GOODMANS

250 YONGE STREET
SUITE 2400
TORONTO, ONTARIO
CANADA M5B 2M6
TEL: 416.979.2211
FAX: 416.979.1234
www.goodmans.ca

September 22, 2003

Competition Act Consultations,
Public Policy Forum
1405-130 Albert Street
Ottawa, ON
K1P 5G4

Dear Sirs/Mesdames:

Re: June 20, 2003 Discussion Paper: "Options for Amending the Competition Act: Fostering a Competitive Marketplace"

Goodmans LLP welcomes the opportunity to provide its comments on the proposals contained in the June 2003 Discussion Paper. In providing our comments, we will follow the order of the proposals as set out in the Discussion Paper.

1. Administrative Monetary Penalties for Civil Reviewable Matters under Part VIII (except mergers)

(a) AMPs Generally

We believe that the ability to impose administrative monetary penalties ("AMPs") will provide a valuable means to enhance the competitive environment in Canada. We believe that AMPs should be imposed only against those who knew or ought reasonably to have known that the practice followed by them has (or had), or was likely to have anti-competitive effects.

The justification for distinguishing between reviewable practices and criminal offences in the first place appears to have been twofold:

(i) While criminal sanctions have a greater deterrent effect, proving criminal liability requires proof beyond a reasonable doubt; foregoing criminal sanctions in return for being able to make a case on a lower standard of proof was presumably felt to be a sensible trade-off.

(ii) Many reviewable practices can have a pro-competitive effect. For example, exclusive dealing can enable a new supplier in a market to quickly establish a viable foothold in that market, thereby increasing competition. It was feared that putting persons who

> engage in such practices in jeopardy of criminal liability might deter pro-competitive, or at least competitively neutral, conduct.[1]

To these we would add that in some cases it would be unfair to impose criminal or punitive sanctions on parties for engaging in conduct which only on "after the fact" and complex economic analysis could demonstrate was anti-competitive.

These policy will, to some extent, be affected by the imposition of AMPs. Regardless of what they are called, and regardless of the wording in the statute to the effect that their purpose is not punitive, AMPs will be viewed as the functional equivalent of criminal fines. As such, they may both **[unfairly?]** stigmatize the respondent and discourage others from engaging in reviewable practices.

We do not regard this result as undesirable, subject to our comments below. There is now a serious weakness in Part VIII, and we believe AMPs can play a role in addressing it without compromising the policy concerns outlined above. The weakness which must be addressed is this. For companies which have no objection to becoming involved in legal proceedings with the Commissioner, there is currently very little discouragement to engaging in anti-competitive practices. There is always the chance that no one will challenge the conduct, and there is the virtual certainty that if the conduct is challenged, it will take a very long time for any remedial order to be obtained. While proceedings are ongoing, the conduct can be continued and if the Commissioner or a private applicant succeeds, the worst that is likely to happen to the anti-competitive party is that its conduct will have to be stopped. In the meantime, the respondent will have reaped the benefit of conduct that has been found to be anti-competitive.

The way to address this weakness in Part VIII but at the same time not compromise the policy concerns enumerated above is to impose AMPs, *in cases in which the person engaging in the practice knew or ought reasonably to have known that the practice was or was likely to have the effect of lessening or preventing competition substantially in a relevant market*.[2] Conduct which is egregiously anti-competitive (and at which AMPs should be aimed) will in our experience be obviously anti-competitive. Imposing AMPs only in such circumstances will deter deliberate (or reckless) anti-competitive conduct without discouraging pro-competitive or competitively neutral conduct. We would suggest that in many of the Part VIII cases which have come before the Tribunal to date, demonstrating actual or constructive knowledge of anti-competitive effects would not have been difficult.

---

[1] See e.g., The 1969 Economic Council of Canada's Interim Report on Competition Policy (1969).

[2] This is not unlike the subjective and objective tests applied by the Supreme Court of Canada in R. v Nova Scotia Pharmaceuticals Society (1992) 2 SCR 606. The Court said in that case that in order to obtain a conviction under Section 45, the Crown must prove both that the accused had the intention to enter into the agreement and had knowledge of the terms of the agreement and on an objective view of the evidence deduced the accused intended to lessen competition unduly: "It would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition."

We do expect this proposal to meet with opposition. Some will argue that the imposition of administrative AMPs goes too far in blurring the distinction between criminal offences and Part VIII reviewable practices. Indeed, the Discussion Paper itself inadvertently supports this opposition by referring to "contraventions" of Part VIII's provisions. In fact, none of the provisions of Part VIII can be "contravened". Persons can and do engage in reviewable practices and in many cases their doing so is beneficial to competition. These practices can be the subject of prohibition or remedial orders if shown to be anti-competitive, but even in such cases it would be incorrect to characterize the practices as violations of the Act. We believe our suggestion deals with these issues.

(b) Limits on AMPs

We believe that once the actual or constructive knowledge test has been met, the Competition Tribunal should be free to impose AMPs at its discretion, without being subject to any statutory maximum.

(c) Criteria

Subject to the qualification of actual or constructive knowledge which we have suggested above, we believe the criteria enumerated in 107.1(2) are appropriate.

(d) Airlines

If AMPs are available for reviewable matters under Part VIII of the Act, we believe that general regime should replace the current one that applies specifically to airlines in section 79. Wherever reasonably possible the *Competition Act* should be structured as a law of general application.

2. Administrative Monetary Penalties for Civil Reviewable Matters under Part VII.1

(a) AMPs Generally

We strongly support giving the courts the power to impose AMPs at their discretion in the case of deceptive marketing practices, and believe the criteria set out in subsection 74.1(5) are appropriate and adequate.

(b) Restitution Generally

We are also in favour of giving the courts the ability to order restitution to consumers in certain circumstances and on application by the Commissioner. Absent a restitution mechanism, there is no practical way of compensating consumers for the harm they have suffered as a result of false or misleading representations.

The appointment of a administrator to administer and distribute the fund also seems to us an appropriate mechanism. The establishment of a fund eliminates the risk of a respondent's subsequent bankruptcy or misappropriation of funds.

(c) Dealing with Funds Remaining

We believe that funds remaining in a restitution fund after consumers have been given an appropriate time within which to file claims should be returned to the respondent. To deal with the remaining funds otherwise is to in effect convert them into an additional AMP. This is an inappropriate result, given that the court will have previously determined the appropriate quantum of the AMP, if any. A restitution fund should be used for restitution of consumers; it is not intended to serve the same deterrent effect as an AMP. Directing the funds to a non-profit organization will not, even in the most indirect sense, provide restitution to the specific consumers harmed by a misrepresentation, and could lead to unseemly squabbles over which organization had the greatest entitlement.

(d) Freezing Orders

We favour empowering the courts to make freezing orders in the circumstances described in section 74.11 of Appendix 3 of the Discussion Paper. We assume that a court will question whether all property in the court's jurisdiction should be subject to being frozen, unless the Commissioner is also able to make a strong prima facie case that property in that amount will be required to make restitution.

3. Civil Causes of Action in Respect of Part VII.1 and Part VIII Reviewable Practices

We favour amending section 36 to allow businesses and individuals to sue for damages suffered as a result of conduct which becomes the subject of an order under Part VII.1 or Part VIII. Civil damages, like AMPs, can play an important role in deterring anti-competitive behaviour. As in the case of AMPs we would urge that courts be permitted to award civil damages in the case of Part VIII reviewable practices only if the person engaging in the practice knew or ought reasonably to have known that the practice was preventing or lessening competition substantially. As we are dealing here only with civil damages and not with fines or penalties, however, we would recommend that this actual or constructive knowledge be deemed to exist, and that damages be deemed to have begun to accrue, once an application has been made to the Tribunal or a court in respect of the practice. In other words, a person who chose to continue a practice notwithstanding the commencement of Tribunal or judicial proceedings would be doing so with full knowledge of the risk of liability for civil damages.

4. The Criminal Conspiracy Provisions

(a) General

We agree that section 45 is badly in need of amendment. We are also in general agreement with an approach which would see "hard core" collusive activity being dealt with under the Act's criminal provisions and other agreements which may lessen competition substantially being dealt with in a civil context.

(b) Actual vs. Potential Competitors

We believe that the criminal provisions should deal only with agreements between persons who actually compete. Having the provision apply to persons who could "reasonably be expected" to compete will

require an analysis of potential or imminent market entry. These have proven to be difficult issues to deal with in the merger context. If the goal of these amendments is to ensure that complex economic analysis is not required to determine whether persons have engaged in serious criminal conduct, then the amended provision should not cover agreements between potential competitors.

(c) Purpose and Effect

We agree that agreements that have the "purpose" of fixing prices, allocating customers or markets, or restricting production or supply of a product, should be covered by the criminal provision. We are also in agreement with the "effects" test, so long as the "knew or ought to have known" test set out in section 45(4) of the draft provisions remains a part of the provision as ultimately enacted.

(d) Ancillary Agreements

We would favour removing the "ancillary agreement" defence which appears in section 45(5) of the draft provisions. This defence would, we believe, prove to be very difficult to apply, and could excuse highly objectionable conduct. Determining whether an agreement is "necessary" for implementing a principal agreement will be particularly difficult. Is an agreement "necessary" for implementing a principal agreement if one party will not enter into the principal agreement unless the ancillary agreement is part of it?

The wording in the proposed Section 45(5) is obviously heavily influenced by the American "ancillary restraints" doctrine. As the staff of the FTC is recognized, that doctrine is "plagued by ambiguities". While the U.S. Supreme Court has made it reasonably clear that requires that, in order to be protected by the doctrine, a restraint must be "necessary" for achieving a lawful purpose (as opposed to being merely "related to" such purpose) it is also implied that the word "necessity" includes the concept of less anti-competitive alternatives. As FTC staff have pointed out, however, "it is often difficult to determine whether suspect conduct is necessary without a potentially complex inquiry into less anti-competitive alternatives." And this contradicts the fundamental precept behind having a per se rule, which should be clear and easy to apply.

We therefore suggest that price-fixing, market allocation and output restriction agreements between actual competitors be treated in the same way as price maintenance is currently treated under the Act. Many persons entering into distribution, licensing, franchising or other agreements wish to insert price maintenance clauses into those agreements, and no doubt in many cases would argue that the insertion of such a clause is necessary to make the overall agreement commercially efficacious. However, so far as we are aware, the absence of an "ancillary agreement" defence in section 61 has not placed an undue burden upon the business community or deterred the entry into distribution, license, franchise or similar arrangements. We are unable to see why prohibiting market or customer allocation or price fixing arrangements on a strictly per se basis should cause any greater burden.

(e) Exemptions

We are unable to think of any industries or sectors which should be exempted from the provisions of section 45. Should the Government at a later date be of the view that a particular industry or sector

should be granted such an exemption, then the exemption should be considered and enacted by Parliament. The exemption of an entire sector or industry from a criminal law of general application is not, we would submit, properly the subject of an order-in-council.

(f) Grandfathering Issues

We would suggest that written agreements in effect at the time section 45 is amended could be grandfathered, such that they would be dealt with under section 45 as it read prior to the amendments. Unwritten agreements, which in most cases will be much easier for a party to terminate, could all be dealt with under the new wording of section 45, whether or not they were in existence at the time the amendments became law.

5. Civil Strategic Alliances Provisions

(a) General

Should section 45 be amended in the manner contemplated by the Discussion Paper, we think a new civil provision along the lines contained in Appendix 6 of the Discussion Paper will be required. We do not believe the existing abuse of dominant position and merger provisions would adequately address all other types of agreements not covered by the proposed criminal provision. Parties not possessing the control or substantial control of a class or species of business required by section 79 could nonetheless enter into agreements which lessen or prevent competition substantially. There are many types of agreements, moreover, which do not fall within section 91's definition of a "merger" but which nonetheless could lessen or prevent competition substantially. Another approach, which would be beyond the scope of your current enquiries, would be to amend S.79 to remove the requirement of "control or substantial control" of a class of business.

(b) Duplicate Proceedings

We do believe a "no duplicate proceedings" clause should be included in these provisions. At the same time, to avoid confusion and overlap, we would also add to section 79.11 a sentence specifying that agreements contemplating or implementing mergers are not to be dealt with under that section.

(c) Criteria

We believe the inclusion of a list of factors similar to that included in the Act for merger review should be included for civil strategic alliances. The inclusion of such a list in section 93 and its absence from the civil strategic alliance provisions could create the implication that a different set of factors is to be applied in the latter instance. We would suggest that included in the list of factors applied in evaluating civil strategic alliances should be the duration and scope of the agreement under review.

Efficiencies should be considered as a factor in the civil strategic alliances provision. In our view, the pro-competitive impact of efficiencies needs to be weighed in the balance together with any potentially anti-competitive effects of an agreement. However, it is enormously important that all efficiency gains,

and not just those which are demonstrated to provide benefits to consumers, as required by the draft wording section 79.11(3)(h), should be considered by the Tribunal.

(d) Joint Venture/Specialization Agreements

It would seem that enactment of the proposed civil strategic alliances provision, together with the proposed clearance certificate provisions, would remove the need for the joint venture and specialization agreement provisions. This would mean that parties would no longer have the right to apply to the Tribunal for registration of a "specialization agreement" as defined in section 85, but to our knowledge this is not a right of which any party has availed itself to date.

6. Clearance Certificates

We believe that clearance certificates for civil strategic alliances should be dealt with in precisely the same manner that advance ruling certificates are dealt with in the merger context. Thus, clearance certificates would be available in the case of both proposed and existing agreements.

It should be left to the Competition Bureau to decide, based on the circumstances of each case, what types of information it needs to receive before it can decide whether or not to issue a certificate. This is not, we would submit, something which should be codified by regulation. Similarly, we would let the Bureau decide on a case-by-case basis whether or not third parties should be contacted before a clearance certificate is issued. In some cases, the party who is requesting a certificate may stipulate that no third parties are to be contacted. In such a case, it will be up to the Bureau to decide whether or not it is prepared to issue a clearance certificate without third party contacts.

We believe written opinions can exist together with clearance certificates, as they do in merger reviews. The Bureau could issue a clearance certificate in cases in which it was prepared to bind itself not to challenge the agreement or transaction in question. In cases in which the Bureau had decided not to take enforcement action for the time being but where, for various reasons such as high market shares or barriers to entry, the Bureau wishes to keep open the option of enforcement proceedings at a later date, an opinion or "no action" letter could be issued (again, as is currently the case in merger reviews).

7. Repeal of Pricing Provisions

We agree that the criminal provisions dealing with price discrimination, geographic price discrimination, promotional allowances and predatory pricing should be repealed. The fact that convictions are so rarely obtained under these provisions is proof enough that they are of marginal utility. However, we would not suggest that these practices be dealt with only in the existing abuse of dominant position provisions of the Act. In our view, these practices can be harmful even if the person engaged in such conduct does not "substantially or completely control" a class or species of business, as required by the abuse of dominant position provisions. A person who possesses significant market power, albeit market power falling short of "control" of a market, for example, can cause significant harm to competition through unreasonably low pricing.

In the case of price discrimination two issues must be addressed:

(i) Should price discrimination be expanded to govern all types of products; i.e., both articles and services?

(ii) Should price discrimination be subject to an order by the Tribunal, as well as AMPs, only if the price discrimination is having an anti-competitive effect (under section 50(1) as currently worded, price discrimination is a true per se offence, with no analysis of competition required other than to answer the question of whether the persons receiving different pricing treatment are competitors of one another.)

We see no reason to exclude services from the price discrimination provisions. Discrimination in the pricing of services can unfairly disadvantage one competitor in relation to another just as much as discrimination in the pricing of articles.

As to the second question though American and European law applies a rule of reason approach to price discrimination, the European Court of Justice has in some instances come close to applying a per se prohibition on discriminatory pricing which is not cost-related. We would advocate a similar approach.

8. Inquiries into the State of Competition

We believe that it is very important that the Commissioner be knowledgeable of the state of competition and the functioning of markets in various sectors in Canada. By having knowledge of the current state of the economy, the Bureau will be able effectively and expeditiously to deal with merger applications and other matters which come before it without requiring the time to build imperative coherent background knowledge.

But we think it a very serious mistake to have the work in this regard performed by a third party, such as the Canadian International Trade Tribunal ("CITT").

The real value of the studies which might be performed would be to enlarge the perspective of the Bureau to have it develop "historical memory" with respect to important industries in Canada. As an example, one could point to merger reviews in very important Canadian industries where much of the Bureau's time and energy was occupied in coming to the understanding of the way in which those industries function. It would be dramatically preferable to have the Bureau develop its understanding of such industries in the absence of the time and emotional pressures inherent in every merger review.

While inquiries conducted by a body such as the CITT might be of interest, they would result in a formal report which the Bureau felt required to respect. Two negative conclusions are then to be drawn. The first is that the Bureau would not have developed its own organic understanding of the industry; the second is that the flexibility of the Bureau would be inhibited in receiving and incorporating distinctive information provided by merger proponents which might alter the conclusions of the CITT report.

The Commissioner should have full freedom to conduct inquiries into those areas which he considered important for the functioning of the Canadian economy. The primary objective should be to enhance the understanding of the Bureau of the economy on a continuing basis. The ability to identify areas such as financial services would, in the past, have resulted in much more rapid merger review. A corollary may

well be that it will be necessary to provide the Commissioner with both staff and budget to ensure the effectiveness of highly desirable studies.

Historically, there were investigative powers in the *Combines Investigation Act* under s.75(1)(b) where "on direction from the Minister" the Director was empowered to "carry out a general inquiry into" matters considered by the Minister to be "related to the policy and objectives" of the Act. It is unclear why similar provisions did not find their way into the *Competition Act* in 1986. It will enhance the effectiveness of the Canadian economy to reconsider this issue and whether Ministerial direction is necessary or desirable, in order to provide to the Competition Bureau the ability to have a greater understanding of that economy.

Yours very truly,

GOODMANS LLP