 81 against any person, it may also order the person to pay [...] an administrative monetary penalty in an amount in the discretion of the Tribunal.” This wording appears to permit plaintiffs that have commenced a private refusal to deal, tied selling, market restriction or exclusive dealing action to request the imposition of an AMPs order.

participants.<sup>33</sup>

### ***Civil Cause of Action***

18. *Should section 36 be amended to allow businesses and individuals who have suffered damages to recover their losses in civil court once an order by the Tribunal or a court has been made? Why or why not?*

This proposal is predicated on the same misunderstanding of the nature of a “reviewable practice” that has already been discussed above. The effect would be to turn remedially-oriented reviewable practices into broadly-worded competition torts. More specifically, the proposed amendment would expose Canadian companies to large damage claims by multiple individual plaintiffs as well as potentially enormous class action claims. With the recent emergence of an entrepreneurial Canadian class action bar, this development would be a recipe for expanding U.S.-style lawyer-driven private antitrust litigation in Canada.

As discussed in the General Comments and the response to question 1 above, it is fundamentally unfair to place Canadian businesses under massive financial exposure in respect of the many ordinary commercial practices covered by Part VIII that are only occasionally anti-competitive,<sup>34</sup> especially when such effects are difficult to identify and predict in advance. A further practical result (presumably unintended) of this level of exposure could be to potentially provide unwarranted leverage for the Bureau to force abandonment of practices or settlements by firms which may give up their right to have “their day in court” before the Competition Tribunal because of the uncertainty of fact-intensive reviewable practices litigation.

The *Discussion Paper* seeks to justify this amendment on the basis of there being “all the safeguards of civil courts in place to guard against strategic litigation”.<sup>35</sup> However, this directly contradicts explicit and repeated statements by the former Commissioner and the Minister of Industry to the effect that the absence of private damage awards was one of the four core safeguards against the high risk of strategic litigation resulting from the unique nature of reviewable practices.<sup>36</sup> The extension of section 36 of the *Act* to the recovery of damages for

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<sup>33</sup> For a detailed analysis of the risks of strategic litigation in respect of the reviewable practices in Part VIII of the *Act*, see the *CPG Report*, *supra* note 9.

<sup>34</sup> On average, the Competition Bureau identifies about 4 situations per year in which reviewable practices cases are anti-competitive and warrant remedial action (see the statistics in Appendix A).

<sup>35</sup> *Discussion Paper* at 11.

<sup>36</sup> See, *eg*, the testimony of Konrad von Finckenstein before the House of Commons Standing Committee on Industry, Science and Technology on April 13, 2000 (“certainly, [the *Act*] should not provide for damages [for reviewable practices]”); and on November 7, 2001 (in which he stated that private litigants before the Competition Tribunal “could get only injunctive relief, not damages, so there would be no incentive for strategic litigation”). See also the testimony of the Hon. Allan Rock before the Standing Senate Committee on Banking, Trade and Commerce on April 18, 2002, in which he stated that “the issue [of private access] turns on how you see the role of the tribunal. I do not see it as a source of compensatory damages for an aggrieved individual party. Rather, I see it as an agency that regulates the marketplace in the broad public interest.”

reviewable practices would indirectly circumvent the carefully-constructed balance for the private rights of action added by Bill C-23.<sup>37</sup>

19. *What should be the starting point for the assessment of the loss or damage suffered as a result of the reviewable practice: the day of the start of the practice or of an investigation by the Commissioner, or the date of an application to the Tribunal or a court?*

This question raises an important issue, particularly since the absence of a specified start date<sup>38</sup> would appear to permit damage claims from the day the practice commenced. This would be unfair and inappropriate in the context of common commercial activity where anti-competitive effects are unlikely (and sometimes difficult to predict in advance of a full analysis by the Competition Tribunal).<sup>39</sup>

The 1976 and 1986 amendments to the *Act* considered this issue carefully and designed a section 36 right to recover damages that complements the concept of a reviewable practice through the linkage to breach of a Competition Tribunal remedial order. Any earlier date would undermine the reviewable practice concept and the opportunity for firms to fully defend such cases before becoming exposed to damages. If an earlier date were to be established, however, the “the date of an application to the Tribunal or a court” should be used to minimize the concerns set out above.

20. *Under the proposed provision, consent agreements under sections 74.12 and 105 of the Act are exempt from recourse under section 36. Do you agree with this? Why or why not?*

Yes.

It is generally recognized that settlements such as consent agreements can be efficient and effective methods for remedying competition concerns under the *Act*.<sup>40</sup> If a consent agreement were to expose the settling company to potential follow-on individual and/or class actions for damages under section 36 of the *Act*, it would make such resolutions much less attractive to private parties and hence much more difficult for the Bureau to obtain. The result would be a significant increase in contested cases which would result in greater costs and delayed outcomes for the Bureau, defendants and other marketplace participants, as well as the Competition Tribunal. It would also unnecessarily drain the Bureau’s budget which, according to the *Industry Committee Report*, is already under-funded.<sup>41</sup>

22. *Should section 36 apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?*

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<sup>37</sup> *Competition Act*, ss. 75(1), 77(3.1) and 103.1, added by S.C. 2002, c. 16.

<sup>38</sup> While the *Discussion Paper* mentions this issue, Appendix 4 has been drafted without any restriction on the date at which damages begin to accrue.

<sup>39</sup> See the General Comments as well as the responses to Questions 1 and 18 for further discussion of these points.

<sup>40</sup> See, *eg*, Competition Bureau, “Conformity Continuum Information Bulletin” (June 2000). They minimize costs for both the Competition Bureau and private parties.

<sup>41</sup> See, *eg*, the *Industry Committee Report* at 34.

It would be inappropriate to extend section 36 to foreign-directed refusals to supply when neither the Bureau, the *Industry Committee Report* nor the *Discussion Paper* has provided any need, benefit or other reason for such a change.

23. *Do you have additional comments?*

If, notwithstanding the foregoing, damage actions were to be introduced, damages should only be payable for conduct occurring after the amendment is proclaimed into force. It would be fundamentally unfair to expose Canadian businesses to retroactive liability in respect of activities undertaken under the current structure of the reviewable practices.

## “REFORMING THE CRIMINAL CONSPIRACY PROVISION”

### GENERAL COMMENTS

While the Public Policy Forum and the Industry Committee have asserted that there is a consensus regarding the concept of reforming the conspiracy offence,<sup>42</sup> the reality is that a large portion of the business and legal communities do not agree that such changes should be made.<sup>43</sup> For example, many of the submissions to the Public Policy Forum regarding this issue in 2000 expressed concern about the proposals in Bill C-472 (which are very similar to those in the *Discussion Paper*).<sup>44</sup> More recently, a task force appointed by the Canadian Bar Association’s Competition Law Section, which consisted of leading competition law experts, recommended strongly against the proposed reform of the conspiracy offence,<sup>45</sup> and the Section’s Executive communicated the lack of consensus in its membership to the Bureau.<sup>46</sup>

The three main arguments advanced by proponents of reform are that the current section 45 has a chilling effect on strategic alliances, that it is too difficult to enforce, and that Canada is lagging behind international norms because it lacks a *per se* cartel offence. For the reasons detailed in the response to Question 24 below, the Group believes that the proposed reforms would create rather than reduce chilling effects, that the Bureau’s enforcement record proves the effectiveness of the current law, and that Canada is an international leader in cartel enforcement.

If reforms were to proceed, there would be complex challenges in developing a statutory *per se* offence that is not over-inclusive, providing appropriate defences, and ensuring that any reviewable practice related to competitor agreements and clearance certificate mechanisms are workable. Specific recommendations regarding the proposed text for each of these aspects of the *Discussion Paper* are set out in the responses to various subsequent questions.

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<sup>42</sup> See Public Policy Forum, “*Amendments to the Competition Act and Competition Tribunal Act: A Report on Consultations*”, Final Report (December 20, 2000) at 27 and the *Industry Committee Report* at 59.

<sup>43</sup> Even the PPF noted, in its 2000 Final Report, that “[t]here was an uneasiness about moving to a strict *per se* criminal provision”: *Ibid.* at 31.

<sup>44</sup> See Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, 36<sup>th</sup> Parl., 2<sup>nd</sup> Sess., 2000, ss. 1 and 7; and *Discussion Paper*, Appendices 5-7.

<sup>45</sup> See “CBA National Competition Law Section 45 Amendments Task Force Report” 21 Can. Compet. Rec. 3 (Summer 2003) (forthcoming).

<sup>46</sup> For instance, the Executive noted at the outset of its report that “there are divided views in the National Competition Law Section of the Canadian Bar Association regarding the necessity or wisdom of amending section 45 of the *Competition Act*”, and further noted that “it may not be possible to define the criminal track of any new two-track framework in a way that would avoid inadvertently bringing within its scope a significant range of agreements not ordinarily considered harmful to competition”: see Canadian Bar Association, National Competition Law Section, “Submission on the Reform of Section 45 of the *Competition Act* (Conspiracy)” (February, 2003) at 1-2, available online at: <<http://www.cba.org/CBA/Sections/Competition/Submissionfeb14-2.pdf>>.

## RESPONSES TO SPECIFIC QUESTIONS

### *Criminal Conspiracy Provisions*

24. Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that the Competition Act include a criminal provision to deal with egregious anticompetitive cartel activity and a companion civil provision to deal with other types of agreements among competitors?

No.

The *Competition Act* already includes criminal provisions that cover cartel activity very effectively. It is neither necessary nor desirable to amend the current section 45 to create a *per se* criminal conspiracy offence.<sup>47</sup>

#### (i) Chilling Effects on Strategic Alliances

The lead rationale for modifying section 45 is to reduce possible chilling effects on strategic alliances.<sup>48</sup> However, the *Discussion Paper* proposals are likely to have the *opposite effect* of criminalizing many types of alliances and other agreements that are not cartels. This results from the inability (even after many years of considering the issue) to draft a statutory definition of cartel conduct that is not over-broad.

Given that section 45 is the one of the “pillars” of the *Act*,<sup>49</sup> it is particularly important that the need for changes be assessed rigorously. This has not been done in the *Discussion Paper* or in the studies commissioned by the Bureau.<sup>50</sup> The constituency best positioned to identify whether section 45 of the *Act* produces problematic chilling effects in real world situations are Canadian businesses which are participants in numerous strategic alliances in Canada and internationally. They clearly are not seeking these reforms. While section 45 of the *Act* may not be free from excessive breadth or ambiguity, any imperfections have not been a significant problem in practice. The reasons include well-developed case law and responsible enforcement track records by the Bureau and the Attorney General.<sup>51</sup>

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<sup>47</sup> It is not necessary to create a separate new reviewable practice covering non-cartel agreements among competitors for the reasons set out in the response to Question 36 below.

<sup>48</sup> See, eg, *Discussion Paper* at 13 and *Industry Committee Report* at 65.

<sup>49</sup> *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 at 29 (S.C.C.) [hereinafter “*PANS*”]. The court further described the conspiracy offence as the “core of the criminal part of the Act”: *ibid.* at 32.

<sup>50</sup> See: A. Gourley, “A Report on Canada’s Conspiracy Law: 1889-2001 And Beyond” (August, 2001), available online at: <<http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf>>; R.S. Russell, A.F. Fanaki & D.D. Akman, “Legislative Framework For Amending Section 45 of the *Competition Act*” (April, 2001), available online at: <<http://strategis.ic.gc.ca/pics/ct/russellrep2.pdf>>; and McCarthy Tetrault, “Proposed Amendments to Section 45 of the *Competition Act*” (August, 2001), available online at: <<http://strategis.ic.gc.ca/pics/ct/tetrault.pdf>>.

<sup>51</sup> The Commissioner is responsible for investigating conspiracy and other criminal offences under the *Competition Act*. Independent prosecutorial discretion is then exercised by the Attorney-General after reviewing the evidence compiled by the Competition Bureau: see *Competition Act*, s. 23.

In practice, criminal enforcement activity related to strategic alliances and joint ventures has almost never been pursued. Where it has identified such concerns, the Bureau has used the reviewable practices of abuse of dominance or merger,<sup>52</sup> both of which have applicability to a broad range of competitor agreements:<sup>53</sup>

“A review of all the [conspiracy, foreign-directed conspiracy and bid-rigging prosecutions since 1980] reveals that *every single case* involved blatant hard-core anticompetitive behaviour — primarily price-fixing, market-sharing or bid-rigging. *None involved what are sometimes called strategic alliances [...]*”<sup>54</sup>

To further reduce uncertainty for firms engaging in strategic alliances, the Bureau issued an information bulletin on the application of section 45 and other provisions of the *Act* to strategic alliances in 1995.<sup>55</sup> While well-intentioned, the level of guidance in the bulletin was modest and has been eclipsed by recent U.S. guidelines on the same subject.<sup>56</sup> The Bureau recognized in 2002 that a revision of its bulletin would be beneficial and requested stakeholder submissions.<sup>57</sup> The Group recommends that the Bureau complete this process in the near future instead of pursuing controversial and unnecessary amendments.

## (ii) Ease of Prosecution

The second frequent justification for redesigning section 45 as a “*per se*” illegal criminal offence is to remove the requirement that the Bureau and the Attorney General prove that an agreement is likely to lessen competition unduly<sup>58</sup> in order to address its alleged “underinclusiveness”.<sup>59</sup> However, no actual under-inclusiveness has been documented and the real focus appears to be to make it easier to obtain convictions. The *Industry Committee Report*

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<sup>52</sup> *Competition Act*, ss. 91-92 and 78-79.

<sup>53</sup> For a detailed analysis, see the response to Question 36 below and also A.N. Campbell, “Two, Three or Four Tracks — How Chilly is the Current and Proposed Treatment of Strategic Alliances Under the *Competition Act*”, Insight National Conference on *Canada’s Changing Competition Regime* (February 26-27, 2003), available online at: <[http://www.mcmillanbinch.com/Upload/Publication/Two%20Three%20or%20Four%20Tracks\\_Strategic%20Alliances%20under%20the%20Competition%20Act\\_ANCampbell\\_0203.pdf](http://www.mcmillanbinch.com/Upload/Publication/Two%20Three%20or%20Four%20Tracks_Strategic%20Alliances%20under%20the%20Competition%20Act_ANCampbell_0203.pdf)>.

<sup>54</sup> See H. Chandler and R. Jackson, “Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada’s *Competition Act*”, Roundtable on *Competition Act* Amendments, May 2000, at 7-8 (emphasis added, footnotes omitted).

<sup>55</sup> Competition Bureau, *Strategic Alliances Under the Competition Act* (Ottawa: Supply and Services Canada, 1995).

<sup>56</sup> U.S. Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), available online at: <<http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>>.

<sup>57</sup> The Bureau’s website contains submissions from the Competition Policy Group, (available online at: <[http://strategis.ic.gc.ca/pics/ct/ct02508e\\_2.pdf](http://strategis.ic.gc.ca/pics/ct/ct02508e_2.pdf)>), the Canadian Chamber of Commerce (available online at: <[http://strategis.ic.gc.ca/pics/ct/ct02508e\\_1.pdf](http://strategis.ic.gc.ca/pics/ct/ct02508e_1.pdf)>), and the Canadian Bar Association (available online at: <[http://strategis.ic.gc.ca/pics/ct/ct02508e\\_3.pdf](http://strategis.ic.gc.ca/pics/ct/ct02508e_3.pdf)>).

<sup>58</sup> *Competition Act*, s. 45(1).

<sup>59</sup> See, eg, Konrad von Finckenstein, “Section 45 At the Crossroads”, Remarks to the 2001 Invitational Forum on Competition Law (October 12, 2001), available online at: <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02285e.html>>.

contained a similar suggestion that the word “unduly” could be removed from section 45.<sup>60</sup> The entirety of the Committee’s analysis of this issue is set out in the following passage:

The necessary elements in a contested section 45 case must accurately reflect contemporary economic thinking on conspiracies; they should not require excessive labouring on irrelevant economic factors coincidental to the agreement or industry under scrutiny. We believe that a conspiracy should be a *per se* criminal offence and should be guided by the simple and pertinent facts of the case at hand.<sup>61</sup>

The Supreme Court of Canada reviewed Canada’s conspiracy jurisprudence and sent out a comprehensive analytical framework in 1992.<sup>62</sup> The elements it established (agreement, market power, injurious behaviour and intent) have readily been utilized by the Bureau, legal counsel for private parties and trial courts. In 1993 the Bureau and the Attorney General embarked on a leniency program which has been an incredibly successful addition to the arsenal of enforcement powers.<sup>63</sup>

It is important to remember that section 45 is an extremely serious criminal offence which is punishable by up to \$10 million in fines per count and up to five years imprisonment. It would be irresponsible in the extreme to amend this provision solely to ease proof by the Crown, especially when no evidence of a problem has been presented.<sup>64</sup>

To the contrary, statistics compiled by the Bureau demonstrate that there has been no such problem since the Supreme Court’s clarification of the law in 1992. The Bureau has obtained convictions in 25 of the 28 conspiracy cases since 1992, a remarkable 89% success

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<sup>60</sup> *Industry Committee Report*, *supra* note 31 at Recommendation No. 13.

<sup>61</sup> *Ibid.* at 61.

<sup>62</sup> *PANS*, *supra* note 49.

<sup>63</sup> Canada is considered a world leader, along with the U.S. and E.U., in the successful use of immunity programs to increase convictions. See, *eg.*, “The Architects of Leniency” (October, 2003) 6:9 *Global Competition Review* at 20; and the further discussion below.

<sup>64</sup> The Industry Committee offered a similar observation regarding a proposal to reform the current *per se* price maintenance offence, noting that the Bureau was the “lone dissenter” on the issue of decriminalizing section 61 of the *Competition Act*, and that the Bureau “could only offer a higher success rate when prosecuting under a *per se* offence as its reason for departing from expert opinion”: see *Industry Committee Report*, *supra* note 31 at 75.

rate.<sup>65</sup> Moreover, as one study has pointed out, the Crown's case in each of the three acquittals was fundamentally flawed.<sup>66</sup>

In fact, the Bureau has proudly emphasized its extraordinary success in getting major companies (including many of the world's largest multinational enterprises, some without Canadian subsidiaries) to plead guilty and pay huge fines in Canada.<sup>67</sup> For example, on the occasion of guilty pleas by three European and two Japanese vitamin producers, the Commissioner noted that "[t]oday's convictions send an important message to business that the Bureau will aggressively pursue the parties involved in international cartels that target Canadian consumers from outside the country. This type of criminal behaviour will not be tolerated".<sup>68</sup> Even more remarkable is the Bureau's success over the past five years in obtaining personal convictions of foreign as well as Canadian executives who engage in such conspiracies. A recent illustration is the \$70,000 fine paid by the U.S.-based former CEO of one of the participants in the graphite electrodes cartel.<sup>69</sup> These results would not have occurred if the "undue lessening of competition" requirement<sup>70</sup> was a serious impediment to the enforcement of the conspiracy offence.<sup>71</sup>

### (iii) International Standards

The OECD has taken a leadership role in the international battle to combat hard core cartels. Its *Recommendation* requires countries to:

- develop competition laws to "effectively halt and deter hard core cartels" by use of effective sanctions and adequate enforcement powers (including

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<sup>65</sup> Chandler and Jackson, "Treatment of Conspiracies", *supra* note 54 at Appendix I. Of the three acquittals, one related inadequate proof of the agreement and one related to failure to prove intent (see *Ibid.*, Appendix II). Thus, only one case since 1992 (the "Freight Forwarders" case) foundered on the Bureau's inability to prove that "competition was likely to be lessened unduly" (the court noted that the Crown's evidence was "unreliable and inconclusive" in part because its expert witness engaged in advocacy and lost his credibility: see *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 290 (Ont. Ct. Gen. Div.) at 325.)

<sup>66</sup> See B.A. Facey & D.H. Asaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" 20 Can. Compet. Rec. 4 (Winter 2001-2002) 61 at 63.

<sup>67</sup> See the summary chart entitled "Recent Convictions and Fines in Cartel Cases Under the *Competition Act*", attached to this submission as Appendix B.

<sup>68</sup> Competition Bureau, News Release, "Federal Court Imposes Fines Totally \$88.4 Million for International Vitamin Conspiracies" (22 September 1999).

<sup>69</sup> See Competition Bureau, News Release, "Former UCAR Executive Robert Krass Pleads Guilty to Price Fixing" (18 September 2003), in which the Deputy Commissioner stated that: "[t]he Competition Bureau will be aggressive in pursuing executives who play a central role in cartel activities." Fines against senior executives have reached as high as \$250,000 per individual, as in the case of Takaysu Miyasaka of Daicel Chemical Industries Ltd., a participant in the sorbates conspiracy: see Commissioner of Competition, *Annual Report for the Year Ended March 31, 2001* (Ottawa: Industry Canada, 2001) at 32. Charges under section 45 have also resulted in prison sentences: see, *eg*, Director of Investigation & Research, *Annual Report for the Year Ended March 31, 1997* (Ottawa: Supply and Services Canada, 1997) at 12 (the accused, Jacques Perreault, was sentenced to a one-year prison term).

<sup>70</sup> *Competition Act*, s. 45(1).

<sup>71</sup> Simply put, "if defendants thought they had a chance at acquittal, because of a weak law, one would not expect to see firms consistently entering guilty pleas" and paying multi-million dollar fines: Facey & Asaf, *supra* note 66 at 63.

document and information production powers, backed up by penalties for non-compliance); and

- cooperate with other member countries in enforcing their laws against hard core cartels.<sup>72</sup>

There is no doubt that Canada meets — indeed exceeds — these international standards.

The OECD defines “hard core cartel” conduct as

an *anticompetitive* agreement, *anticompetitive* concerted practice, or *anticompetitive* arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.<sup>73</sup>

The present section 45 fully covers the recommended scope for a cartel law: price-fixing, market allocation and output restriction agreements all contravene section 45 when they are engaged in by firms with “market power” (*ie* are “*anticompetitive*”).<sup>74</sup>

Proponents of section 45 reform appear to assume that the United States has a simple *per se* standard for cartel conduct that could be codified in a Canadian statutory definition. This perception is mistaken. As the recent FTC decision in the *Polygram Holding* case<sup>75</sup> demonstrates, American law no longer favours (if it ever did) *per se* rules which exclude consideration of the business legitimacy of the questioned collaboration or its contribution to economic efficiency.

In *Polygram Holding*, FTC Chairman Muris provides the most recent summary and exposition of the U.S. law of horizontal restraints, culminating in a review of the Supreme Court decision in *California Dental Association*,<sup>76</sup> which held that conspiracy analysis is “a continuum, rather than a series of distinct boxes (*per se*, quick look, full rule of reason).”<sup>77</sup> Over the past century, section 1 of the U.S. *Sherman Act* (the equivalent of section 45) has generated an enormously complex and fluctuating jurisprudence regarding *per se* and “rule of reason”

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<sup>72</sup> Organisation for Economic Co-operation and Development, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (March 25, 1998) at recommendation A.2, available online at: <<http://webdomino1.oecd.org/horizontal/occdacts.nsf/Display/7328AA9E04799859C1256DAA00643D29?OpenDocument>>.

<sup>73</sup> *Ibid.* (emphasis added).

<sup>74</sup> *PANS*, *supra* note 49 at 36-37. As the Supreme Court noted, absent market power, “agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures”: *ibid.* at 34.

<sup>75</sup> *In the Matter of Polygram Holding, Inc.; Decca Music Group Limited; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp.*, Docket No. 9298 (opinion of July 28, 2003), available online at: <<http://www.ftc.gov/os/2003/07/polygramopinion.pdf>> [hereinafter, “*Polygram Holding*”].

<sup>76</sup> *California Dental Ass’n v. Federal Trade Commission*, 526 U.S. 756 (1999) [hereinafter, “*California Dental*”].

<sup>77</sup> *Polygram Holding*, *supra* note 75 at 25.

analyses. Since the late 1970s the U.S. law has been moving towards a continuum model which disavows the sharp dichotomy between “*per se*” and ‘rule of reason’ approaches in favour of a unified analytical continuum.<sup>78</sup>

The present state of the law, in the aftermath of *California Dental* and *Polygram Holding*, requires a case-by-case contextual analysis, in which

[t]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is *an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint*.<sup>79</sup>

Rather than employing the rigid *per se* treatment proposed in the *Discussion Paper*, modern U.S. law recognizes that “conduct cannot be judged illegal without an analysis of its market context to determine whether those engaged in the conduct or restraint are likely to have sufficient power to harm consumers”<sup>80</sup> (in other words, an examination of market power, such as presently required by the undue lessening of competition element of the current section 45). Even where the impugned conduct is “inherently suspect” which in the past would have been subject to “summary condemnation”, the defendant can now avoid a *per se* determination of illegality by “advancing a legitimate justification for those practices”, triggering a further rule-of-reason analysis.<sup>81</sup>

25. *Do you agree that the phrase “persons who compete or could reasonably be expected to compete” will ensure the provision only captures horizontal agreements among competitors? Will this language require the Competition Bureau to do a complex competition analysis for each criminal case? If so, how else could horizontal agreements be captured by the provision? Please explain.*

The proposed phrase would capture more than horizontal agreements among competitors and should be revised to remove this over-inclusiveness.

**(i) Potential Competitors**

The phrase “persons who compete *directly*” would be a reasonable method of ensuring that a criminal provision “only captures horizontal agreements among competitors.” However, the phrase “or could reasonably be expected to compete” is vague and could create criminal exposure for vertical, conglomerate and other non-horizontal agreements which are

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<sup>78</sup> For a Canadian perspective on these “twilight years of the *per se* rule in the U.S.”, see B.M. Graham, “Reform of Section 45 is Unnecessary”, Atlas Information Canada Conference, Langdon Hall, May 2002 at 1 and 5ff.

<sup>79</sup> *California Dental*, *supra* note 76 at 780-81.

<sup>80</sup> *Polygram Holding*, *supra* note 75 at 29.

<sup>81</sup> *Ibid.*

rarely anti-competitive. Deletion of the latter phrase would help to achieve the objective of limiting the offence to horizontal agreements.<sup>82</sup>

## (ii) Competition Related to the Agreement

The proposed provision appears to capture agreements between firms which are competitors in *any market*, even if the agreement does not relate to the competing products or services. In the modern economy, many firms compete with respect to some products or services while having supply agreements or strategic alliances with respect to others. This would include “dual distribution systems” which are commonplace in franchise networks and many other industries where a supplier has some corporate outlets or direct sales in addition to independent franchisees, distributors or dealers:

- The “establishing” of the supply price to the independent purchaser<sup>83</sup> could be *per se* illegal under the *Discussion Paper* proposals even though it is a “vertical” rather than “horizontal” transaction and clearly would not have any anti-competitive effects.<sup>84</sup>
- Contractual terms which fix or cap supply volumes would also appear to be problematic *per se* because of the “limiting or lessening” of the “supply of a product”,<sup>85</sup> even though the restriction may be a commercially sensible reflection of the two parties’ desired level of commerce and have absolutely no anti-competitive consequences.
- Any attempt to provide a territory to a franchisee, distributor or dealer would appear to be *per se* illegal on the basis it would be “allocating customers or markets”<sup>86</sup> between the manufacturer and the independent reseller.

There are also many other contexts in which competitors in one market may have supply, toll manufacturing, swap or other non-anti-competitive agreements in respect of other products or services. Such arrangements are particularly common in “network industries” where collaboration is usually welfare-enhancing. Examples include transportation (*eg* interlining agreements), telecommunications (*eg* traffic routing and interconnection arrangements), computers and other high technology products (*eg* interface standards), and financial services (*eg*

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<sup>82</sup> Although it would continue to have overly broad potential application to ones which are not anti-competitive — see the response to question 26 below.

<sup>83</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(1)(a).

<sup>84</sup> This goes much further than Bill C-235, *An Act to Amend the Competition Act (protection of those who purchase from vertically-integrated suppliers who compete with them at retail)*, 1<sup>st</sup> Sess., 36<sup>th</sup> Parl., 1997, a private member’s bill which sought to regulate pricing in dual distribution systems that was rejected by the Industry Committee because it focussed on the protection of competitors, not competition.

<sup>85</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(1)(c).

<sup>86</sup> *Ibid.*, Draft New s. 45(1)(b).

various types of payment systems). The commercial relationships between firms in such industries would become *per se* illegal to the extent that they involve “fixing or establishing” the prices for access or other goods or services that are exchanged, and/or “limiting or lessening” the potential “production or supply “of any such product”.<sup>87</sup>

26. *The draft provision would apply to agreements among competitors or potential competitors that have the “purpose” or “effect” of fixing prices, allocating customers or markets, or restricting production or supply of a product. Do you agree with the inclusion of a purpose and an effect test? Why or why not?*

If, notwithstanding the foregoing, a *per se* offence were introduced, it is imperative that it be defined to catch only conduct that is unambiguously anti-competitive. The former Commissioner has acknowledged that this would be a very difficult drafting challenge.<sup>88</sup> The definition of the offence in the *Discussion Paper* has not achieved this objective. The prohibited activities in proposed section 45(1) need to be drafted in such a way as to prevent over-inclusiveness when either a “purpose” or an “effect” test is applied (see the response to Question 27 below). In addition, consideration should be given to using only a “purpose” test. Otherwise, an “effect” test could lead to criminal liability in cases where the impugned agreement has a benign purpose or intent. Such situations could and would be dealt with more appropriately by using the reviewable practices provisions in the *Act*.

27. *Does the provision as drafted capture the types of agreements that are the most egregious? Should boycotts be mentioned specifically, or are they captured by the provision as drafted?*

**(i) Egregious Cartel Conduct**

The draft provision in Appendix 5 covers all three types of concerted activity (price-fixing, market/customer allocation and agreements to restrict output) that are generally regarded as egregious cartel conduct.<sup>89</sup> However, it is drafted in a manner that over-inclusively covers many other types of arrangements that are not cartel conduct.

Even if the introductory clause of the offence was limited to agreements involving specific products or services in which the parties are direct competitors,<sup>90</sup> the three enumerated definitions of hard-core cartel activity are too broad because they have the potential to capture a wide range of activity that should not be subject to criminal sanctions. For example:

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<sup>87</sup> *Ibid.*, Draft New ss. 45(1)(a) and (c).

<sup>88</sup> He has publicly stated, for instance, that “hard core cartel behaviour should be a criminal offence without a competition test. The technical details are, of course, very important and [...] the issues are complex”: see Konrad von Finckenstein, “Section 45 at the Crossroads”, *supra* note 59. The authors of a leading paper on the subject of section 45 reform have also noted that “from the jurisdictions surveyed, we conclude that a *per se* criminal prohibition for naked price-fixing cannot be formulated with complete precision, and will unavoidably target potentially pro-competitive agreements”: see P. Warner & M. Trebilcock, “Rethinking Price-Fixing Law” (1993) 38 McGill L.J. 679 at 716.

<sup>89</sup> See the definition of “hard core cartel” in the OECD *Recommendation*, *supra* note 72.

<sup>90</sup> See the response to Question 25, above.

- Strategic alliances often contain price-related clauses to ensure that the parties do not undermine each other in the course of pursuing the benefits of the alliance. Any such clause could constitute “fixing, establishing, controlling or maintaining” prices, even though the intent and economic effect may be far removed from cartel “price-fixing”.
- Many strategic alliances include territorial, channel or other customer / segment restrictions to divide responsibilities between the parties and create appropriate incentives or protections related to the investments they are making. Such clauses could offend the proposed prohibition against “allocating customers or markets” even though the intent and economic effect may be totally unrelated to any “market allocation” cartel.
- The parties will have difficulty being confident there would not be a “limiting or lessening” of supply in a wide range of strategic alliances because there will normally be some collaboration on the actual output level and it will often be less than the theoretical maximum output for a variety of *bona fide* commercial reasons. This would result in a risk of criminal liability even where the intent and economic effect is not a cartel-like restriction of output to exercise market power.

Network Industries<sup>91</sup> would be especially susceptible to these types of overbreadth. However, many other industries also exhibit collaboration which is not anti-competitive including the high tech sector (where partnering is a common way of integrating complementary inputs in respect of both hardware and software), natural resources (*eg* exploration and development joint ventures, where risk-sharing is essential to facilitate large projects), pharmaceuticals and chemicals (*eg* various types of R&D, supply / toll manufacturing and co-promotion arrangements), and retailing (*eg* joint advertising campaigns by groups of independent dealers or franchisees). These arrangements often promote efficiency and facilitate investments or new product offerings that might otherwise not occur. They are rarely anti-competitive and are certainly not hard-core cartel activity, but could well be caught by one or more of the three proposed *per se* prohibitions related to prices, market allocations or output.<sup>92</sup>

Despite more than a decade of attempts, the proponents of section 45 reform have been unable to develop a workable definition of *per se* cartel conduct. While not surprising in light of a century of experience in the United States, this suggests that section 45 should be left unchanged unless and until the over-inclusiveness concerns are overcome.

## (ii) Boycotts

The *Discussion Paper* improved upon Bill C-472 by not mentioning Boycotts specifically. Most “boycotts” probably would be subsumed by the phrase “preventing,

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<sup>91</sup> See the response to Question 25 above for several major examples.

<sup>92</sup> *Ibid.*, Draft New ss. 45(1)(a)-(c).

eliminating, limiting or lessening the production or supply of a product.”<sup>93</sup> This is a further illustration of the over-breadth of the draft provision: boycotts should not be subject to *per se* criminal liability.<sup>94</sup> For example, “boycotting” could potentially be interpreted as covering refusals to deal which are based on a variety of non-anti-competitive motives including reasonable investment, operational and other criteria related to participation in a network.<sup>95</sup>

28. *Does the draft provision deal appropriately with the issues of circumstantial evidence and intent? If not, what do you propose?*

Please see the response to Question 26 regarding the combination of an intent test for criminal liability with a *per se* offence.

29. *Does the defence in section 45(5) of the draft provision deal appropriately with the potential overreach of a per se provision? Does it provide appropriate safeguards from exposure to civil cause of action under section 36?*

No and no.

**(i) Over-reach**

The idea of an ancillary restraints defence appears to have been inspired by U.S. jurisprudence. However, the attempt to codify it in statutory language has resulted in a proposed defence which has negligible scope because the “necessary” and “less restrictive alternatives” elements<sup>96</sup> would (irrespective of the onus of proof discussed in Question 30) almost never be able to be invoked in practice.

If notwithstanding the concerns set out above, a *per se* version of section 45 were to be enacted, it would be vitally important to provide a meaningful ancillary restraints defence. The steps needed to achieve this are:

- (i) replacing the “is necessary for implementing” test with a more commercially realistic standard such as “bears a reasonable supporting relationship to”;<sup>97</sup> and
- (ii) deleting the requirement that there not be any “less restrictive alternatives” (which is a recipe for complex disputes involving the second-guessing of

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<sup>93</sup> *Ibid.*, Draft New s. 45(1)(c).

<sup>94</sup> See, eg, Carlton, *supra* note 10 at 831.

<sup>95</sup> Indeed, parties to an existing joint venture or other strategic alliance might commit a criminal offence if they declined an overture from another firm that was interested in joining even where this made no commercial sense, involved free riding on their investments or had the potential to disrupt or undermine the alliance.

<sup>96</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(5).

<sup>97</sup> This wording has been inspired by the “reasonable technological relationship” defence to the reviewable practice of tied selling in s. 77(4)(b) of the *Competition Act*.

commercial negotiations with *ex post* hypotheticals and potentially *de minimis* variations).

If these changes were made, the defence would read as follows:

*“(5) In a prosecution under subsection (1), where the accused establishes, on a balance of probabilities, that*

*(a) the agreement or arrangement is ancillary to a principal agreement, and*

*(b) the agreement or arrangement bears a reasonable supporting relationship to the principal agreement,*

*the court shall not convict the accused unless the court finds that the principal agreement, when considered without the agreement or arrangement in respect of which the prosecution is commenced, is for a purpose, has an effect or is likely to have an effect referred to in any of paragraphs (1)(a) to (c).”*

There is also an important technical defect in the definition of “principal agreement”. While this provision appropriately allows for the possibility that an ancillary agreement could be found in a separate agreement as well as within a single broad agreement, the requirement that the separate ancillary and principal agreements be “between the same persons”<sup>98</sup> is too restrictive. Given the multiplicity of corporate and individual parties in many commercial transactions, a specific ancillary restraint may not involve every party to the main agreement (and hence would be ineligible for the defence).<sup>99</sup> The Group therefore recommends that “between” be changed to “includes”, so that ancillary restraints involving a sub-set of multiple parties to a principal agreement remain eligible for this defence.

## **(ii) Relationship to Section 36**

An ancillary restraints defence should have the same applicability in a section 36 private action that is based on a contravention of section 45 as it would have in a criminal prosecution. While this presumably was intended in the *Discussion Paper* proposals, it appears that a very literal reading of the references to “prosecution”, “convict” and “accused”<sup>100</sup> could imply that the defence would not be available in respect of a private action (which may occur regardless of whether criminal proceedings are pursued). These terms are also found in the

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<sup>98</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(6)(b).

<sup>99</sup> For example, a covenant not to compete, which is a standard form of ancillary restraint in the acquisition of a business, will frequently be embodied in a separate agreement that may not necessarily include every party to the broader asset or share purchase agreement.

<sup>100</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(5).

existing defences in section 45.<sup>101</sup> Accordingly, a general amendment to make clear that all the section 45 defences are applicable in section 36 actions would be a useful technical amendment.

30. *Do you agree that the burden of proof - on a balance of probabilities - should lie with the accused with respect to the proposed defence in section 45(5), taking into account the fact that they relate to information on potentially complex economic matters that are primarily within the knowledge and control of the accused? If you do not agree, what other options would you suggest?*

The burden of proof for the proposed defence in section 45(5) should be the same as for all of the other defences available under the current section 45.

31. *Should the defences in the current section 45 be repealed? Why or why not?*

The *Discussion Paper, Industry Committee Report* and the Bureau-commissioned reports have not provided any compelling reasons to repeal the existing defences in section 45.

While three of the defences have been brought forward in the draft revisions to the conspiracy offence, the continued restriction of the affiliate defence to “companies”<sup>102</sup> is puzzling since the term “persons” is used in the offence itself<sup>103</sup>). There is no obvious reason why individuals, proprietorships, partnerships or other unincorporated entities should be precluded from invoking this defence.

Of greater concern is the removal (without any supporting rationale in the *Discussion Paper*) of the important and long-standing defences for:

- (i) exchanging statistics;
- (ii) defining product standards;
- (iii) exchanging credit information;
- (iv) defining industry terminology;
- (v) R&D cooperation;
- (vi) advertising restrictions;
- (vii) packaging sizes / shapes;
- (viii) metric system weights and measures; and

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<sup>101</sup> See *Competition Act*, ss. 45(3), (5), (7), (7.1) and (8).

<sup>102</sup> *Discussion Paper*, Appendix 5, Draft New s. 45(10)(b).

<sup>103</sup> *Ibid.*, Draft New s. 45(1).

- (ix) measures to protect the environment.<sup>104</sup>

These are all matters where collaboration, often conducted through trade associations, is usually efficiency-enhancing and rarely anti-competitive. Since such activities would not necessarily be protected by the ancillary restraints defence<sup>105</sup> and the reviewable practices in the *Act* could be invoked if any anti-competitive effects were to occur, the current defences should be retained.

Missing from the *Discussion Paper* proposals to reform section 45 is any consideration of the pro-competitive efficiencies which competitor collaborations may produce. The *Industry Committee Report* noted the importance of efficiency considerations when moving to a *per se* offence, which would otherwise “cast a wide net — too wide a net” without important exceptions for pro-competitive efficiencies and innovation.<sup>106</sup>

The *Discussion Paper* proposals also omits the new product entry defence that was included in Bill C-472.<sup>107</sup> This would be a useful parallel to the defence which already exists in respect of market restriction and exclusive dealing.<sup>108</sup>

32. *Do you think that block exemptions, such as exemptions by industry, sector or activity, as outlined in draft subsection 45.2(2), should be part of any new criminal conspiracy provision? Why or why not?*

It is premature to address the potential use of block exemptions until a workable *per se* conspiracy offence is developed.

33. *Given the amounts of recent fines obtained from conspiracy prosecutions, would allowing the courts to set the fines at their discretion be a more appropriate way to respond to criminal conspiracies than the current \$10 million fine? Or, should the fine be set based on a fixed percentage of affected commerce? Why or why not?*

**(i) Maximum Fines**

Given the very substantial fines levied in recent conspiracy prosecutions, it is not clear that there is any need to remove the fine cap of \$10 million *per conspiring entity* and *per count*. A review of conspiracy cases over the past decade indicates that the maximum \$10 million fine per offence charged under section 45 has never been imposed<sup>109</sup> (although fines in

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<sup>104</sup> *Competition Act*, s. 45(3).

<sup>105</sup> See *Discussion Paper*, Appendix 5, Draft New s 45(5); and the response to Question 29, above.

<sup>106</sup> *Industry Committee Report* at 62.

<sup>107</sup> Bill C-472, *supra* note 44 at s. 7 (proposed s. 79.1(3)).

<sup>108</sup> *Competition Act*, s 77(4)(a).

<sup>109</sup> Archer Daniels Midland was fined \$9 million on a count of price-fixing under section 45 in 1998 (an additional \$7 million in fines were imposed under two other counts) — see Competition Bureau, News 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).

excess of \$10 million have been cumulatively imposed in cases where multiple offences were charged<sup>110</sup>).

The Competition Policy Group believes that a potential fine of \$10 million would be regarded as a serious deterrent by very large companies (even without regard to the time and cost of a conspiracy investigation and prosecution, the stigma resulting from a conviction, the payment of full damages plus costs in direct civil and/or class actions under section 36, and the damage to customer relationships). The possibility of significant fines and jail sentences for senior executives also provides a major deterrent against corporate misconduct, as does the fact that a conviction in Canada will inevitably lead to follow-on class actions for damages.

The \$10 million cap was in fact introduced to emphasize to courts the seriousness of the conspiracy offence and has been very successful in doing so. If, notwithstanding the foregoing, it is decided that maximum fines need to be increased, a moderately higher fixed level would be preferable to the uncertainty and potential unfairness resulting from providing unlimited discretion to individual trial judges in respect of a *per se* offence. For example, the maximum could be adjusted for inflation which has occurred since it was established in 1986 and periodic updates could also be made in parallel with future inflation levels to maintain the significance of the fine level in real terms.

**(ii) Affected Commerce**

A rigid formula based on a fixed percentage of affected commerce should not be introduced because, as with any criminal offence, there are numerous potential mitigating and aggravating factors that must be considered by a court in determining a sentence which is appropriately tailored to the conduct of each accused and the circumstances of the particular offence. Canadian courts have repeatedly endorsed the fundamental principle (now incorporated in the *Criminal Code*),<sup>111</sup> that sentences must be proportionate to the gravity of the offence charged and the degree of responsibility or culpability of the offender.

**(iii) Absence of Fine Cap for Section 46**

One oversight in the current *Act* is the failure to apply the section 45 maximum fine to the companion anti-avoidance provision in section 46 (which exposes Canadian subsidiaries to apparently unlimited fines<sup>112</sup> for the less culpable offence of implementing — knowingly or unknowingly — an international conspiracy that contravenes the section 45

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<sup>110</sup> In several cases, multiple counts have resulted in total fines against a single entity well in excess of \$10 million. For example, F. Hoffman-LaRoche Ltd. was convicted of eight counts of conspiracy and fined a total of \$50.9 million for its role in the bulk vitamins and citric acid cartels: see Competition Bureau, News Release, “Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies” (September 22, 1999).

<sup>111</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.

<sup>112</sup> This was the fate of UCAR Canada Inc. in the graphite electrodes case — it was convicted of implementing a conspiracy on instructions from its foreign parent and fined \$11 million, a greater penalty than if it had actually been a member of the cartel. See Competition Bureau, News Release, “Record \$30 Million Fine and Restitution by UCAR Inc. for Price Fixing Affecting the Steel Industry” (March 18, 1999).

standards). Whatever fine cap is applicable to the main offence should be extended to the anti-avoidance provision as well.

34. *The new draft criminal provision applies to existing and proposed agreements. How should existing agreements be handled under the new provision? Should there be transitional provisions to deal with existing agreements? If so, what do you suggest? Please explain.*

The changes to section 45 should not apply to existing agreements unless and until they are amended or renewed.

Proper transitional provisions would be critically important to prevent unfairness to parties that in good faith have entered into agreements in reliance on the scope of the current conspiracy law. Such agreements may involve significant investments, commitments or other arrangements that would be time-consuming and costly to restructure. Moreover, even a “safe harbour during a time-limited transition period” would require every company in Canada to review every joint venture, strategic alliance or other agreement or “arrangement” with every person who is a competitor (regardless of whether they were at the time), or other person who could reasonably become a competitor, in order to ensure there is not a violation of the strict *per se* wording proposed for section 45. This would impose a massive compliance burden on Canadian businesses for no good reason.

Retroactive legislation is typically reserved for exceptional circumstances. In this situation, the simpler and fairer policy approach would be to apply the current section 45 to all agreements entered into prior to the amendment taking place. In conjunction with this approach, a limitation could be inserted into the *Act* that would make the new offence applicable at the point when any renewal or amendment of a pre-existing agreement takes place. This would provide a natural time and process for firms to review whether agreements comply with any amendments to section 45.

35. *Do you have additional comments?*

If, notwithstanding the foregoing, a *per se* offence were introduced, a defence for agreements between parties of minor importance should be included. Even the most prominent proponent of reforming section 45, M.P. McTeague, recognized in Bill C-472 that this type of defence was important (in addition to an ancillary restraints defence) to prevent over-reach:

An agreement or arrangement shall not be considered to be collusion if [...] the participants collectively do not account for, or control, at least 25% of the relevant market for the product affected by the agreement or arrangement.<sup>113</sup>

While this provision would partially mitigate the removal of the requirement that market power be established, the market share threshold of 25% used in Bill C-472 was

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<sup>113</sup> Bill C-472, *supra* note 44 at s. 1 (proposed s. 45(7)(e)).

unnecessarily conservative. The Bureau has for many years used 35% as a safe-harbour below which market power cannot realistically be exercised and this would be an appropriate standard for a Section 45 defence.<sup>114</sup>

### *Civil Strategic Alliances Provisions*

36. *Do you think that a new civil provision is required or can the current abuse of dominant position and merger provisions adequately address all other types of agreements not covered by the proposed criminal provision? Why or why not?*

A new civil strategic alliances provision is not required.

The merger provisions can be used to address the vast majority of strategic alliances. This is particularly so in light of the Bureau's enforcement guidelines which interpret the phrase "significant interest in whole or part of the business of a competitor, supplier, customer or other person" in the definition of "merger"<sup>115</sup> to mean the "ability to materially influence the economic behaviour (*eg* decisions relating to pricing, purchasing, distribution, marketing or investment)" — even where there is little or no equity investment involved in the relationship.<sup>116</sup>

The abuse of dominance provisions also have wide applicability because the *Act* specifically covers joint dominance.<sup>117</sup> Since "control" of a "class or species of business"<sup>118</sup> has been interpreted as the possession of market power<sup>119</sup> (which could result from a horizontal or vertical alliance or could simply be possessed by either party on its own), and the list of "anti-competitive acts" which can constitute abuse is non-exhaustive,<sup>120</sup> there is substantial potential to address anti-competitive behaviour resulting from strategic alliances (or other

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<sup>114</sup> See, *eg*, Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1991) [hereinafter, the "MEGs"] at 21; Competition Bureau, *Predatory Pricing Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1992) [hereinafter, the "PPEGs"] at 6-7; and Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (Ottawa: Industry Canada, 2001) [hereinafter, the "ADEGs"] at 13-15.

<sup>115</sup> *Competition Act*, s. 91.

<sup>116</sup> *MEGs*, *supra* note 114 at 1-2. For example, in the *Pay Less Gas* case, the Bureau argued that a series of contracts between Shell Canada and Pay Less Gas (including a gasoline supply agreement and sub-leases over certain retail stations) gave Shell a level of control over Pay Less which met the "merger" threshold in the *Act*: see Director of Investigation and Research, *Annual Report for the Year Ended March 31, 1991* (Ottawa: Supply and Services Canada, 1991) at 8. (Shell and Pay Less Gas ultimately restructured their arrangements to resolve the Bureau's concerns).

<sup>117</sup> See *Competition Act*, s. 79(1)(a), which refers to situations where "one or more persons" substantially control a class of business anywhere in Canada. See also *ADEGs*, *supra* note 114 at 14-17.

<sup>118</sup> *Ibid.*

<sup>119</sup> See, *eg*, *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Director of Investigation & Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); and the *ADEGs*, *ibid.* at 13-14.

<sup>120</sup> *Competition Act*, s. 78 and *infra*, note 143.

competitor agreements) even if they were not subject to the merger provisions. Examples include the consent order remedies in the *Interac* and *AGT* cases.<sup>121</sup>

For more detailed analysis of these issues, please see the paper entitled “*Two, Three or Four Tracks — How Chilly Is The Current and Proposed Treatment of Strategic Alliances Under The Competition Act?*”.<sup>122</sup>

37. *Do you think that the addition of a “no duplicate proceedings” clause could adequately address a potential overlap between the abuse of dominant position provision, the merger provision and the civil strategic alliances provision? Should notifiable transactions under Part IX be excluded from the civil strategic alliances provision? Why or why not?*

Yes.

If, notwithstanding the analysis in response to Question 36 above, a reviewable practice for competitor agreements is inserted into the *Act*, it should be structured to minimize disputes between enforcement agencies and defendants regarding which provision of the *Act* will be applied to particular conduct. A “no duplicate proceedings” clause should be adequate to address this issue, particularly since the *Discussion Paper* sensibly adopted the substantial lessening of competition (“SLC”) standard applicable throughout virtually all of Part VIII of the *Act*.<sup>123</sup>

38. *Should a list of factors similar to that included in the Act for merger review be included for civil strategic alliances? Why or why not?*

Yes.

For the reasons noted in the response to Question 37, the *Discussion Paper* draft text is to be commended for adopting the detailed analytical factors applicable to mergers<sup>124</sup> (as well as the extraordinary remedy language in the reviewable practice of abuse of dominance).<sup>125</sup>

39. *Should efficiencies be considered as a factor in the civil strategic alliances provision? Should efficiencies be considered as a factor in a merger review? Why or why not?*

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<sup>121</sup> See *Canada (Director of Investigation & Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.) [hereinafter “*Interac*”]; and *Canada (Director of Investigation & Research) v. AGT Directory Ltd. et al.*, [1994] C.C.T.D. No. 24 (QL) (Comp. Trib.) [hereinafter “*AGT*”].

<sup>122</sup> Campbell, “Two, Three or Four Tracks”, *supra* note 53.

<sup>123</sup> See, *eg*, *Competition Act*, ss. 77(2), 77(3), 79(1)(c) and 92(1). Section 75 (refusal to supply) is a notable exception to the SLC standard applied throughout Part VIII, employing instead an “adverse effect on competition” test (*ibid.* s. 75(1)(e)). It is unclear what benefit is gained from applying different standards to reviewable practices that are based on the same conceptual harm (*ie*, monopolization). For reasons of consistency and predictability, as well as the concerns of many stakeholders regarding strategic litigation (see, *eg*, the *CPG Report*, *supra* note 9 at 110-132), it would be desirable to amend s. 75(1)(e) to incorporate the SLC standard.

<sup>124</sup> *Ibid.*, s. 93.

<sup>125</sup> *Ibid.*, s. 79(2).

While the Group believes that the merger defence included with the merger provisions introduced in 1986 was a sound policy decision, and that it should have been interpreted using the “total welfare approach” recommended by most economists, it recognizes that certain stakeholders are pursuing change after the *Superior Propane*<sup>126</sup> litigation. For the reasons set out above, in response to Questions 37 and 38, the strategic alliances provision should include an efficiencies component which matches the merger provisions. For consistency, it should also be extended to the existing abuse of dominance regime because anti-competitive effects may also be outweighed by efficiencies in that context.<sup>127</sup> The Group also notes that the requirement to demonstrate pass-through of savings to consumers in Bill C-249<sup>128</sup> would in practice destroy the usefulness of the efficiencies provision (regardless of whether it is structured as a factor or a defence). It is to be hoped that this aspect of Bill C-249 will not be implemented for mergers or strategic alliances.

41. *Do you have additional comments?*

Defences and exemptions to any reviewable practice for competitor agreements should, at minimum, include all the defences to and exemptions contained in the existing conspiracy offence.<sup>129</sup> Strategic alliances between competitors currently benefit from these defences and they would be equally relevant in a non-criminal regime.

### ***Clearance Certificate***

42. *Should the clearance certificate apply to both proposed and existing agreements? Why or why not?*

If clearance certificates are introduced, there does not appear to be any compelling reason to limit them to proposed agreements while excluding existing agreements. There are occasions where parties may become concerned about the competitive effects of an alliance or other agreement after it is in operation, and there is no need or benefit to discouraging analysis by the parties and the Bureau as to whether a remedial order is warranted in respect of activity which is already occurring.

43. *Should the Competition Bureau require certain types of information from parties applying for a clearance certificate similar to the information requested prior to issuing an advance ruling certificate in a merger review? Why or why not? Should this required information be defined through regulations?*

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<sup>126</sup> See *supra* note 6.

<sup>127</sup> At present, *Competition Act* s. 79(4) only contains a vague direction that “superior competitive performance” should be considered as part of an SLC analysis.

<sup>128</sup> Bill C-249, *An Act to Amend the Competition Act*, 2d. Sess., 37<sup>th</sup> Parl., 2003 (passed by House of Commons May 13, 2003, awaiting review by the Senate), s. 1.

<sup>129</sup> *Competition Act*, ss. 45(3), (5), (7), (7.1) and (8).

The information which is relevant to an application for an advance ruling certificate has been outlined through flexible guidelines<sup>130</sup> rather than rigid regulations because it is highly variable depending on the fact situation. If clearance certificates were introduced for strategic alliances, the same approach would be appropriate for the same reasons.

46. *Do you have additional comments?*

While the availability of a clearance certificates seems appealing, such a regime will only be useful if it is neither cumbersome for business nor overwhelming for the Bureau. Speed, cost-effectiveness and confidentiality are often crucial in the negotiation and implementation of strategic alliances. In the modern economy, many strategic alliances are formed in weeks, or even days. The more time-consuming, costly and public the clearance process is, the greater the likelihood that businesses will be deterred from using it.

In order to ensure that a clearance certificate system would be useful, the following issues will need to be addressed:

- Parties should be able to obtain confirmation that a strategic alliance or other collaboration would not result in enforcement activity under the conspiracy offence as well as the reviewable practices dealing with both competitor agreements and abuse of dominance (in addition to the merger provisions, where advance ruling certificates are already available<sup>131</sup>). The *Discussion Paper* proposals are currently limited to conspiracy and the new competitor agreements provisions.<sup>132</sup> They should be supplemented with the availability of a certificate covering abuse of dominance.
- If user fees are to be charged for clearance certificate applications, they must be reasonable and the proposed amount should be discussed during the amendments process.<sup>133</sup>
- There must be strict confidentiality provisions to protect information voluntarily supplied to the Bureau in a clearance certificate application. Section 29 of the *Act* should be amended to give such information the

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<sup>130</sup> Competition Bureau, *Procedures Guide: Notifiable Transactions and Advance Ruling Certificates Under the Competition Act* (Ottawa: Supply and Services Canada) at 9-11.

<sup>131</sup> *Competition Act*, ss. 102 and 103.

<sup>132</sup> *Discussion Paper*, Appendix 7, Draft New ss. 124.3(1) and (2).

<sup>133</sup> Given the cost-recovery basis on which user fees are supposed to be imposed and the fact that many competitor collaborations are much less complex than full mergers, any user fee should be much less than the \$50,000 fee for advance ruling certificates in merger cases: see Competition Bureau, *Fee and Service Standards Handbook* (March, 2003) at 5 and 8, available online at: <<http://strategis.ic.gc.ca/pics/ct/ct02529e.pdf>>.

same protection as currently exists for merger advance ruling certificate applications.<sup>134</sup>

- The *Discussion Paper* has (presumably inadvertently) omitted the language that precludes that Commissioner initiating enforcement activity after issuing a certificate. The “Validity of Certificate” provision should be broadened to mirror the approach used for advance ruling certificates:

*Where the Commissioner issues a certificate under this section, no proceedings may be commenced under sections 45, 79 or 79.11 on the basis of the same or substantially the same facts as the facts on the basis of which the certificate was issued.*<sup>135</sup>

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<sup>134</sup> See *Competition Act*, s. 29(1)(d).

<sup>135</sup> The double-underlined material represents proposed additions to *Discussion Paper*, Appendix 7, Draft New s. 124.3(4), based on the approach currently used for merger advance ruling certificates in *Competition Act*, s. 103.

## “REFORMING THE PRICING PROVISIONS”

### GENERAL COMMENTS

With the exception of the potential removal of the dominance element from the reviewable practice of abuse of dominant position, these changes should be very beneficial to Canadian businesses and consumers.

### RESPONSES TO SPECIFIC QUESTIONS

#### *Price Discrimination and Promotional Allowances*

47. *Do you agree that the criminal provision dealing with price discrimination should be repealed? Why or why not?*

Yes.

It is widely recognized<sup>136</sup> that the price discrimination and disproportionate promotional allowance provisions<sup>137</sup> do not provide significant practical protection for retailers. Moreover, to the extent they do protect competitors at the retail level, it can be argued that this protection is inefficient and inappropriate in framework legislation whose alternate purpose is to promote consumer welfare and an efficient economy. The absence of a competitive effects test makes the current broadly drafted provisions too rigid and imposes wasteful compliance burdens on Canadian manufacturers and distributors, (especially since the provisions are accompanied by the threat of imprisonment and/or unlimited fines).<sup>138</sup>

48. *Should price discrimination govern all types of products, including articles and services? Why or why not?*

The historic focus of the price discrimination offence on “articles”<sup>139</sup> reflects the fact that this offence is difficult to apply to services because they are highly differentiated and comparable volumes are not easy to measure. If price discrimination were treated as a potential aspect of abuse of dominance, there would be no specific need to refer to services as any

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<sup>136</sup> See, eg, L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Supply and Services Canada, 1976); the *Consultative Panel Report* (March 1996), commissioned by then-Director of Investigation & Research George N. Addy, available online at <<http://strategis.ic.gc.ca/SSG/ct00064e.html>>; J.A. VanDuzer & G. Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (October, 1999); and O.K. Wakil & C.W. Halladay, “Canada Again Considers Reform of Criminal Pricing Offences” (July 2002) *Antitrust Report* 2.

<sup>137</sup> *Competition Act*, ss. 50(1)(a) and 51.

<sup>138</sup> Sections 50(1) and 51(2) impose a penalty of up to two years’ imprisonment. Under section 735 of the *Criminal Code*, a corporation may be sentenced to an unlimited fine, in lieu of imprisonment, for an indictable offence.

<sup>139</sup> *Competition Act*, s. 50(1)(a).

concerns that did arise could be dealt with as part of the open-ended approach to the “anti-competitive act” element of this reviewable practice.<sup>140</sup>

49. *Is the existing abuse of dominant position provision sufficient to respond to anti-competitive price discrimination and promotional allowances? Why or why not? If not, please provide alternatives.*

Yes.

As noted in the response to question 48, the non-exhaustive definition of “anti-competitive act” in the reviewable practice of abuse of dominance<sup>141</sup> allows any type of activity which is anti-competitive to be dealt with under one standard legal and economic framework. Since the abuse of dominance provision employs a “substantial lessening of competition” test, it is not only sufficient but in fact a more appropriate means for assessing pricing behaviour.

50. *Do you agree that the abuse of dominant position provision would provide sufficient deterrence against price discrimination if AMPs were available and with the lower burden of proof of a civil setting?*

Yes, even in the absence of AMPs.<sup>142</sup>

### ***Predatory Pricing Behaviour***

52. *Should the criminal provisions dealing with geographic price discrimination and predatory pricing be repealed?*

Yes.

Low pricing is almost always advantageous to customers except in the very unusual circumstances where the supplier has sufficient market power to eliminate or discipline rivals and then recoup its short-term losses through supra-competitive prices. In the U.S. and elsewhere, predatory pricing is generally recognized as a species of “monopolization” law. The existing reviewable practice of abuse of dominance already provides a legal and economic framework which is perfectly suited to predatory conduct.<sup>143</sup>

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<sup>140</sup> *Ibid.*, ss. 79(1)(b) and 78.

<sup>141</sup> *Ibid.*

<sup>142</sup> As discussed above, particularly in response to Question 1, the Competition Policy Group does not believe there is a need for the introduction of AMPs in Part VIII of the *Act*.

<sup>143</sup> The definition of “anti-competitive act” currently includes “selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor”: *Competition Act*, s. 78(1)(i). Furthermore, the Tribunal has recognized that the list of anti-competitive acts in section 78 is not exhaustive and could extend to any type of predatory activity: see *Canada (Director of Investigation & Research) v. Nutrasweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 34.

53. *Is the existing abuse of dominant position provision sufficient to respond to anticompetitive predatory pricing? Why or why not? If not, please provide alternatives.*

Yes, for the reasons outlined in response to Question 52.

55. *Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that paragraph 79(1)(a), which requires establishing that "one or more persons substantially or completely control" a market, should be repealed? Why or why not?*

No.

The repeal of this provision would turn abuse of dominance into an extraordinarily broad reviewable practice of "abuse of position" (or abuse *simpliciter*), without the market power element that is essential pre-requisite for any economic welfare concerns to arise. It would also be inconsistent with other major competition laws including the U.S., and the E.U., which require that significant market power is a necessary condition for monopolization or dominance.

The *Industry Committee Report* provides no explanation or justification for this very significant amendment, other than the bare assertion that it will bring section 79 "into closer conformity with the concept of market power as it has evolved through judicial interpretation".<sup>144</sup> However, both the Committee and the Bureau recognize that the phrase "substantial or complete control" is synonymous with "market power".<sup>145</sup> Thus, the *Industry Committee Report* appears to take the curious position that this amendment will bring section 79 closer to the concept of market power by eliminating the requirement of market power entirely. It is understood that the *Discussion Paper* sought comments on this suggestion because it was raised by the Industry Committee, but that the Bureau would not support such a change.

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<sup>144</sup> *Industry Committee Report* at 86.

<sup>145</sup> *Ibid.* at 85; and *ADEGs* at 13ff.

## “INQUIRIES INTO THE STATE OF COMPETITION”

### GENERAL COMMENTS

These proposals do not appear to offer benefits for Canada’s economy, and risk imposing significant burdens on Canadian businesses.

### RESPONSES TO SPECIFIC QUESTIONS

57. *Should the Act be amended to allow the Commissioner to ask an independent and impartial body such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy? Why or why not? Are there other bodies that could conduct such inquiries?*

No.

No need for or benefit from this proposal has been demonstrated in the *Discussion Paper* or elsewhere. The Bureau already has all the power needed to investigate and enforce the *Act* where anti-competitive practices are occurring.<sup>146</sup> It also already has the mandate and capabilities to provide inputs to other federal and provincial government departments and tribunals on any matter involving competition policy.<sup>147</sup>

It is not clear why such studies would be needed in respect of matters not related to the Bureau’s inquiry or advocacy functions. The Commissioner has suggested they could be used in respect of industries such as gasoline and grocery products, which simply reconfirms the concern that it would likely generate time-consuming and costly inquiries in response to political pressures.

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<sup>146</sup> Indeed, the Bureau has successfully undertaken many such industry or sector-specific inquiries in recent years: see, eg, Commissioner of Competition, *Annual Report for the Year Ended March 31, 1999* (Ottawa: Industry Canada, 1999) at 33 (inquiry into the Canadian high-speed Internet service business); Competition Bureau, Information Notice, “Low Gasoline Prices in the Greater Vancouver Market are the Result of Vigourous Competition” (January 28, 2000); Competition Bureau, Information Notice, “Competition Driving Changes in the Saskatchewan Grain Handling Industry” (April 26, 2000); Commissioner of Competition, *Annual Report for the Year Ended March 31, 2000* (Ottawa: Industry Canada, 2000) at 33 (inquiry into the Canadian auto glass industry); and Commissioner of Competition, *Annual Report for the Year Ended March 31, 2002* (Ottawa: Industry Canada, 2002) at 36 (inquiry into the Canadian book retailing and distribution business). The Bureau’s ongoing review of the Canadian airline industry (and its related litigation therein) has been well-documented in the media, but summaries of its recent activities may be found in the Commissioner’s *Annual Reports* for 2001 and 2002 at pages 28ff and 27ff, respectively.

<sup>147</sup> *Competition Act*, ss. 125-126. A brief review of the Commissioner’s *Annual Reports* over the past decade confirms that the Bureau has actively fulfilled its role as a commentator before numerous other agencies considering issues with an impact on competition.

58. *If inquiries into the state of competition were allowed, should the proposed provisions include specific criteria to determine under which circumstances the Commissioner of Competition would be allowed to ask for an inquiry? If so, which criteria should be considered? Please explain.*

If, notwithstanding the foregoing concerns, an industry regime is established, it would be important to insert criteria which focus on substantive competition concerns. However, the Competition Policy Group is concerned that it will not be possible to draft criteria which prevent inappropriate politically-motivated studies from being undertaken.

59. *Do you have additional comments?*

Industry studies have the potential to gather evidence and generate reports that could have serious negative implications (including potential use in criminal prosecutions) under the existing provisions of the *Act* for various industry participants. Accordingly, a host of process issues would need to be considered both in the design of an appropriate procedural framework for such studies as well as the scope for such evidence and reports to be used in proceedings under the current criminal and reviewable practice components of the *Act*.

**APPENDIX A**

<b>Competition Bureau Statistics on Civil Matters (ie Reviewable Practices Excluding Mergers)</b>		
<b>1992-2002</b>		
	<b>Average/Yr</b>	<b>%</b>
Total Complaints/Information Contacts	630	100.0
Examinations Commenced (two or more days of review)	33	5.0
Inquiries Resolved by Alternative Case Resolution (undertakings, consent orders, abandonment by parties, etc)	3	0.5
Competition Tribunal Applications (contested)	1	0.2
Total Complaints Determined To Be Meritorious by the Competition Bureau, regardless of Tribunal outcome	4	0.6
Source: Director of Investigation and Research, "Statistical Data", in <i>Annual Reports</i> for the fiscal years 1993-2002. This is an updated version of a summary table contained in <i>Should Reviewable Practices Be Turned Into Competition Torts?</i> , Report Prepared for the Competition Policy Group (October, 2001) at 192ff.		

**McMILLAN BINCH LLP**

**APPENDIX B**

**Convictions and Fines in Cartel Cases Under  
the *Competition Act***

<b>DATE CONVICTED/ SUBJECT</b>	<b>COMPANY</b>	<b>CONSPIRACY DURATION</b>	<b>FINE</b>
<b>1993</b> Insecticides	Chemagro Limited	1 year	\$2 Million 2 counts
<b>1993</b> Insecticides	Sumitomo Canada Limited	2 years	\$1.25 Million
<b>1994</b> Thermal Fax Paper	Kanzaki Specialty Papers	6 months	\$950,000
<b>1994</b> Thermal Fax Paper	Mitsubishi Canada Ltd. & Mitsubishi Corp	6 months	\$950,000
<b>1995</b> Ductile Iron Pipe	Canada Pipe Company Ltd.	9 months	\$2.5 Million
<b>1996</b> Thermal Fax Paper	New Oji Paper Company Ltd.	6 months	\$600,000
<b>1996</b> Thermal Fax Paper	Mitsubishi Paper Mills	6 months	\$850,000
<b>1998</b> Lysine/ Citric Acid	Archer Daniels Midland Co.	3 years	\$14 Million \$2 Million 3 counts
<b>1998</b> Lysine	Ajinomoto Co. Inc.	3 years	\$3.5 Million
<b>1998</b> Lysine	Sewon America Inc.	3 years	\$70,000
<b>1998</b> Citric acid/ Sodium gluconate	Jungbunzlauer International AG	4 years	\$2 Million 2 counts
<b>1998</b> Citric acid	Haarmann & Reimer Corp.	4 years	\$4.7 Million
<b>1999</b> Sodium gluconate	Fujisawa Pharmaceutical	8 years	\$360,000
<b>1999</b> Graphite electrodes	UCAR Inc. (Canada)	5 years	\$11 Million
<b>1999</b> Sodium gluconate	Roquette Frères	8 years	\$700,000
<b>1999</b> Sodium gluconate	Akzo Nobel Chemicals, BV; Glucona, BV	8 years	\$350,000  \$350,000
<b>1999</b> Vitamins/ Citric acid	F. Hoffmann-La Roche	9 years  4 years	\$48 Million (8 counts) \$2.9 Million
<b>1999</b> Vitamins/ Choline chloride	BASF AG	9 years  3 years	\$18 Million (8 counts) \$1 Million

<b>DATE CONVICTED/ SUBJECT</b>	<b>COMPANY</b>	<b>CONSPIRACY DURATION</b>	<b>FINE</b>
<b>1999</b> Vitamins	Rhône Poulenc SA	9 years	\$14 Million
<b>1999</b> Vitamins	Eisai Co., Ltd.	8 years	\$2 Million
<b>1999</b> Vitamins	Daiichi Pharmaceutical Co., Ltd.	8 years 3 years	\$2.5 Million
<b>1999</b> Choline chloride	Chinook International	10 years	\$2.25 Million
<b>1999</b> Sorbates	Hoechst AG	17 years	\$2.5 Million
<b>1999</b> Sorbates	Eastman Chemical Co.	2 years	\$780,000
<b>1999</b> Vitamins	Roussel Canada Inc.	7 years	\$370,000
<b>1999</b> Vitamins	R. Brönnimann	9 years	\$250,000
<b>2000</b> Vitamins	Takeda Chemical Industries Ltd.	4 years	\$4.7 Million \$500,000
<b>2000</b> Vitamins	Merck KgaA	4 years	\$1 Million
<b>2000</b> Graphite electrodes	SGL Carbon AG	5 years	\$12.5 Million
<b>2000</b> Sorbates	Daicel Chemical Industries Ltd.	17 years	\$2.46 Million
<b>2000</b> Sorbates	T. Miyasaka	11 years	\$250,000
<b>2001</b> Graphite Electrodes	Tokai Carbon Co., Ltd.	5 years	\$250,000
<b>2001</b> Isostatic Graphite	Carbone of America Industries Corp.	5 years	\$300,000
<b>2001</b> Sorbates	Ueno Fine Chemicals Industry Ltd.	17 years	\$1.25 Million
<b>2001</b> Sorbates	Yashiyuki Ebara	17 years	\$150,000
<b>2001</b> Sodium Erythorbate	Pfizer Inc.	2 years	\$1.5 Million
<b>2002</b> Vitamins	Degussa AG	6 years	\$2.5 Million
<b>2002</b> Vitamins	Lonza AG	6 years	\$1.1 Million
<b>2002</b> Vitamins	Nepera Inc.	6 years	\$240,000
<b>2002</b> Vitamins	Reilly Industries	6 years	\$35,000

<b>DATE CONVICTED/ SUBJECT</b>	<b>COMPANY</b>	<b>CONSPIRACY DURATION</b>	<b>FINE</b>
<b>2002</b> Vitamins	Dr. Kuno Sommer	6 years	\$150,000
<b>2002</b> Sorbates	Nippon Gohsei Industries, Ltd.	17years	\$100,000
<b>2003</b> Methylglucamine	Rhone-Poulenc Biochemie SA	9 years	\$500,000
<b>2003</b> Graphite Electrodes	Robert P. Krass	5 years	\$70,000