# COMMENT AND ANALYSIS

## SELECTED 1990 AUSTRALIAN DEVELOPMENTS

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## RPM ENFORCEMENT ALTERNATIVES AND THE NEW ZEALAND CONNECTION

Much as is the case in Canada, an Australian supplier is prohibited by section 48 of the *Trade Practices Act* (the *Act*) from engaging in resale price maintenance (RPM). Two exemptions from this otherwise absolute prohibition are genuinely recommended prices and loss-leader selling.[1]

Judging by a recent spate of cases, the consumer electronics and computer hardware sectors appear to be popular venues for RPM practices.[2] Familiar names like Commodore, Sony and Toshiba have figured in recent proceedings. *Commodore Business Machines*[3] was fined $250,000 (adjusted to $195,000 on appeal in March 1990) after pleading guilty to 19 counts of RPM involving its Amiga computers.

In the *Sony* case,[4] the Commission obtained a conviction in May 1990 against the company, its national consumer sales manager and its former Queensland manager for six breaches of the *Act*. The Federal Court found that the respondents had deliberately refused to supply Sony goods to two Brisbane retailers who had discounted the equipment below the price set by Sony. In September 1990, the maximum fine of $250,000 was levied against the company while its executives were fined $25,000 and $12,000 respectively. This was less than the general 20 per cent proportionate penalty because neither was found to be personally responsible in any way for the formation of the RPM strategy that they were implementing.[5]

The *Toshiba*[6] case, on the other hand, was handled quite differently by the Commission. In a proceeding virtually identical to our own Director's negotiation of a supplier's Undertaking, the Australian authorities traded prosecution for a detailed Deed of Compliance[7] from Toshiba (Australian) Pty Ltd. Under the Compliance Deed accepted in August 1990, the Commission agreed not to take RPM proceedings against Toshiba provided the company set up a long-term training program to ensure that company staff would comply with the *Trade Practices Act* in the future. Toshiba admitted its wrongdoing, set up a three-year program of training and dealer notification and accepted regular monitoring by the Commission. In turn, the Commission featured the *Toshiba* case in its program of business education and voluntary compliance.

The Toshiba undertaking is a test case in the attempts of the Trade Practices Commission to encourage and proselytize a "culture of compliance"[8] among market leaders in Australian business. The parallels with Canadian experience are obvious and interesting. At the same time, the fundamental question of whether RPM should be authorized in certain situations is likely to be debated in Australia fairly soon, since the New Zealand *Commerce Act* is "likely to be amended"[9] to authorize RPM in appropriate cases. This change will influence similar thinking in Australia under the ambit of the countries' *Closer Economic Relations Agreement* (*CERA*).

*CERA* established full free trade in goods on July 1, 1990, when the competition laws of both countries replaced their respective anti-dumping provisions in applying to "relevant anti-competitive conduct affecting trans-Tasman trade in goods."[10] This step has accelerated a bilateral interest in harmonizing the Australian and New Zealand competition laws. In the words of the current Chairman of the Australian Trade Practices Commission, the RPM question is "an issue that cannot be avoided"[11] in the harmonization debate.

Whither Canada and the United States in due course?

**Notes**

1 *Trade Practices Act* 1974, as am., sections 48, 96-100.

2 The Trade Practices Commission, in 3 *Fair Trading*, p.6 (August 1990) referred to "a cycle of non-compliance" with the resale price maintenance provisions of the *Act* in the computer hardware industry.

3 Trade Practices Commission (TPC) Bulletin (hereinafter Bulletin) No. 52 (Jan-Feb 1990), p.19.

4 Bulletin No. 53 (March-April 1990), pp.15 and 18.

5 *TPC* v. *Sony (Australia) Pty. Ltd. & Ors* ATRP §41-053. Pincus J. pointedly lamented the $250,000 ceiling and was followed a few days later by the TPC Chairman's call for more "commercially realistic" penalties to underpin enforcement, drawing a comparison with New Zealand's maximum fine of $5 million: *Id.* §11-160.

6 *Supra*, note 2.

7 The Deed, including four schedules, runs to 25 pages.

8 A term coined by the Commission to define the corporate mindset underpinning its program of voluntary compliance, most evident in programs of education, guidelines and codes of conduct: 2 *Fair Trading*, (Feb 1990) p.1. The Toshiba Deed of Compliance has been given sustained prominence in business education seminars, the financial press and retail trade circles.

9 *Per* Professor Robert Baxt, current TPC Chairman in his 1990 Commonwealth Law Conference address, Bulletin No. 53, p.9.

10 Explanatory Memorandum (p.1), Trade Practices (Misuse of Trans-Tasman Market Power) Bill 1990. Passed by Parliament in early 1990, the Bill, *inter alia*, extended the misuse of market power prohibition to the Australian-New Zealand market context upon the expiration of antidumping controls on trade between the two countries.

11 *Supra* note 9. He continued, however, that "even if authorization were to be allowed, it would be extremely difficult to obtain it in the appropriate case."

## CONCENTRATION–NEWSPAPERS–COMPANY AND PUBLIC BENEFIT TESTS: THE PERTH DAILY NEWS TAKEOVER

"Australia's media industry is, as the saying goes down under, 'in more strife than the early settlers'."[1] Two of the country's three commercial television networks are in receivership. So is the John Fairfax Group, the second largest newspaper publisher in Australia. In Brisbane, Sydney and Perth, afternoon newspapers have ceased publishing in the last three years. In this respect, the Australian experience has mirrored Canadian and U.S. trends. Recent U.S. figures, for instance, reveal that 1296 dailies of the 1514 currently printed are their cities' only papers. In 47 of the 88 two-paper cities, the same owner prints both papers and in 21 other cases competitors share production and distribution facilities.[2]

Until mid-September 1990, Perth, the capital of Western Australia, enjoyed two dailies, the morning *West Australian* founded in 1833 and the afternoon *Daily News* dating from 1882. Faced with mounting losses and declining circulation, the *Daily News* agreed to a buyout by the *West Australian*, which promised to keep it going for at least the next 18 to 24 months with a reduced workforce.

Because the takeover would give the *West Australian* a monopoly of the Perth daily newspaper market, it would first required the approval of the Australian Trade Practices Commission. The decision of the Commission[3] and its aftermath raise several issues of comparative interest to *Record* readers, including the "failing company" defence, the application of public benefit tests to authorizing market dominance takeovers and the treatment of legislative bids to rescue target firms for non-competitive reasons.

The West Australian newspaper market has in recent years been the preserve of two local groups –West Australian Newspapers Ltd. (WAN), a wholly-owned subsidiary of Alan Bond's Bell Group, and United Media (UM), controlled by Brian Coppin.. WAN owns the only morning daily (*West Australian*, circulation 250,000), eleven regional papers, a rural weekly and, significantly, a 49.9 per cent share in Community Newspapers Ltd. (CN).

The remaining 50.1 per cent of CN shares are owned by UN. CN publishes ten suburban weeklies around Perth, and the *Daily News*, whose afternoon circulation has declined from 115,000 to 75,000 over the past six years. For the past three years, WAN was the contract printer for the *Daily News*. By the time of the proposed buyout by WAN, its unpaid printing bills amounted to nearly 70 per cent of the *Daily News*' current debt of $A13.2 million.[4] WAN offered that exact figure for the *Daily News*. The only other offer came from Robert Holmes at Court's Heytesbury Holding Ltd. in the amount of $250,000 for the paper's masthead and goodwill.

The *Australian Trade Practices Act* (section 50) prohibits any merger resulting in market dominance, unless the Trade Practices Commission on application by the acquirer specifically authorizes the merger (section 88(9)). By section 90(9), the Commission cannot grant authorization unless it is satisfied in all the circumstances that the proposed acquisition will result in benefits to the public that outweigh the takeover's anti-competitive consequences.

The Commission was more than a little familiar with the Perth scene by the time of its 1990 hearings, having taken steps beginning in 1987 to prevent WAN from getting control of the *Daily News* or the suburban papers. But losses continued to mount at the *Daily News* and United Media sought to include the Bell Group (WAN) in the ownership of the *News*. The Commission approved this in mid –1988 subject to United Media's maintaining control of Community Newspapers, the owners of the *Daily News*, through its four-to-three Board majority and 50.1 per cent shareholding control.

In rejecting WAN's bid, the Commission was "frankly skeptical about the good faith of WA Newspapers,"[5] who had permitted the *Daily News* to run up record debts while claiming to have effective control over its Board.[6] The acquisition, if approved, would have left WAN in a totally dominant position in the metropolitan Perth market. In the Commission's view, it created substantial barriers to entry by future papers and insulated WAN from further challenges should the Bell Group seek to sell either or both papers in the future.[7]

The Commission "professed serious difficulty"[8] in balancing the social costs (primarily of unemployment) against the anti-competitive consequences, concluding that the latter were simply too substantial to authorize the buyout. In the course of its decision, the Commission raised a number of questions for WAN to answer in its consideration of the U.S. "failing company" defence "in the Australian context".[9] These included:

- Is the potentially failing firm going to fail irrespective of the Commission's decision?
- What are the real causes of the firm's failure?
- Are there less anti-competitive solutions internal to the firm?
- Have all good-faith efforts been made to find other potential acquirers, which might pose a less severe danger to competition?
- Is the proposed acquirer the least anti-competitive acquirer available, in order to prevent assets leaving the industry?
- Will the apparent causes of failure of the firm be addressed by the new acquirer?[10]

Western Australian Newspapers failed to satisfy the Commission that the *Daily News* was a "failing" company. The masthead and goodwill offer by Heytesbury, which was rejected as "laughable"[11] by the majority owner, was seen by the Commission as the kind of alternative offer that the directors of the *Daily News* "must consider ... more seriously."[12] Target companies "may well have to accept offers for their assets and undertaking which fall far short of the price that a company that would become dominant is prepared to offer."[13] In effect, the "legal environment" of a one-company dominance merger places an onus on target company directors to find alternative buyers whose purchase price will always be less than the "monopoly price" that the dominant acquirer is prepared to pay. Even the absence of an alternative buyer may not genuinely assist the case for authorization if the target firm may not survive in the longer term irrespective of the Commission's decision.[14]

WAN claimed several public benefits would result from its acquisition of the *Daily News*. The first, the paper's continued availability, fell before the Commission's concern over WAN publishing "newspapers in every niche of the market".[15] The second, the preservation of jobs, proved to be elusive since combined morning and afternoon operations would cut the staff by a third and WAN's commitment to keep the *Daily News* going was both qualified and limited in time. On efficiency claims, the Commission was unpersuaded that the takeover would achieve appreciable savings beyond those already arising under WAN's existing contractual printing arrangement with the *Daily News*.[16] At the end of the day, the likely anti-competitive detriments from the takeover outweighed the claimed public benefits.

The Commission preferred to let the target company find an alternative purchaser or if necessary go into liquidation rather than grant a regional newspaper monopoly to the *Daily News*' morning rival and principal unsecured creditor. At least the way would remain open for a successor to come into the vacated market.

In the week following the Commission's decision, confusion and turmoil reigned. WAN, as it had threatened, called the *Daily News* on its sizeable debt, a receiver was appointed and staff were served their notices. The West Australian state government, railing against insensitive and distant Canberra bureaucrats, attempted to secure Opposition approval for emergency legislation to place the *Daily News* outside the Commission's jurisdiction. Under the State plan, WAN would be empowered to purchase the remaining shares of CN in return for a commitment to keep the *Daily News* going for the next two years. This was the very plan rejected by the Trade Practices Commission. The State government chose to rank the short-run social cost of unemployment and community dislocation over perceptions of corporate favoritism. A dangerous rift in Commonwealth-State relations derailed the government's rescue bid and the Bill never went forward.[17]

The *Daily News* closed and liquidation followed, including the sale of its masthead to a new bidder for $A300,000. Potential successors are periodically announced by nothing has crystallized and media observers doubt that anything will, judging by the current state of the newspaper publishing industry in Australia. Bond's Bell Group, the owners of the *West Australian*, announced in December that its Publishing Group (including the morning daily) was up for sale.[18] With the Fairfax collapse so are Melbourne's *Age*, the Sydney *Morning Herald* and the *Australian Financial Review*. Paper, anyone?

*WN*

**Notes**

1 *The Economist*, Dec. 15, 1990, p.62.

2 Cited in Devine, "Competition: A Pressing Need", *The Australian*, Sept. 20, 1990 at p.11.

3 *Trade Practices Commission Determination re West Australian Newspapers Limited and the Daily News* (Application No. A90502), Sept. 10, 1990 (hereinafter "TPC Determination").

4 *Ibid.*, p. 28.

5 "The Death of the Daily News", *The Age*, Sept. 24, 1990, p. 13.

6 Brian Coppin, the *Daily News*' majority owner, angrily denied charges that Community Newspapers was "warehousing" the paper for the Bond interests, claiming that every effort had been made to raise circulation, but had failed: *Sunday Times*, Sept. 16, 1990, p. 34.

7 By Section 50(2)(c), a merger is not prohibited if it merely results in the transfer of a position of dominance in a market from one business to another, unless the acquirer is then in a stronger position to dominate the market.

8 TPC Determination, p. 39.

9 *Id.*, at p. 25.

10 *Id.*, at pp. 25-26.

11 *Per* Brian Coppin, *supra*, note 6, at p.35. The 1989 value of the masthead had been written down to nil from its 1988 $A4.275 million level. No provisions was made for goodwill in the paper's 1989 balance sheet.

12 Heytesbury testified that it expected the Board of the *Daily News* to respond to its "initial" offer of $250,000. The Board did not do so, arguing that the offer was not a genuine offer. In November 1990, the *Daily News* went into liquidation. Its masthead was sold to HMR Engine Co., a little-known delisted firm, for $300,000.

13 TPC Determination, p. 27.

14 *Id.*, p. 26.

15 *Id.*, p. 31.

16 *Id.*, p. 35.

17 *West Australian*, Sept. 19, 1990, p. 1. The legislation would have assured WAN its complete control of the *Daily News* and given the Bond-controlled Bell Group the freedom to sell or close the paper after two years. West Australia was still engulfed in the aftermath of the infamous "WA Inc." affair involving serious allegations of corruption and misdealing between WA politicians and Bond companies. Better to blame Canberra for shutting down the *Daily News* and leave Bond to its own devices, became the majority political view in the state.

18 *Australian Financial Review*, Dec. 21, 1990, p. 1. The Bell Group's currently accumulated losses were reported at $A944 million, but its Publishing Division reported an $A40 million profit for the 15 months to October 1990.

## EC COMPETITION POLICY AND EUROPE 1992: IMPLICATIONS FOR CANADIAN BUSINESSES AND PUBLIC POLICY*

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Competition policy has traditionally played an important role in the achievement of the objectives of the European Community (EC). The policy is seen in the EC as a strong force for the development of a common market through the control of private restraints on competition within the Community as well as barriers to competition resulting from industrial aid granted by the member states. The initiative to complete the internal market by 1992 has further increased the importance attached to the role of competition policy in the EC. As the EC Commission stated in 1985:

> A strong competition policy will play a fundamental role in maintaining and strengthening the internal market ... As the Community moves to complete the Internal Market, it will be necessary to ensure that anti-competitive practices do not engender new forms of local protectionism which would only lead to a re-partitioning of the market.[1]

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*The discussion in this note is based on *Europe 1992: Working Group Report on Competition Policy* released in January 1991 as one of a series of reports on Europe 1992 by External Affairs and International Trade Canada. The *Report on Competition Policy* was developed within the Economics and International Affairs Branch of the Bureau of Competition Policy under the direction of an interdepartmental working group consisting of members of the Canadian departments of External Affairs and International Trade, Industry Science and Technology, Finance, Consumer and Corporate Affairs and Investment Canada. Copies of the Report can be obtained from the European Community Bureau of External Affairs.

The emphasis placed on the role of competition policy in completing the internal market has led to the adoption of a wide range of measures for expanding and strengthening its application in the Community. This note discusses the potential implications of these developments for Canadian businesses and public policy.

**EC Competition Policy Developments Relating to Europe 1992**

The role of competition policy in the EC has traditionally been broader than in Canada. In both jurisdictions, competition policy establishes rules on competition between private companies. Unlike the situation in Canada, however, EC competition policy also includes rules on the granting of government aid to business. These rules reflect the need for Community policy to deal with the separate industrial, regional, research and development and other policies of the independent member states that make up the Community. To some extent the nature of EC competition policy also differs from Canada's because of the inclusion of competition rules among the terms of the *EEC Treaty* itself. This has provided competition policy advocates in the EC with a particularly strong basis of support from which to promote the pro-competitive development of other Community policies.

Each of these dimensions of EC competition policy has an important relationship to the Europe 1992 initiative. With respect to the Community rules on inter-company competition, the main development relating to the Europe 1992 initiative has been the adoption of the *Merger Control Regulation*.[2] The *Regulation* was not specifically included in the program for finalizing the internal market set out by the European Commission in 1985. However, the issue subsequently obtained high political and economic prominence due to the large amount of cross-border merger activity in the late 1980s, and to continuing disparities between the merger policies of the individual member states. Increasingly, development of the *Merger Control Regulation* came to be viewed as necessary for the completion of a Community legal regime that would achieve the objective of a unified internal market.[3]

The *Merger Control Regulation* was accepted by the member states in December 1989, and came into effect in September 1990. The *Regulation* places most concentrations having a "Community dimension" under the exclusive jurisdiction of the EC Commission. These concentrations are defined in the *Regulation* as those in which:

i) the aggregate world-wide turnover of the merging parties is more than 5 billion ECU (about $8 bil. Cdn.);
ii) the aggregate Community-wide turnover of each of at least two of the merging parties is more than 250 million ECU (about $400 million Cdn.); and
iii) each of the relevant parties achieves no more than two-thirds of its Community-wide turnover within one member state.[4]

Concentrations subject to the *Regulation* may include not only mergers, but also any exchange of securities or assets, contract or other action transferring "the possibility of exercising decisive influence on an undertaking."[5] For these transactions, the *Regulation* establishes extensive notification requirements and a short time frame for the completion of investigations by the EC Commission.

The need for strict controls on anti-competitive state aids was recognized from the outset of the Europe 1992 initiative. In this regard, the *White Paper on Completing the Internal Market* stated: "it will be particularly important that the Community discipline on state aids be rigorously enforced ... [state aids]... not only distort competition but also ... threaten to defeat efforts to build the internal market".

The Commission's concerns regarding the threat of state aids to the internal market were borne out by the *First Survey on State Aids*, and a follow-up survey completed as part of the 1985 *White Paper*.[6] Both surveys found that large amounts of industrial aid were being provided by the member states across a wide range of industries. Overall, this aid amounted to about four per cent of the total value added of the EC manufacturing sector, or about 1,500 ECU ($2,400 Cdn.) for every worker in the sector.

In respect of this situation, the EC Commission has taken a number of steps to establish stricter control over the granting of anti-competitive state aids. These measures include:

i) the start of a review of major existing state aid programs to ensure their consistency with the EC competition rules;
ii) the development of frameworks and guidelines on the granting of state aids to the motor vehicle industry, economically depressed regions and public enterprises; and
iii) the initiation of actions to ensure proper notification of state aids to the EC Commission.

In addition, attempts to reduce the amount of subsidies granted under the existing system to the steel and shipbuilding sectors have been seen as further evidence of the EC Commission's determination to bring state aids under stricter control by 1992.

The White Paper on *Completing the Internal Market* also recognized that member state regulatory and institutional restraints are a major impediment to the development of open and competitive markets in areas of the EC economy such as air travel, telecommunications, energy, financial services and public procurement. Accordingly, pro-competitive regulatory and institutional reform in these areas has been a major part of the Europe 1992 initiative. In the air travel sector, for example, two packages of air travel regulatory reforms have been adopted, with a third being contemplated, to reduce regulatory restraints on intra-EC competition between Community-based carriers. In the financial services sector, substantial progress has been made toward the creation of single banking and insurance licences allowing companies based in one member state to establish branches and conduct business across the Community.

To ensure the development of competition in deregulating sectors of the European economy, the removal of anti-competitive legal and institutional restraints on competition is also being accompanied by strict enforcement of the EC competition rules. In this regard, the EC Commission has been very active in the development of competition guidelines and in the initiation of competition cases in many sectors of the EC economy (which traditionally are highly regulated). This activity is intended to ensure that the transition to competitive markets in these sectors will be smooth, and that companies will not be able to substitute private restraints of competition for the legal and institutional restraints that are being removed by the Europe 1992 initiative.

### Implications for Canadian Businesses

The developments noted above have a number of potential implications for Canadian businesses. The implementation of the *Merger Control Regulation*, in some cases, may improve the ability of Canadian companies to use mergers, acquisitions and other concentrations as a means to gain access to EC markets. In the past, such transactions were often complicated by overlapping EC and member state jurisdiction and by uncertain merger review procedures. The *Merger Control Regulation*, however, places most concentrations having a Community dimension under the exclusive jurisdiction of the EC. The *Regulation*'s time frame and procedures for investigations should help to expedite the completion of these concentrations.

There are, however, some important limitations on the potential benefits of the *Merger Control Regulation* for Canadian businesses. The *Regulation* is of little potential direct benefit to small and medium-sized Canadian businesses. Rather, the Community dimension thresholds in the *Regulation* should (with some exceptions) limit its application to mergers involving only large Canadian companies.[7] Mergers involving smaller Canadian companies, however, may be more likely to come under the *Regulation* after 1993 when the Community dimension thresholds are likely to be reduced.[8] Also, the *Merger Control Regulation* may indirectly benefit some smaller Canadian companies. These companies, overall, should be less likely to have their mergers and acquisitions scrutinized by both the EC Commission and the relevant member states. Rather, the Commission may be reluctant to use the limited resources that it has available to fulfill its obligations under the *Merger Control Regulation* to examine many smaller mergers that will also be reviewed by the member states.

The strict time limits that the Merger *Control Regulation* imposes for notification may be important for Canadian companies involved in concentrations having a Community dimension. The EC Commission must be notified of arrangements covered by the *Regulation* within one week of the completion of a binding agreement. Delayed or incomplete notification of concentrations can slow their approval and also result in fines. The information required to complete notification can be extensive. Accordingly, companies involved in concentrations that may come under the *Merger Control Regulation* would be well advised to start collecting the necessary information during the negotiation phase. In addition, it may be advisable to take advantage of less formal channels for prenotifying the EC Commission of proposed concentrations. This contact may help to clarify whether a proposed concentration has a Community dimension, as well as the nature and amount of information that the Commission will later require for notification.

Certain of the criteria for evaluating concentrations under the *Merger Control Regulation* may also create complications for Canadian businesses. In general, the assessment of concentrations under the *Regulation* should focus on their implications for competition in EC markets. However, some aspects of the *Regulation*, such as the requirement to consider the effects of concentrations on economic and technological progress, may place pressure on the EC Commission to also consider other social and industrial policy objectives. Companies that are involved in concentrations coming under the *Regulation* may, therefore, be required to deal with objections relating to both competition issues and broader policy concerns.

It should also be noted that business arrangements which may come under the *Merger Control Regulation* are not limited to concentrations among companies having operations in the EC. Rather, EC authorities may also attempt to apply the *Regulation* to concentrations in other countries that meet the Community dimension thresholds. These concentrations may include not only non-EC mergers and acquisitions, but also certain joint ventures, export consortia and other business arrangements in Canada or other non-EC countries that involve some transfer of control of a company.

The direct impact on Canadian businesses of the efforts being made to strengthen EC competition policy controls on state aids should generally be favourable. These controls should reduce the scope for member states to intervene in European markets to prop up failing industries, promote national champion or state-owned companies, or achieve other objectives. As a consequence, Canadian companies should be less likely to have their competitive position in EC markets directly undermined by member state subsidies.

The potential benefits to Canadian businesses, however, should not be overestimated. Despite the current efforts to control anti-competitive state aids, the EC member states will continue to have a wide discretion in providing subsidies for regional, social and industrial policy aims permitted under the *EEC Treaty*. Moreover, the more interventionist EC member states could strongly resist further attempts to restrain their ability to provide industrial subsidies. There is also the danger that stricter controls on member state aids will create pressure on the EC to increase the amount of industrial aid granted under Community programmes. This could create new competitive disadvantages for Canadian businesses in high technology, research and development and other areas in which Community authorities have been active.[9]

The EC's progress toward lower regulatory and institutional barriers to competition within the internal market may greatly benefit Canadian companies that have established access to related markets in the Community. As efforts to complete the internal market become further advanced, these companies will increasingly be operating in integrated European markets of up to 340 million people, as opposed to fragmented markets within individual member states. The measures being adopted in areas such as public procurement, financial services and telecommunications, however, may be of more limited benefit for companies exporting to the EC from Canada. Rather, these companies may find their access to Community markets impeded by the use of EC content or reciprocity provisions in related regulations and directives. Therefore, Canadian businesses in certain industries may be

required to establish operations in the Community or develop strategic alliances with EC-based companies in order to benefit fully from the opening of EC markets .

Canadian companies may also find that the removal of legal and institutional barriers to competition in the EC increases their potential exposure to the Community's competition rules. As noted, EC competition authorities are actively enforcing these rules in newly opening areas of the European economy. Canadian companies that may be affected should become aware of possible differences between the Canadian and EC competition policy treatment of restrictive trade practices such as territorial restrictions.

### Public Policy Implications

The developments discussed in this report also entail important concerns for Canadian public policy development. The efforts being made to establish open and competitive European markets should also increase competitive pressures on many areas of the Canadian economy. The European companies that will emerge from these new markets will offer formidable competition for Canadian businesses not only in EC markets but also in Canadian, U.S. and other markets. In addition to other possible advantages, these companies will have the benefit of assured access to open and competitive European markets of up to 340 million people.

Against this background, Canadian economic development will increasingly depend on the adoption of outward-looking policies rather than policies focusing solely on domestic markets. The relatively small Canadian market, by itself, will be less effective in the future at generating companies that are able to compete successfully in world markets which include more efficient EC competitors. Accordingly, bilateral and multilateral trade arrangements such as the GATT and the *Canada-U.S. Free Trade Agreement*, which enhance Canadian businesses' access to larger markets, will be even more important for Canadian competitiveness.

A concern that has frequently been raised in connection with the Europe 1992 initiative is the possibility that it will lead to new barriers to trade and competition between the Community and third countries. This does not appear to be an immediate issue with respect to the recent development of EC competition policy. The competition-related measures being adopted in the EC do not specifically create new impediments to access to EC markets by foreign businesses. There is, however, possible cause for future concern. Depending on how they are applied, some of the provisions in the merger, finance, telecommunications and other directives or regulations referred to above could, in the future, create new barriers to Canadian access to EC markets.[10]

A continuing strong commitment to competition policy principles in the EC would help to ensure that the removal of barriers to competition within the internal market will not eventually be accompanied by new barriers to the Community's trade with non-EC countries. This point was demonstrated by the development of the *Merger Control Regulation*. The emphasis placed on competition policy principles in the final draft of the *Regulation* ensure that potentially protectionist policy objectives will not have a greater influence on the assessment of concentrations. For example, some earlier drafts of the *Regulation* would have given greater prominence to EC social and industrial policy objectives in the assessment of concentrations.[11]

It should not be taken for granted, however, that competition policy concerns will continue to play as large a role as they have in the development and application of legislation in the European Community. Rather, the make-up of the EC Commission, which includes Commissioners having responsibility for all areas of Community policy, combined with the Commission's role in the enforcement of the EC competition rules, may result in other policy objectives obtaining greater prominence in the future. This might occur, for example, if a relatively weak Commissioner is appointed in the area of competition policy, or if other events, such as the possible failure of the current GATT negotiations or a European recession, increase the protectionist pressures on the EC Commission.

It will be important, therefore, for public officials and business interests in Canada to monitor the future development and application of competition-related legislation in the EC, and to be capable of effectively representing Canadian interests. This will require the establishment or maintenance of strong cooperative relationships between key public authorities in the EC and Canada. Over the longer term, it may also require the adoption, in an EC context, of more formal measures for cooperation, similar to the Canada-U.S. *Memorandum of Understanding With Respect to the Application of National Antitrust Laws.*[12]

The EC competition policy developments noted above will also be important factors for consideration in future Canadian domestic policy development. The use of reciprocal treatment provisions in Community directives and regulations on public procurement, merger control, financial services and other areas is increasing the interdependence between Canadian policy developments and the access of Canadian businesses to EC markets. Canadian policy development, therefore, will be required to take greater account of the Community's economic and regulatory legislation, as well as that of the U.S. and our other major trading partners.

It will also be even more important for Canadian domestic policies to promote the development of competitive domestic markets. With more efficient EC competitors, the use of regulatory, procurement, subsidy and other policies that create unnecessary inter-provincial barriers to trade, or restrict competition between Canadian firms, will pose an even greater threat to the development of internationally competitive Canadian industries. Similarly, Canadian companies that are able to use private arrangements to restrain competition will be less likely to become internationally competitive. Accordingly, it will continue to be important to have an effective competition policy framework in place in Canada.

**Notes**

1 Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council* (Luxembourg: Office for Official Publications of the European Communities, 1985), p.39.

2 *Council Regulation (EEC) No. 4064/189, of 21 December 1989*, OJ No L 395, 30.12.1989.

3 For discussion of the development of the *Merger Control Regulation*, see *Europe 1992: Working Group Report on Competition Policy* (Ottawa: External Affairs and International Trade Canada, January 1991), Chapter III.

4 See *id.*, for discussion of the coverage of the *Merger Control Regulation*, pp. 9-11.

5 *Council Regulation (EEC) No. 4064/189, supra*, note 2, Article 3.

6 Commission of the European Communities, *supra*, note 1, p.39.

7 See Commission of the European Communities *First Survey on State Aids in the European Community* and *Second Survey on State Aids in the European Community* (Luxembourg: Office for Official Publication of the European Communities, 1989 and 1990 respectively).

8 These measures are examined in more detail in the *Europe 1992: Working Group Report on Competition Policy, supra*, note 2.

9 See *id.*, Chapter V, for discussion.

10 Smaller mergers may be dealt with under the *Regulation* at the request of member states.

11 The EC Competition Commissioner has proposed that the Community dimension thresholds be lowered to 2 billion ECU (about $3.2 billion Cdn.) world-wide turnover and 100 million ECU (about $160 million Cdn.) Community-wide turnover.

12 For further discussion, see *Europe 1992: Working Group Report on Competition Policy, supra*, note 3, pp. 12 and 18-19.

13 *Id.*, pp. 29-31.

14 Examples of such provisions are outlined in *id.*, Chapter V.

15 On the treatment of territorial restrictions in the EC as opposed to Canada, see R. Anderson, P. Hughes, S.D. Khosla and M. Ronayne, *Working Paper on Intellectual Property Rights and International Market Segmentation:*

*Implications of the Exhaustion Principle* (Ottawa: Consumer and Corporate Affairs Canada, Economics and International Affairs Branch, October 1990), Chapter III.

16 The requirement in the *Merger Control Regulation* to consider the implications of concentrations for economic and technological development is a possible example of this type of provision. The requirement may create pressure for less favourable treatment of concentrations involving non-EC companies where, for instance, this might result in the transfer of technology out of the Community.

17 See Bernd Langeheine, *Substantive Review Under the EEC Merger Regulation* (Draft), presented at the Fordham Corporate Law Institute Seminar on International Merger and Joint Ventures, New York, October 18-19, 1990.

18 The *Memorandum* is reproduced in Annex IX of the *Annual Report: Director of Investigation and Research, Combines Investigation Act for the year ended March 31, 1984* (Ottawa: Supply and Services Canada, 1984).

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July 25, 1991

Dear Subscriber:

The March issue of the *CCPR* contained a feature article by Mr. Mark Ronayne, entitled "EC Competition Policy and Europe 1992: Implications for Canadian Businesses and Public Policy". Unfortunately, the article was printed with a number of errors and omissions in the footnotes.

*The Record* assumes full responsibility for the errors and apologizes to Mr. Ronayne for any embarrassment. The editors have conclusively established that the problems were caused by leprechauns in the *CCPR* computers. We believe that they were unwittingly brought into the country by a *CCPR* editor who visited the Blarney Stone during a recent visit to Ireland.

We have re-printed Mr. Ronayne's article in its entirety with a complete set of footnotes and references. Please insert the corrected article in your March issue.

Eric A. Milligan
Associate Editor