

Competition Law Update In-House Counsel Congress

**Canadian Institute
November 4, 2004**

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Introduction

- Possible amendments to the Competition Act
- Revised Merger Enforcement Guidelines
- International Developments

Amendments

- Possible amendments to the Civil provisions
- Possible amendments to the Criminal provisions
- Market References

Reform History

- April 2002 House of Commons Standing Committee (IST) report on suggested amendments
- June 2003 Government Discussion Paper
- April 8, 2004 Public Policy Forum issues final report on consultations

Civil Provisions Amendment Options

- Administrative Monetary Penalties
- Civil cause of action
- Restitution

Administrative Monetary Penalties

- To create greater incentive for deterrence
- Exists for abuse of dominance by domestic airline (maximum of \$15 million)
- Issues
 - Reviewable practice vs. offence
 - Criminal vs. civil
 - International convergence

Civil Cause of Action

- Currently only for criminal activity or breach of a Tribunal/court order
- Option to include where Tribunal issued an order under the civil provisions (except consent agreements)
- Single damages plus costs

Restitution

- Would apply to misleading advertising (s.74.01 (1) a)
- Amount would not exceed the purchase price of the product
- In addition to a civil cause of action

Criminal Conspiracy Options

- Per se offence for price fixing, reducing supply, market sharing or customer allocation agreements
- Civil provision for reviewing agreements among competitors or potential competitors with competition effects test
- Clearance process

Criminal Conspiracy Options

- Challenge is to draft a per se offence without being overly inclusive of legitimate agreements
- Alternative approach: focus on covertness of the activity by providing immunity with notification

Criminal Conspiracy Options

- New ancillary agreement defence
- Block exemptions
- Civil conspiracy provision parallels merger provisions

Criminal Pricing Provisions

- Repeal criminal price discrimination, promotional allowances and predatory pricing provisions
- Dealt with under the civil abuse of dominance provision

Market References

- Inquiry into the state of competition in an industry
- Finding provided to Minister of Industry and tabled in Parliament
- Suggested body to undertake the inquiry is the Canadian International Trade Tribunal

Revised Merger Enforcement Guidelines (MEGs)

- Increased emphasis on coordinated effects:
 - Where a group of firms is able to profitably coordinate its behaviour because of each firm's accommodating reaction to the other firms
 - What conditions are there that facilitate the coming to an understanding, monitoring the understanding and punishing deviations
 - How does the merger change those conditions?

Revised MEGs

- New section on countervailing buyer power
- No change to safeharbour market share
- Market definition focuses only on demand side substitution (supply side is dealt with later in the analysis)
- Standard for efficiencies tradeoff still unclear

International Developments

- U.S. Supreme Court in F.Hoffman-LaRoche Ltd. Et al. v. Empagran declined to uphold application of US civil antitrust law to foreign companies where the foreign purchasers had only purchased the product outside the U.S. and the adverse foreign effect is *independent* of any adverse domestic effect

International Developments

- International Competition Network
 - Seoul meeting of April 22/04 adopted 4 new recommended practices for merger notification procedures covering:
 - Conduct of merger investigations
 - Procedural fairness
 - Confidentiality
 - Inter agency cooperation

Conclusion

- Significant changes to the Competition Act are being considered but likelihood and timing for change is very uncertain
- Revised merger enforcement guidelines provide improved guidance on current enforcement approach
- Extension of US civil antitrust remedies to foreign countries not upheld
- ICN continues its soft convergence agenda