

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

THE INTERNATIONAL DIMENSION OF THE COMPETITION POLICY OF THE EUROPEAN COMMISSION

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The purpose of this paper is to describe how the European Commission sees its role vis-à-vis its main trading partners around the world.

In recent decades the volume of trade has grown at a spectacular rate, doubling every seven or eight years, while foreign direct investment has grown even more dramatically. There are also larger multinational firms, and more commercial practices that have an international dimension.

In such a context, every country has to make sure that firms are competing on an equivalent basis, even if they choose to operate beyond the limits of a national market. An important aspect of competition

policy is thus to create a *level-playing field*, so that the rules of the game are equal or at least similar for all competing enterprises. We know, however, that such a target is difficult to reach if these firms are subject to different competition rules with different criteria for making decisions, different procedures and different deadlines. The principle of equivalence is also violated when anti-competitive practices result in sanctuary market profits, or when remedial action is prevented because anti-competitive practices are located beyond the jurisdiction of a competition authority. It is thus in the interest of any country to seek for itself, and for its trading partners, an external dimension to its competition policy.

For several years now, the European Commission has been considering how best to address these issues. One question is what is the best approach to establish an international framework of competition rules. In 1994, a group of independent experts recommended that efforts should, in future, be made on two parallel fronts: **deepening** the existing forms of international cooperation; and **developing** a multilateral framework of competition rules including a commitment by all countries to apply similar competition rules.

These two points are addressed in order below.

I) **Deepening the existing forms of**

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international co-operation

1. European Economic Area Agreement

After the European Union Treaties, the most extensive international agreement in terms of competition policy is the European Economic Area Agreement ("EEA Agreement"), which was concluded between the then twelve members of the European Economic Community ("EEC") and six members of the European Free Trade Association ("EFTA"). It came into force on January 1, 1994. (Three of the EFTA countries, Sweden, Austria and Finland, have since joined the European Union ("EU")). The countries now concerned (Norway, Iceland and Liechtenstein) are subject to rules identical to the provisions of the European Community ("EC") Treaty, secondary legislation, as well as interpretations given by the European Court of Justice and EFTA Court, both of which must work in unison. This agreement contains competition rules identical to those under the EC Treaty.

The EEA Agreement provides that, in cases falling under the EEA competition provisions, the two authorities shall systematically forward copies to each other of notifications and complaints, to the extent that these have not been sent to both authorities, as well as copies of "comfort letters" and requests for information. The authorities shall also invite each other to oral hearings of the parties to proceedings in cases falling under the EEA competition provisions, and the EFTA Surveillance Authority shall be invited to observe at EC Advisory Committees in such cases. Important case documents may be requested by either authority. Moreover, the authorities are to consult each other before taking important steps in individual cases falling under the EEA competition provisions, and

take each other's comments into account. The authorities must, if requested, help each other in the carrying out of investigations in their respective territories.

Other agreements have been entered into, because it was recognised that an important condition for strengthening the economic links between the parties is the approximation of legislation. The Europe Agreements with Central and Eastern European countries ("CEEC") contain such provisions.

2. Europe Agreements

The Europe Agreements provide a valuable experience on how the introduction of competition policy and effective enforcement can contribute to the opening of a wider market. The introduction of market economies in Central and Eastern Europe has led the Community to review its trading relations with those countries and to conclude new agreements with them. The Europe Agreements provide a new framework for trade and related matters between the European Communities and their Member States, on the one hand, and each CEEC, on the other hand, on a bilateral basis. Europe Agreements with the following ten CEECs are in force: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia.

The Europe Agreements contain substantive competition rules, which apply where trade between the Community and the CEEC concerned is affected. Consequently, the Europe Agreements prohibit restrictive agreements between undertakings as well as abuses of dominant position in as far as they affect trade between the EC and the CEEC. They also contain provisions on the

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adjustment of state monopolies of a commercial character and on public undertakings as well as undertakings benefiting from special and exclusive rights. The Europe Agreements also provide that state aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the Agreement in as far as it affects trade between the Community and the CEEC concerned.

Another essential concept of the Europe Agreements is the **approximation** of legislation. In fact, the Europe Agreements provide that a major pre-condition for the CEECs' economic integration into the Community is the approximation of their existing and future legislation to that of the Community. The approximation of legislation also covers competition policy.

Approximation of legislation in the context of the Europe Agreements does not mean that the CEECs should adopt all the details of the Union *acquis* in the field of competition. Countries can limit themselves to taking over the main principles within the appropriate structural framework. Each country may decide that particular forms of laws or guidelines are the most suitable in its individual situation and that a particular monitoring and enforcement structure serves the purpose best.

What are now the main achievements and future challenges in competition policy in the CEECs?

In the field of anti-trust, the establishment of competition offices has taken place relatively quickly and without too much controversy in the CEECs. Most of the CEECs have also adopted basic competition laws taking over the core elements of Articles 81 and 82 of the EC Treaty and merger

control, as well as the necessary enforcement powers, and they are in the process of completing and refining the existing legislative framework. This is a great achievement.

However, the establishment of a competition authority and a competition law is only the first step towards an effective competition policy. A much more difficult task to fulfil is the effective enforcement of the law and application of the law by all economic operators. This requires, first of all, that the competition authority have sufficient human and financial resources. Secondly, the competition authority needs to be independent from political interference. The political will must also exist to grant the competition office real powers to enforce the law. Quite often competition authorities have far-reaching powers on paper, but in practice their ability to enforce decisions against certain enterprises or public undertakings or bodies seems more limited.

In the field of state aid, the introduction of control has proven much more controversial and politically sensitive than anti-trust policy. Progress has been slow and the most important objective today is to create transparency. As a matter of urgency, the CEECs need to take the necessary steps to establish a state aid inventory of all existing aid.

A second priority is the setting-up of a monitoring authority on state aid and a system for implementing this monitoring. Currently, these monitoring authorities do not yet receive, on a systematic basis, information on all new aid granted in their country so as to enable them to give an opinion on the compatibility of the proposed aid with the Europe Agreement.

It is clear that the establishment of a credible state

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aid control cannot be achieved overnight. However, to fulfil the economic criteria for accession to the European Union and to maintain confidence in current and future trade relations between the Community and the CEECs, it is important that concrete measures are taken to ensure a progressive adjustment of the system of state aid within a reasonable period of time.

The experience of the Commission's last 40 years' of enforcement of competition policy provides a useful model for competition policy in the CEECs. However, it is equally important to take into consideration the changing nature of market structures in the CEECs, as transition takes place. We therefore take a pragmatic approach to approximation of laws, ensuring that competition policy in the CEECs is fully compatible with that in the European Community, and at the same time taking into account the needs of transition economies. The Commission believes that the current institutional, substantive and procedural framework governing relationships between the EC and the CEECs is suited to achieving these goals.

3. EC-US Agreement

Another key example of the Commission's bilateral policy in the field of competition is the agreement concluded with the USA in 1991. When this agreement was signed the parties were facing a growth in transatlantic transactions and they wished to ensure a more effective and efficient application of their respective competition rules, especially in view of the development of transborder anti-competitive practices.

The objectives of this agreement are to promote a better co-ordination of competition policies, to further co-operation, to co-ordinate actions and to

respect principles of comity when implementing competition rules in individual cases. An original element is the inclusion of a so-called positive comity instrument whereby one country can ask the other country to act in those cases where the practice falls within the latter's jurisdiction but affects the former's important interests. The EC-US Agreement finally also includes provisions on mutual notification of cases.

Most cases of co-operation, which can range from merger reviews to cartel investigations, start by a discussion of the timing of the respective procedures. Checking when each step in the procedure is likely to be taken is a key element in determining the evolution of future co-operation and the scope for co-ordination of enforcement activities.

Further discussions frequently focus on the product market to determine whether both competition authorities have arrived at similar conclusions. These discussions are based on information that is publicly available. Under present rules, exchange of confidential information can only occur with the agreement of the firms through the grant of a waiver of their confidentiality rights. In fact, frequent exchanges of information have taken place after such waivers.

To give some statistics, in 1998 the EC notified 52 non-merger cases to the US and 43 merger cases; on its side, the US notified 46 non-merger cases to the EC and 39 merger cases.

The experience in operating this agreement with the US has demonstrated that such co-operation can be highly effective, substantially reducing the risk of divergent or incoherent rulings. Co-operation to date has helped to build confidence

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between the Commission and the US competition authorities and has facilitated an increasingly convergent approach toward the analysis of markets and regarding appropriate remedies. The closely co-ordinated parallel investigations of the Worldcom/MCI and Dresser/Halliburton mergers are good examples of the intensification of this co-operation.

The EC-US Agreement has recently been improved by the adoption of the Administrative Arrangement on Attendance ("AAA"). Indeed, in 1997 the US-DoJ and the US-FTC formulated specific requests to attend hearings held within the framework of the EC Merger Regulation. Following these requests, observers from the US were invited by the Commission Hearing Officer to attend after careful consideration of the particular situation of the cases involved: Boeing/MDD, Guinness/GrandMet and WorldCom/MCI.

In accepting US requests, the Commission took account of the fact that the US authorities were examining the same transactions in the US and that attendance at the hearings could improve co-operation and co-ordination of enforcement activities in the EU and the US and understanding of each other's work.

On these occasions, the Commission also stressed the bilateral and reciprocal nature of this co-operation. In order to establish reciprocity in this respect, Competition DG has concluded with the US-DoJ and the US-FTC this AAA enabling (i) the US authorities to participate, under certain circumstances, in our hearings as an observer, and (ii) enabling the Commission to attend under the same conditions certain crucial meetings between the US competition authorities and parties to proceedings under US antitrust rules. These are

the so-called "pitch meetings" which take place at the top level between the DoJ or the FTC and the companies involved in their proceedings, prior to the decision of the US authorities to take enforcement action.

In the longer term, the Commission is interested in reinforcing co-operation with the US in competition matters even further. That would include, for instance, the exchange of confidential information in order to combat violations of competition rules more effectively and efficiently. In this respect, we share the US view that our respective actions against serious infringements (cartels, abuses of dominant position) would be more effective if we could share confidential information.

To illustrate the benefits for antitrust authorities from deepening their co-operation in this area, one can cite the experience gained by the Commission and the US authorities in cases of international cartels investigated in parallel. These cases demonstrate the limitations of the existing co-operation framework owing to the impossibility of sharing confidential information for use as evidence.

In certain cases companies approach the Commission or the US authorities and offer, on the basis of the "leniency" or "immunity" schemes applied in the EU and the US, their full co-operation in establishing the existence of a cartel. They often submit substantial evidence in this respect. It often happens that such events provoke in the authority approached the launching of inquiries and investigations. The existing strict rules on confidentiality make it impossible for it to provide any information on its proceedings to other antitrust authorities. These authorities may

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thus have to spend several months collecting on their own the necessary information to launch dawn raids, taking the risk that, "warned" by the advanced discovery actions of the authority "first approached", companies might destroy evidence or generally prepare their defence. Exchange of confidential information in such cases could have improved enforcement on both sides.

In other cartel cases, the Commission and its US counterparts have been able to exchange sufficient information in order to synchronise dawn raids, thus limiting the risk that companies might destroy evidence. However, it is clear that information discovered by the two authorities during the first round of investigations (or in subsequent investigative actions), although of importance for reaching a final prohibition decision and imposing fines, cannot be passed on to the other side. This renders prosecution of these cartels more difficult.

In view of the benefits stemming from exchanging confidential information, the Commission believes that bilateral agreements enabling such exchanges should be seriously considered among OECD member countries within the framework of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels.

The Commission has finalised a bilateral agreement with the Canadian Government which is closely analogous to the 1991 EC-US Agreement. It is expected that it will be in force in June 1999.¹

4. Bilateral co-operation with other countries

With OECD countries, co-operation takes place under the umbrella of a "first generation" instrument for co-operation in the form of a

Recommendation, issued in 1986 and last revised in 1995.

The basic co-operation possibilities under this instrument are for all practical purposes similar to the ones in the bilateral agreements: notifications, consultations, comity, etc. This Recommendation forms the primary basis for current bilateral co-operation between the Commission and the competition authorities of OECD member countries. The Commission endeavours, to the fullest extent possible consistent with its resources and other constraints, to respect it diligently even if the Recommendation is not binding.

In particular, constructive, informal contacts are maintained between the Commission and the competition authorities of both Australia and New Zealand: in recent times, there has been extensive consultation between the Australian authorities and the Commission with regard to the Coopers and Lybrand/Price Waterhouse and P+O/Nedlloyd merger cases.

With Mexico, an Economic Partnership Agreement was concluded in 1997 which provides that the EU and Mexico should establish a mechanism for co-operation aimed at preventing restrictions of competition liable to affect trade between the EU and Mexico. Contacts between the Commission and the Mexican Federal Competition Commission already take place on a regular basis.

There is as yet no formal bilateral framework for the Community's co-operation in the field of competition with its other principal trading partners, most notably Japan. Notwithstanding this, regular contacts including an annual high-level bilateral meeting and the reciprocal

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notification of cases affecting each others' important interests take place between the Commission and the Japanese Fair Trade Commission.

The Commission does not see any need for separate competition co-operation agreements between the EU and these countries, at least for the time being. It should be noted that Australia has on a number of occasions called for the conclusion of such an agreement, pointing to the success of a competition co-operation agreement between Australia and New Zealand. It is felt, however, that the volume of cases being dealt with by the authorities in these countries and by the Commission which affect our respective important interests would not justify the administrative burden which such dedicated agreements would place on the Commission. Co-operation on the basis of the OECD Recommendation is regarded as sufficient.

What about non-OECD Countries?

Generally speaking, the Commission endeavours to co-operate with its most important trading partners in a fashion broadly analogous to that recommended by the OECD for co-operation between its members. That is to say that the authorities of the third countries concerned would usually be informed of the existence of investigations or proceedings affecting their important interests, and that the views expressed by those countries in relation to such enforcement activities will be given due consideration by the Commission. It would also be possible for the Commission or third countries' authorities to request each other to investigate a particular competition matter. It should be noted, however, that such co-operation will only be engaged in on the basis of reciprocity.

Some agreements containing competition provisions also exist with non-OECD countries. For example, a Trade, Development and Co-operation Agreement has just been concluded between the EU and South Africa which provides that restrictions of competition and abuses of dominance affecting trade between the EU and South Africa are incompatible with its proper functioning. South Africa recently introduced domestic competition legislation and is in the process of setting up a competition authority and specialised courts. The agreement also provides for the grant by the EU to South Africa of technical assistance in the competition field.

With MERCOSUR, Chile and with other Latin American countries, the Commission will shortly have to consider the merits of including provisions on competition and co-operation in relation to competition enforcement in forthcoming free trade negotiations.

The Community has recently concluded a series of so-called Partnership and Co-operation Agreements with Russia, Ukraine, and several of the other ex-Soviet states. These agreements, while less ambitious than the Europe Agreements, nonetheless involve a commitment by these countries to move their competition and state aid legislation progressively towards an approximation of the Community's legislation.

Relations with the Mediterranean countries in the competition field are primarily governed by the terms of the various Association Agreements (the Med Agreements) which have been concluded with most of these states. Only an Agreement with Tunisia has so far been ratified. However, Interim Agreements containing competition provisions are in force for Tunisia, Morocco, Israel, Jordan and

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the Palestinian Authority.

A draft Association Agreement with Egypt, containing provisions related to competition and perhaps state aid, is currently at an advanced stage of negotiation. Egypt is in the process of introducing domestic competition legislation. In contrast, negotiations with Algeria, Syria and Lebanon are, for a variety of political and economic reasons, not very far advanced.

II) The development of a multilateral framework of competition rules

Bilateral agreements are an important means of developing international co-operation and of promoting competition principles and they will undoubtedly remain so in the future. However, this is not the whole story.

Agreements so far have tended to be concluded between countries taking a common view of competition policy and sharing a commitment to enforcement. Moreover, the case by case approach of bilateral agreements is not sufficient to meet all the concerns raised by globalisation. This type of co-operation is by definition geographically limited. If we are to be able to reap the benefits of greater trade liberalisation, a more comprehensive and consistent approach is necessary. Hence the Commission's desire to broaden the remit of the WTO.

In today's global economy, there are numerous anti-competitive practices which have an international dimension and which therefore come under the jurisdiction of different competition authorities. This may result in conflicts of law and/or jurisdiction and might make it difficult for competition agencies to deal with transborder

restrictive practices.

The European Union has therefore taken the initiative to start a process of reflection and exploration in this field. It may of course be tempting, from a theoretical point of view, to think of an international system of common competition rules for all cross-border issues. Such a system has been working effectively within the European Community for decades. But it would not be realistic to extend this experience outside Europe for many reasons: problems of national sovereignty, different economic and legal traditions, etc.

The approach the Commission has chosen is prudent, pragmatic and progressive. What we have in mind is, in a first stage, a limited framework of competition rules. We would afterwards see what else could be done.

The WTO Singapore Ministerial meeting in December 1996 established a working group on the interaction between trade and competition policy. Most WTO members, including a large majority of developing countries, seem to acknowledge that an international framework of competition rules would contribute to the development of international trade and would therefore benefit all interested parties. Indeed, there is a growing recognition that anti-competitive business practices can in certain cases have restrictive effects on access to markets. There is also a general consensus that competition policy is a key factor in supporting the competitiveness of industry, in protecting a sound functioning of the economy, and in maximising consumer welfare.

The Commission therefore believes that the time has come for the WTO to begin negotiations on a basic framework of binding principles and rules on

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competition law and policy as it relates to anticompetitive practices with a significant impact on international trade and investment.

Let us now consider which areas could be covered by negotiations. In light of the discussions that have already taken place within the working group, the Commission believes that negotiations could focus on the following four points:

– First, the contracting parties could commit themselves to adopting domestic competition structures. This would imply basic competition rules on restrictive business practices, abuse of market power and mergers. Of course, the mere adoption of national legislation does not guarantee that competition law would be enforced in an efficient way. It does not ensure either that there is no discrimination between domestic and foreign firms. This legislation should therefore be coupled with adequate enforcement provisions and a right of access for undertakings to domestic enforcement authorities and national courts.

– Second, an important element of a WTO framework on competition could be the development of core principles and rules on domestic competition law and its enforcement. In this connection, attention should particularly focus on those aspects of competition law and policy which are more relevant for the multilateral trading system, while fully recognising the development dimension and differences in domestic legal and institutional frameworks. The WTO principles of transparency and non-discrimination would provide a key foundation for the development of such core principles and rules and it seems opportune to concentrate initially in areas where international consensus can be reached at an early stage.

WTO disciplines should be clearly geared towards the objective of better addressing those anticompetitive practices which have a significant impact on international trade and investment and therefore affect the WTO market-opening objectives. For instance, priority could be given to the issue of hard-core cartels, which are of particular concern from both a trade and competition perspective. At the same time, the possibility of flexible common approaches could be explored in relation to other anticompetitive practices which foreclose access to a market or severely limit market entry. Work in other areas, such as monopolies and vertical restraints, may take longer.

– Third, the elements of a co-operation instrument could also be developed. International co-operation is essential to enhance the application of competition law and to limit the risk of conflict arising from extraterritorial enforcement and fact-finding. Competition policy is an issue of common concern and co-operation should not be limited to OECD countries or bilateral agreements: any potential entrant should be in a position to fully exploit any competitive opportunity.

The elements of a co-operation instrument would be based to a large extent on experience to date. This means that they should include, for instance, exchange of non-confidential information and notification. These are, among other procedures, already provided for by the 1995 OECD Recommendation, as mentioned earlier.

Of course, precautions should be taken to make sure that a party with a more “pro-active” stance and more resources available does not influence the agenda and disturb the established enforcement priorities of another party. Priority would have to

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be given to practices with a substantial foreclosure effect.

Positive comity could also be addressed in a multilateral agreement, but there should be no binding obligation to investigate on behalf of a third country.

– Finally, WTO dispute settlement would back up the commitments assumed by Members under a multilateral framework of rules and principles. Dispute settlement modalities will need to be further considered so that they are well adapted to the specifics of competition law. In particular, there should be no dispute settlement review of individual decisions.

What is the state of play in Geneva?

In the context of the preparation of the 1999 Ministerial by the WTO General Council, the Community has identified competition as one of the “new issues” that the WTO should take up for rule-making in 1999.

This position is shared by most Member States, and by a large proportion of the developing member countries, especially in Africa and South America. The main source of opposition comes, on the one hand, from Asian countries who wish to link negotiations on competition to anti-dumping (although Japan and Korea’s position has softened a lot lately) and from the US, on the other hand, which does not wish to reopen negotiations on anti-dumping and which considers that “negotiation would be premature and could be counterproductive”.

The US arguments based on the diversity of the WTO should be turned on their head: the fact that

many developing countries are still in the process of developing a competition law framework is precisely a reason for WTO involvement so that such legislation can be based on commonly agreed principles which benefit from the experience acquired by other countries on the establishment of effective enforcement structures.

The Commission also signals to the US that a multilateral framework of competition rules is likely to be largely inspired by the areas of commonality between our respective systems of competition law, in particular if close co-operation can be developed between the two sides.

The argument has also been made by some WTO members (Hong Kong and Singapore) that the adoption of a competition law is not necessary to promote an open trading system and that, in any event, anti-competitive practices are of limited significance when compared with government restrictions on trade. This is, however, a rather marginal view. We should continue to stress that trade liberalisation and the setting up of competition policy structures are mutually supportive.

A related concern is the difficulties that developing countries may experience in setting up an effective domestic competition structure. In this connection, the Community should continue to advocate a flexible approach as regards developing countries, in particular the least developed ones, through transitional provisions and technical assistance.

Conclusion

Competition authorities all over the world face important challenges, in particular to ensure that competition policy can adapt to a rapidly changing

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economic environment. Our instruments to tackle anti-competitive behaviour or operations with an important international dimension are not yet fully developed. However, our co-operation on the basis of bilateral instruments is promising: legislation and administrative structure are in place in most of our main partners and we see the efforts to implement or to start implementing competition laws.

In the EU, fair competition has led to spectacular results. The opening of our markets to foreign trade has accelerated the process of change. In spite of difficulties, industry has been rejuvenated; there is a more efficient use of resources that has led to greater cohesion and social equality; firms now enjoy not only greater rights throughout the single market and beyond, but also a higher level of legal certainty and therefore less risk. All of this, whilst not necessarily creating barriers to other essential policies, has undoubtedly reinforced the social, cultural and economic fabric of the EU.

The EU's experience demonstrates the need to continue down the road of greater multilateral co-operation. The challenge is to extend to a broader stage what has been successfully achieved in Europe. The current talks, notably within the WTO Trade and Competition Group, will pave the way to the future.

Note

¹ See News Release at page 18 of this issue of the *Record*.

NEW ERA DAWNS FOR UK COMPETITION LAW ON MARCH 1, 2000

By: Gavin Murphy¹

March 1, 2000 marks a significant date in the history of United Kingdom competition law. This is the day when the *Competition Act 1998* (the "Act") takes full effect. The Act brings UK competition law into line with European Community ("EC") law and replaces or amends the *Restrictive Trade Practices Act 1976*, the *Resale Prices Act 1976* and the majority of the *Competition Act 1980*. Mergers and monopolies continue to be dealt with under the *Fair Trading Act 1973*, although in certain instances both can also be investigated under the Act.

The former legislation was in serious need of reform. It was unduly technical and essentially form-based, rather than effects-based, with the result that innocuous agreements were often caught. There were no effective sanctions against genuinely anti-competitive behaviour as the old UK competition law did not provide for the power to impose financial penalties, nor the ability to exercise formal powers of investigation. Evidence of anti-competitive behaviour could not be obtained, for example, through the execution of search warrants.² Nor did the law correspond to EC competition law, with the result that compliance with the two regimes created a costly and time consuming burden on business.

The new Act changes all that. It consists of two broad prohibitions and applies to agreements or conduct that affect trade within the UK. The two prohibitions are based on the Articles 81 and 82 (ex Articles 85 and 86) prohibitions in the EC Treaty

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on anti-competitive agreements and abuse of a dominant position. Parallels with EC law do not end there. Section 60 of the Act, the governing principles provision, aims to secure consistency of interpretation with EC law on questions arising under the Act. This section provides that UK courts must act so far as possible in such a way as to ensure that there is no inconsistency between their decisions and the principles laid down by the EC Treaty, the Court of Justice of the European Communities (the "ECJ") and EC jurisprudence in determining any corresponding question under EC law. The UK courts must also have regard to relevant decisions or statements of the European Commission, whose DG IV (Competition) is responsible for EC competition law. Nevertheless, this section also allows for the disapplication of EC law where there are "any relevant differences between the provisions concerned" For example, a relevant difference would be the definition in the Act of what communications are protected from disclosure by solicitor-client privilege, or legal professional privilege as it is called in the UK.³ This means the Director-General of Fair Trading (the "Director-General"),⁴ who has statutory authority to enforce the Act, is not obliged to follow EC principles. He is free to develop his own policy in this area.

Concurrent Jurisdiction With Utility Regulators

The Director-General shares jurisdiction with sector specific utility regulators. There is concurrent application of the Act in the following regulated industries: telecommunications, gas, electricity, water and sewerage and railway services. Apart from two areas relating to the issue of guidance on penalties and procedural rules, the

regulators have the same powers as the Director-General to apply and enforce the Act in their respective sectors. Where a matter is sector specific, it is expected that the regulator will take jurisdiction, although the Director-General always has inherent jurisdiction over all matters. Unless otherwise stated, reference to the Director-General throughout this paper should be taken to include reference to sector regulators.

The Prohibitions

The Chapter I prohibition covers agreements between undertakings, decisions by associations of undertakings or concerted practices, whether written or oral, which prevent, restrict or distort competition in a relevant market and which may affect trade within the UK. The Chapter II prohibition applies to conduct by an undertaking which amounts to abuse of a dominant position in a relevant market which may affect trade within the UK.

An agreement will only infringe the Chapter I prohibition if it has an appreciable effect on competition. This benchmark follows from EC case law.⁵ The Director-General takes the view generally that an agreement will not have an appreciable effect on competition if the combined market share of the parties to the agreement in the relevant market is less than 25 percent. An agreement which directly or indirectly fixes prices, allocates markets, imposes minimum resale prices or is one of a network of similar agreements which have a cumulative effect on the market, is capable of having an appreciable effect on competition even when market shares are below the 25 percent threshold. Likewise, agreements where market shares are above 25 percent may not necessarily have an appreciable effect on competition

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depending on the circumstances.

Chapter II prohibits abuse of a dominant position. Non-exhaustive examples of abuse are included in the Act, mirroring similar provisions found in Article 82 of the EC Treaty. These include imposing unfair purchase or selling prices, limiting production, markets or technical developments to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading partners and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no relation to the subject matter of the contracts.

An undertaking would be considered dominant if it can prevent effective competition being maintained on the relevant market by having the power to act independently of that market.⁶ As in any competition law assessment, market shares are a key factor in determining dominance. Where market shares are less than 40 percent, an undertaking's conduct will generally not be caught by the Chapter II prohibition.

Notification

There is no obligation to notify the Director-General of an agreement or conduct. But undertakings may wish to seek comfort by way of formal guidance or a decision on whether an individual agreement⁷ or conduct infringes the Chapter I or Chapter II prohibition and whether an exemption would be possible if application were made for a decision.⁸ Notification of an agreement provides the parties with provisional immunity from financial penalties from the time of notification to the Director-General. Provisional immunity from financial penalties does not apply with respect to conduct notified under the Chapter II

prohibition. Immunity is also conferred where an agreement is notified to the European Commission, from notification to Commission decision. Favourable guidance or decisions provide immunity from financial penalties and once given, the Director-General cannot reopen a case except in narrowly defined situations.

Section 53 of the Act permits the Director-General to charge fees for specified functions and it is expected that a notification for guidance will cost in the range of £5,000. Decisions are considerably more at £13,000, since they involve an extensive assessment of the relevant market and of the individual circumstances of each case, including its economic effects. Differing from guidance, decisions also involve consultation with third parties such as customers, competitors and suppliers. Furthermore, unlike guidance notification, decision results will be made available to the public.

The Exemptions

Like EC competition law, the Act provides for exemptions from the Chapter I prohibition (but not the Chapter II prohibition). There are three types of exemptions: individual, block and parallel exemptions. The criteria to qualify for an individual or block exemption is the same as in the EC, *viz.* it must be demonstrated that the agreement in question would contribute to improving production or distribution, or promote technical or economic progress, and allow consumers a fair share of the benefits; and the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

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Notification must be made to the Director-General to be considered for an individual exemption.⁹ A block exemption would cover a particular category of agreements and any agreement that falls within the block exemption is automatically exempted.¹⁰ Notification is not necessary. A parallel exemption applies to an agreement that is currently exempted under EC law, either individually or by block exemption. These agreements are also automatically exempted under the Act and need not be notified. By way of example, there is a parallel exemption covering technology transfer agreements by virtue of the EC block exemption in this area. The Director-General may, however, impose certain conditions on the application of parallel exemptions in the UK context.

The Exclusions

The Act also includes exclusions. An agreement that constitutes a professional rule will be excluded from the Chapter I prohibition following designation. Schedule 4 to the Act lists the professional service rules that can be excluded, for example the services of the legal or medical profession, and further provides for the designation of additional professional rules. There is also an exclusion for land and vertical agreements, aimed at ensuring neither the resources of the OFT nor business are wasted on examining harmless agreements that do not have an appreciable effect on competition. Other key agreements or conduct excluded from both prohibitions include mergers and joint ventures (these would be primarily considered under the *Fair Trading Act 1973*), an agreement or conduct which would result in a concentration with an EC-wide dimension (this would be covered by EC competition law rules), an agreement or conduct which is made or engaged in to comply with a specific legal requirement (this

exclusion would be similar to Canada's regulated conduct defence) and an agreement or conduct engaged in by an undertaking entrusted with the operation of services of general economic interest, or of a revenue producing monopoly, insofar as the prohibition would obstruct the performance of those tasks. An example would be the Post Office. This is referred to as the general economic interest exclusion and is based on similar provisions in EC competition law.

Exclusions should not be seen as a licence to enter into seriously anti-competitive agreements. In certain instances the Director-General may give a direction to disapply an exclusion if he considers that an agreement will infringe the Chapter I prohibition and will not qualify for an unconditional individual exemption.

The Powers of Investigation

The Act arms the Director-General with significant powers of investigation. Under s. 26, the Director-General could require any person to produce for him a specified document, category of document or specified information which he considers relates to any matter relevant to an investigation initiated under s. 25. The power is to be exercised by notice in writing. This power includes the power to take copies of, or extracts from, produced documents and require an explanation of the documents produced.

Section 27 provides for the power to enter premises in connection with an investigation under s. 25 without a warrant on either two working days' written notice of the intended entry or without prior notice depending on the circumstances of the investigation. Any investigating officer of the Director-General, who is authorised in writing by

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him to do so, can take copies of, or extracts from, any document which is required to be produced which the officer considers relates to any matter relevant to the investigation and further require an explanation of the document. Information held in a computer accessible from the premises can also be required to be produced for examination.

Section 28 allows for the power of entry without prior notice and the execution of a warrant in relation to an investigation under s. 25. A warrant would specify the power to search for, and take copies of, or extracts from, any document appearing to be covered by the warrant and require an explanation of the document. The power would be exercised by a named officer of the Director-General, and any other of his officers whom he has authorised in writing to accompany the named officer, under a warrant issued by a judge in specified situations. The officers can search the premises specified in the warrant, using such force as is reasonably necessary for entry. As with s. 27, on-site searches can also extend to computer systems. This section also allows for the taking of original documents in certain instances and, where a judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation, the warrant can extend to those documents.

Co-operation with the Director-General's investigation is essential. Failure to comply with a requirement under ss. 26-28, or intentionally obstructing an officer from carrying out authorised duties under ss. 27 and 28 is a criminal offence. Obstruction could result, on conviction on indictment, in imprisonment for two years or to a fine, or to both. Destroying or falsifying documents or intentionally providing the Director-General with misleading information are also criminal

offences that could lead to two years imprisonment, a fine, or both.

Enforcement of the Act

The Director-General acts as both investigator and judge. Like the European Commission, he can issue infringement decisions and require an undertaking to pay a financial penalty for engaging in anti-competitive activity. Where he proposes to make an infringement decision, he is required under s. 31 of the Act to give written notice to the persons most likely to be affected by the proposed decision and give those persons an opportunity to make representations to him before a final decision is taken.

Where an infringement decision is taken under ss. 32 or 33 in respect of either prohibition, the Director-General may give directions to such persons whom he considers appropriate to bring the infringement to an end. A direction may require the parties to modify the agreement or conduct, or require them to terminate the agreement, or cease the conduct. If a person fails to comply with a direction, the Director-General may seek a court order to enforce it. The Act also allows for interim measures to be taken where the Director-General has a reasonable suspicion that one of the prohibitions has been infringed and he considers that it is necessary to act as a matter of urgency to prevent irreparable damage to a person or category of persons or to protect the public interest.

The Director-General can also make a provisional decision if he has conducted a preliminary investigation into a notified agreement and concluded that it will infringe the Chapter I prohibition and it is not appropriate to grant an

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individual exemption. This has practical implications as a provisional decision removes the immunity from financial penalties which initially arose as a consequence of notification. This provision mirrors EC competition law with regards to agreements notified to the European Commission for individual exemption.

The Penalties

The Act provides for the imposition of financial penalties for the first time in UK competition law. There was some discussion when the Act was first being considered whether imprisonment should be a penalty for breaching the prohibitions, as in Canadian competition law. But in the end this proposal was not taken up, perhaps partly because the prohibitions are not of a strict criminal nature, nor is imprisonment a penalty for breaching the EC competition rules.

Penalties can be imposed by the Director-General of up to 10 percent of UK turnover of an undertaking per annum for a maximum of three years. This differs from EC law where the maximum penalty is 10 percent of an undertaking's previous year's worldwide turnover. John Bridgeman, the OFT's Director-General, intends to take a robust approach to his new fining powers, warning company officials that breach of the prohibitions will result in fines "that will make their eyes water".¹¹

The Director-General can only impose a financial penalty if he is satisfied that the infringement has been committed intentionally or negligently. Unlike Canadian competition law, but similar to EC competition law, there is no individual liability for infringing the prohibitions. If a penalty is not paid, the Director-General may recover from the

undertaking concerned any amount payable under the penalty notice as a civil debt due to him.

The Act contains immunity from penalties for small businesses. There is limited immunity from financial penalties for small agreements in relation to the Chapter I prohibition and conduct of minor significance in relation to the Chapter II prohibition. The immunity does not extend to price fixing agreements. What constitutes a small agreement and conduct of minor significance will likely be determined by turnover of the undertakings involved. While the turnover levels need to be defined by an order of the Secretary of State for Trade and Industry, the government minister responsible for UK competition law, it has been suggested by the OFT that the thresholds are likely to be £20 million combined annual turnover for agreements and £50 million for conduct.

Undertakings which are immune from financial penalties are not immune from any other enforcement action by the Director-General. He may still investigate the agreement or conduct and also make a decision to withdraw the immunity if, as a result of his investigation, he considers that it is likely to infringe one of the prohibitions.

Finally, it should be noted that any agreement that infringes the Chapter I prohibition is null and void and cannot be enforced. Third parties who have suffered financial loss as a result of any anti-competitive behaviour can bring a claim for damages in the civil courts.

Appeal Rights

There are limited rights of appeal from the Director-General's decisions to the Competition

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Commission Appeal Tribunals, headed by Sir Christopher Bellamy, knighted in the 2000 New Year honours and formerly the British judge at the European Court of First Instance (which hears appeals from European Commission cases on EC competition law matters). Any party to an agreement in respect of which the Director-General has made a decision may appeal that decision. Likewise, any person in respect of whose conduct he has made a decision may appeal that decision. Third party appeals are permitted where the applicant has sufficient interest and provides reasons why the relevant decision should be withdrawn or varied.

The Appeal Tribunals do not carry out any investigations. If new and substantial evidence comes to light during an appeal, the matter may be referred back to the Director-General for further investigation. Decisions of the Appeal Tribunals can be appealed with leave only to the Court of Appeal (or Court of Session in Scotland or Court of Appeal in Northern Ireland) on points of law or levels of penalty.

Complaints and Confidentiality

There is no standard procedure to lodge complaints, but where the complaint falls within the jurisdiction of a regulator, it will generally be handled by the regulator, otherwise it will be dealt with by the OFT. Anonymous complaints are acceptable, but the OFT, like the Competition Bureau, has pointed out the practical difficulties of maintaining complete anonymity if a complaint reveals serious market failure requiring punitive and/or remedial action. Nevertheless, the Act contains confidentiality provisions and restrictions on the disclosure of information. Section 55 provides a general restriction on the disclosure of information that

has been obtained under, or as a result of, any provision of Part I of the Act and relates to the affairs of any individual, or undertaking, unless consent to the disclosure has been obtained.

This section does not apply to the disclosure of information made for the purpose of facilitating the performance of any relevant functions of the Director-General. This would obviously include examining serious allegations of anti-competitive activity in the UK marketplace. The Director-General¹² must go through a balancing exercise when considering whether to disclose information obtained under the Act. He must have regard to the need for excluding, so far as is practicable, information the disclosure of which would be contrary to the public interest. Furthermore, he must have regard to the need for excluding commercial information, the disclosure of which may harm the business interests of the undertaking or information relating to the private affairs of an individual, the disclosure of which may cause that person harm. The Director-General must also have regard to the extent to which the disclosure is necessary for the purposes for which he is proposing to make the disclosure.

Transitional Arrangements

To help prepare business for the new Act, there is a one to five year transitional period. Most agreements made prior to March 1, 2000 which comply with existing law will benefit from concessionary periods during which the Chapter I prohibition will not apply. A one year transitional period is the general rule. There will be a transitional period of five years for agreements which, immediately before March 1, 2000, were found not to be contrary to the public interest by the Restrictive Practices Court and certain

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arrangements exempted under the *Resale Prices Act*. There are also some five year transitional periods in regulated industries. Agreements subject to a Restrictive Trade Practices Act direction are also exempt from the Chapter I prohibition for their duration. No transitional periods will apply for agreements made after March 1, 2000.¹³

The Director-General can extend transitional periods, either on application or his own initiative. He can also terminate them. Transitional periods do not apply to the Chapter II prohibition.

Conclusion

The *Competition Act 1998* brings UK competition law into the 21st century and represents the most significant revision of British competition policy in 25 years. The new law is founded on a competition-based assessment of agreements and conduct, and brushes aside forever the form-based approach to UK competition law enforcement. As with Canada's Competition Bureau, the OFT takes the view that rigorous law enforcement activity coupled with an extensive public education program are the best methods to promote compliance with the law and to discourage anti-competitive behaviour. The new Act and the OFT's treatment of it feature both these elements.

The Act contains strong investigatory powers and the Director-General can mete out severe financial penalties if he finds that either of the prohibitions have been infringed. Failure to co-operate in his investigation could result in criminal conviction.

But the new Act is also flexible and fair, freeing undertakings from unnecessary filings and letting them get on with the business of business. Only

agreements that have an appreciable effect on competition will be caught by the Chapter I prohibition. The Act provides for guidance or decisions on the competitive effects of agreements or conduct, along with exemptions, exclusions and immunity from financial penalties for small business. There is a favourable treatment policy for whistleblowers, modelled largely on the American corporate leniency policy. Undertakings that have participated in cartel activity may benefit from total immunity from financial penalties or a reduction in financial penalties up to 50 percent. A transitional period starting March 1, 2000 exists for most agreements made before that date to help business adjust to the new regime. The Director-General has published a considerable amount of general advice and information¹⁴ on the Act and established an education program to help inform the public about the Act's provisions. Finally, there is a wealth of substantive EC case law and European Commission statements that can be drawn upon for further consideration.

In his 1998 Annual Report, OFT Director-General Bridgeman says an environment which truly encourages and safeguards competition between firms for the benefit of UK consumers is finally in sight.¹⁵

That day has indeed arrived and effective competition law is now a reality in the UK.

Notes

¹ Of the Canadian Competition Bureau, who completed a one-year assignment in October with the Office of Fair Trading (the "OFT"), the UK competition authority. The author wishes to thank Peter Willis, senior competition specialist at Taylor Joynson Garrett, Blackfriars, London, for his helpful comments on an earlier draft. The views expressed in this paper are

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strictly those of the author and in no way reflect the policy or opinions of either the Competition Bureau or the OFT. This paper was completed in January 2000.

- ² The power to conduct a dawn raid could always be exercised by the OFT when acting on behalf of the European Commission under EC competition law.
 - ³ In the UK, as in Canada, privilege extends to confidential client communications made to or received from any professional legal adviser, when asking for, or obtaining, *bona fide* legal advice. Privilege also protects communications made in connection with, or in contemplation of, legal proceedings. In EC law, privilege only extends to lawyers in private practice and only relates to the client's rights of defence. See in this regard Gavin Murphy, "Solicitor-Client Privilege: Canada and the E. C. Compared", [1999] E.C.L.R. 185, www.dur.ac.uk/Law/deli/murphy1.htm.
 - ⁴ The Director-General is aided in his work by the OFT.
 - ⁵ Case 5/69 *Volk v. Vervaeke* [1969] E.C.R. 295.
 - ⁶ Case 27/76 *United Brands v. Commission* [1978] E.C.R. 207.
 - ⁷ Guidance or a decision cannot be provided on prospective agreements.
 - ⁸ There are no Chapter II exemptions.
 - ⁹ Any agreement that does not have an appreciable effect on competition in the UK should not be notified to the Director-General.
 - ¹⁰ Given the scope of the exclusions and parallel exemption provisions, it seems unlikely there will initially be many UK block exemptions. But see "Bus Groups Look for Competition Law Exemption", *Financial Times*, January 28, 2000, p. 6, where U.K. bus industry leaders hope to obtain the first block exemption under the Act to allow companies to agree to prices and routes.
 - ¹¹ "Fair Trade Chief's Future in the Balance", *Financial Times*, December 22, 1999, p. 4
 - ¹² Or the Secretary of State.
 - ¹³ Except in the limited case of certain utilities agreements.
 - ¹⁴ As he is required to do under s. 52 of the Act.
 - ¹⁵ *Annual Report of the Director General of Fair Trading* (London: The Stationary Office, 1998), p.7.
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