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Competition Reform –Again
The Discussion Paper and Bill C-249

**The Application of the Merger and Abuse of
Dominance Provisions to Competitor Agreements**

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THE APPLICATION OF THE MERGER AND ABUSE OF DOMINANCE PROVISIONS TO COMPETITOR AGREEMENTS

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Introduction

The Federal Government has issued a Discussion Paper² which embraces the “two track” system for differentiating between hard-core cartel conduct and other competitor agreements that has been advocated by various proponents of reform of the *Competition Act*³ conspiracy provisions.⁴ The main rationales for a dedicated reviewable practice dealing with joint ventures, strategic alliances and other “non-hard-core” competitor collaborations (hereafter referred to generically as “competitor agreements”) are that:

- competitor agreements often have to be dealt with under the conspiracy offence because there is not a specific civil provision designed to address such conduct; and

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² Government of Canada, “Discussion Paper — Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” (June 2003) (the “*Discussion Paper*”).

³ *Competition Act*, R.S.C. 1985, c. C-34, as amended, s. 45.

⁴ See, eg, 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*, 2d Sess., 36th Parl., 2000; Presley Warner and Michael Trebilcock, “Rethinking Price-Fixing Law” (1993) 38 McGill L.J. 679; Tim Kennish and Tom Ross, “Towards a New Approach to Agreements between Competitors” (1997) 28 *Can. Bus. L.J.* 22; R.S. Russell, A.F. Fanaki & D.D. Akman, *Legislative Framework for Amending Section 45 of the Competition Act* (April 11, 2001); McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (August 2001) (the “*McCarthy Tétrault Report*”); A. Gourley, *A Report on Canada’s Conspiracy Law: 1889-2001 and Beyond* (August 2001); House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada’s*

- the resulting potential application of a criminal offence to competitor agreements may have a “chilling effect” on commercial activities that would have been welfare-enhancing for the Canadian economy.

This paper challenges the former (and hence implicitly the latter) rationale on the basis that the broad, flexible merger and abuse of dominance regimes in Part VIII of the *Act* are able to address virtually any type of competitive concerns arising from a competitor agreement.⁵ As a practical matter, it is these civil provisions, rather than the conspiracy offence, which are normally used to examine non-hard-core competitor interactions.⁶ To the extent that any chill may exist, a preferred alternative for addressing it would be to issue an upgraded version of the Bureau’s *Strategic Alliances Bulletin*.⁷

Mergers

The *Competition Act* defines “merger” as:

“the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by

Competition Regime, April 2002 (the “*Industry Committee Report*”); and *Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology*, October 1, 2002.

⁵ *Accord*, eg.: Competition Law Section of the Canadian Bar Association, *Submission on the Reform of Section 45 of the Competition Act (Conspiracy)* (February 2003) (the “CBA Report”), p. 29; and Bruce M. Graham, “Reform of Section 45 Is Unnecessary”, 2002 Competition Law Invitational Forum (May 8-10, 2002), p. 4.

⁶ The Competition Bureau and the Attorney General have hardly ever prosecuted non-hard-core competitor agreements as conspiracies: “[P]rosecutions under section 45 have generally been against price-fixing, market-sharing and other similar cartels”. (See *McCarthy Tétrault Report*, *op. cit.*, p. 11, which references H. Chandler and R. Jackson “Beyond Merriment and Diversion: the Treatment of Conspiracies Under Canada’s *Competition Act*” (Roundtable on *Competition Act* Amendments, Toronto, May 25, 2000).)

⁷ Director of Investigation and Research, *Strategic Alliances Under the Competition Act* (Ottawa, Supply and Services Canada, 1995) (the “*Strategic Alliances Bulletin*”). The Bureau requested input on such an initiative in 2002, but proposed revisions have not yet been published.

amalgamation or by combination or otherwise, of control over *or significant interest in* the whole or a part of a business of a competitor, supplier, customer or other person.”⁸

Assuming that the Competition Bureau continues to interpret the “significant interest” branch of the definition of “merger” expansively to mean “the ability to materially influence the economic behaviour of the business,”⁹ the merger provisions are the most relevant component of the *Act* for most competitor agreements. Many competitor agreements involve one-way or two-way equity investments in excess of the 10% voting threshold that the Bureau has identified as a potential indicator of influence.¹⁰ In addition, its view that “material influence” can arise from contractual rights (in the absence of equity investment or board representation) means that a large number of less integrative competitor agreements are already reviewable under the merger provisions of the *Act*:

A significant interest can also be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving corporations, partnerships, joint ventures, combinations and other entities. In addition, loan, supply and distribution arrangements that are not ordinary course transactions and that confer the ability to influence management decisions of another business may constitute a “merger” within the meaning of section 91.¹¹

⁸ *Competition Act*, s. 91 (emphasis added).

⁹ See *Strategic Alliances Bulletin*, *op. cit.*, p. 11 (as well as the illustrative scenario on pp. 20-21); and Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa, Supply and Services Canada, 1991) (the “*MEGs*”), pp. 1-2. The Bureau is currently updating the *MEGs* and it will be interesting to see if this interpretation is changed in any way.

¹⁰ *MEGs*, *op. cit.*, p. 1.

¹¹ *Ibid.*, p. 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*.¹²

Abuse of Dominant Position

The reviewable practice of abuse of dominance explicitly covers situations where two or more persons collectively control a class of business.¹³ While Competition Bureau enforcement guidelines confirm that mere conscious parallelism would not constitute joint control, they contemplate that such a finding could be made where co-ordinated behaviour is encouraged through “facilitating practices” or where there is evidence “that members of the group have acted to inhibit intra-group rivalry.”¹⁴ Since this may occur even in the absence of an explicit agreement between competitors, joint control could arise in very loose alliances or with other modest levels of competitor collaboration / coordination.

In the many situations where competitor agreements involve express contractual or other co-ordination that would exceed the *ADEGs* standard for joint control, the first element of abuse of dominance will be satisfied whenever the parties collectively have market power. With respect to the second element, the statutory list of “anti-competitive acts” is non-exhaustive.¹⁵ This means that any type of joint activity which is exclusionary or otherwise anti-competitive can be addressed under the reviewable practice of joint abuse of dominant position. There is also

¹² See Director of Investigation and Research, *Annual Report for the Year Ended March 31, 1991* (Ottawa: Supply and Services Canada, 1991), p. 8. (Shell and Pay Less Gas ultimately restructured their arrangements to resolve the Bureau’s concerns.)

¹³ *Competition Act*, s. 79(1)(a).

¹⁴ Competition Bureau, *Enforcement Guidelines On The Abuse Of Dominance Provisions* (Ottawa, Industry Canada, 2001) (the “*ADEGs*”), p. 17.

¹⁵ *Competition Act*, s. 78.

no impediment to applying the third element — the general “substantial lessening of competition” test — to competitor agreements.

The Bureau has applied the abuse of dominance provisions in numerous investigations of competitor agreements, including two of the seven decided abuse of dominance Competition Tribunal proceedings.¹⁶ In *Interac*, for example, several major financial institutions entered into complex arrangements to establish and operate a single national ATM and point of sale debit card network. The Bureau was concerned that the resulting system had exclusionary impacts on other current or potential financial service providers. It ultimately obtained a consent order with access and other commitments designed to mitigate the anti-competitive effects.

Is There a Gap in the Law?

The proponents of a civil regime for competitor agreements have not shown that the existing merger and abuse provisions have any significant gap in coverage relating to non-hard-core competitor agreements. If there was such a gap, one would expect the Competition Bureau to be able to identify the number of cases in which it has been forced to resort to using section 45 to address competitor agreements that could not be dealt with under Part VIII of the *Act*. Despite the obvious relevance of the historical experience, the studies commissioned by the Bureau have not made such an assessment.

Even if some gap were to exist, it is far from obvious that it should be remedied by the addition of a new regime as opposed to fine-tuning the scope of the reviewable practices of merger and

¹⁶ *Canada (Director of Investigation and Research) v. Bank of Montreal et al* (“*Interac*”) (1996), 68 CPR (3d) 527; and *Director of Investigation and Research v. AGT Directory Limited et al* (“*CANYPS*”) (18 November 1994), CT9402/19, Consent Order, [1994] CCTD No 24 (QL).

abuse of dominance, each of which now has a reasonably well-developed track record.¹⁷ There do not appear to be significant benefits to be gained from a separate reviewable practice. Moreover, its mere presence may have the perverse effect of causing the Competition Bureau and private parties to spend more time analysing competitor agreements that are seldom anti-competitive. Moreover, an additional provision would add unnecessary complexity if it introduced any differences in the approach to market definition, competitive effects analysis or the emphasis on prohibition remedies under the current merger and abuse of dominance frameworks.

Uncertainty, Chilling Effects and Guidance

Despite vague assertions by the former Commissioner of Competition and some members of the competition bar and business community that section 45 has had a chilling effect on competitor collaborations,¹⁸ the evidence of actual chill is negligible. Moreover, no one has analyzed what portion of any abandoned competitor agreements would have been chilled by the risks of challenge under the merger or abuse of dominance provisions in any event.

The *Discussion Paper* proposal to create a two-track regime is likely to have the unintended effect of worsening uncertainty and chill. This is a consequence of the attempt to draft a legislative definition of hard-core cartel conduct that would not overreach into other non-problematic competitor agreements.¹⁹ While a full analysis is beyond the scope of this

¹⁷ If necessary, very occasional resort could also be made to section 45, accompanied by appropriate exercises of prosecutorial discretion (such as the use of consent prohibition orders as an alternative case resolution instrument): see *Competition Act*, s. 34(2); and, more generally, the range of alternative case resolution instruments discussed in Competition Bureau, *Conformity Continuum Information Bulletin* (Ottawa, Industry Canada, 2000) (the “*Conformity Continuum Bulletin*”).

¹⁸ See, *eg.*, Konrad von Finckenstein, “Remarks to 2001 Invitational Forum on Competition Law: Section 45 at the Crossroads” (October 12, 2001), p. 3.

¹⁹ The focus in this paper on strategic alliance issues is not intended to imply that the proposed conversion of s. 45 to a *per se* offence is not problematic. To the contrary, a definition of hard-core cartel conduct which does not catch other legitimate activity has yet to be developed, and there are also other serious concerns including the absence of any consideration of efficiencies. For general discussion of these issues, see, *eg.*, Donald S. Affleck, “Section 45 — A New

paper, it is noteworthy that numerous submissions to the Public Policy Forum have identified this as a problematic aspect of the *Discussion Paper* proposals.²⁰

Chilling effects can be reduced if greater certainty about the likely behaviour of the enforcement agency is available. Uncertainty can be addressed on a case-specific basis through the Competition Bureau's Program of Advisory Opinions.²¹ Guidelines also have a vital role to play, and the long-promised upgrading of the *Strategic Alliances Bulletin* is an important opportunity to reduce any chilling effects that may exist in respect of section 45's potential application to competitor agreements.

Various proposals have been made to extend the guidance in the *Strategic Alliances Bulletin* beyond its primarily descriptive focus.²² Notwithstanding the substantial ground already covered by the *MEGs* and *ADEGs* (which should be liberally cross-referenced), new "Strategic Alliances Guidelines" ("SAGs") could make important incremental contributions by explaining the application of the definition of "merger" and the concept of joint dominance to various specific

Civil Provision: An Extraordinary Proposal", 2002 Competition Law Institutional Forum (May 8-10 2002); the *CBA Report*, *op. cit.*; John F. Clifford, "Canada Takes Steps Toward Conspiracy Reform", 93 *The Antitrust Counsellor*, (September 15, 2002); Brian Facey and Dany Assaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws," 20 *Canadian Competition Record* (no. 4) 61 (Winter 2001-2002); Graham, "Reform Is Unnecessary" *op. cit.*; Lawson A.W. Hunter and Danielle K. Royal, "Section 45 Amendments – A Cure Worse than the Disease?", 2002 Competition Law Invitational Forum (May 8-10, 2002); D. Martin Low, "If it ain't broke...", *Globe & Mail*, September 27, 2002, p. A15; and Omar Wakil, "Canada's Cartel Laws: Set to Change?", 5 *ABA International Antitrust Bulletin* (no. 1) 19 (Spring 2002).

²⁰ The submissions can be found on the Public Policy Forum's website at www.ppforum.com/competitionact/submissions_e.htm.

²¹ The Program's historic limitation to "non-binding" opinions has been removed by the Bill C-23 amendments (see *Competition Act*, s. 124.1, added by S.C. 2002, c. 16, s. 15). This should make opinions a more attractive option in cases where businesses and their counsel want to ensure that a competitor agreement will not be subject to enforcement proceedings under the *Act*.

²² See the submissions posted on the Competition Bureau's website at (<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02508e.html>) in response to its request for input regarding revision of the *Strategic Alliances Bulletin*.

types of competitor agreements. Most importantly, the Bureau could and should confirm that section 45 will be used primarily to prosecute hard-core cartel conduct and that the civil provisions will normally be applied to other types of competitor agreements. This would reverse a misleading impression arising from the current *Strategic Alliances Bulletin*, which addresses the conspiracy provisions of the *Act* first and in detail (four pages) before briefly discussing mergers and abuse of dominant position (one page each).²³ More specifically, the Bureau should consider a guideline along the line that “competitor agreements which are not shams or designed to implement hard-core cartel conduct will be dealt with under Part VIII of the *Act* unless there are anti-competitive effects which cannot be addressed due to limitations in the scope of the merger, abuse of dominance and other reviewable practices”.²⁴

Concluding Observations

The merger and abuse of dominance provisions are broad enough to cover virtually all anti-competitive competitor agreements. It would be preferable to focus on developing guidelines that explain how they are currently applied rather than adding complexity in the form of a separate statutory reviewable practice for competitor agreements.

²³ *Strategic Alliances Bulletin, op. cit.*, pp. 6-9 and 11-13.

²⁴ This is the basic approach outlined in Commissioner of Competition, *Intellectual Property Enforcement Guidelines* (Ottawa: Industry Canada, 2000), Examples 2, 3.3 and 7, pp. 16-17, 19 and 23-24. Where section 45 needs to be employed to deal with non-cartel conduct because it does not fall within the purview of any of the reviewable practices, the Bureau could commit to the possibility of exploring an alternative case resolution with the parties before referring the matter to the Attorney General for prosecution: see the discussion of the *Conformity Continuum Bulletin, op. cit.*