

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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New Cartel Immunity Policy

The Australian Competition and Consumer Commission (“ACCC”) has recently produced the new ACCC Immunity Policy for Cartel Conduct (the “Policy”). In general terms, the Policy was discussed in the last issue of the *Record* in relation to proposed changes to the *Trade Practices Act 1974* (“TPA”) in the area of cartel conduct. The Policy, which follows similar initiatives existing in Canada and the United States, came into effect on September 5, 2005 and replaces the previous leniency policy released by the ACCC in 2003. The rationale behind the Policy is to encourage businesses and individuals to disclose illegal behaviour and in turn assist the ACCC to more efficiently and effectively protect consumers and prosecute cartel participants.

The Policy confers full amnesty from prosecution and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC’s investigation and prosecution of other cartel participants.

The Policy is purely administrative and does not have any legislative backing, nor does it in any way amend the TPA. The Policy is merely an agreement between parties applying for immunity and the ACCC.

However, as the ACCC is the regulatory body that prosecutes anti-competitive conduct, it is important for companies operating in Australia to be aware of the Policy’s operation and ramifications. If and when the proposed Trade Practices Amendment (Cartel Conduct) Bill becomes law (it is yet to be drafted), the Policy will have to be amended to incorporate the anticipated criminal penalties for parties involved in cartel conduct.

Cartel Conduct

For the purposes of the Policy, cartel conduct comprises any of the following categories of conduct engaged in by two or more businesses who are, or otherwise would be, in competition with each other:

- price fixing;
- market sharing including bid rigging, customer sharing and market allocation;
- agreements not to compete with each other or to limit or restrict competition between them; and
- production or sales quotas.

Eligibility

The immunity policy applies to large and small businesses and to individuals who have engaged in cartel conduct affecting Australian markets.

An applicant will be eligible under the Policy where it applies for immunity and has satisfied the following conditions:

CANADIAN COMPETITION RECORD

- (a) where the applicant is a corporation, the corporation is or was a party to a cartel;
- (b) where the applicant is an individual, the individual is or was a director, officer or employee of a corporation that is or was party to a cartel;
- (c) the applicant admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA;
- (d) the applicant is the first person to apply for immunity in respect of the cartel;
- (e) the applicant:
 - (i) has not coerced others to participate in the cartel; and
 - (ii) was not the clear leader in the cartel;
- (f) the applicant has either:
 - (i) ceased its involvement in the cartel; or
 - (ii) indicated to the ACCC that it will cease its involvement in the cartel;
- (g) in the case of a corporation, its admissions are a truly corporate act (as opposed to isolated or individual admissions); and
- (h) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the TPA arising from the conduct in respect of the cartel.

Markers

An applicant proposing to apply for immunity under the Policy may request a marker for the purpose of preserving, for a limited period of time, its position as the first person to apply to the ACCC for immunity in respect of the cartel. In general, a marker will be valid for a maximum of 28 days and may be shortened in circumstances where the applicant has delayed reporting or the ACCC is advanced in a pre-existing investigation. The ACCC may also renew or extend a marker where it is satisfied that a party requires more time, the delay is reasonable and the party can show a genuine attempt to finalise the immunity application.

A marker can be an important tool, especially for larger companies with offices in different jurisdictions. It may provide a corporation with the extra time it needs to gather all necessary information before making an immunity application. It must be noted that this time extension is not infinite and the ACCC will not tolerate abuse of a marker as a stalling strategy.

Process

If, on the basis of full disclosure and cooperation by the applicant, the ACCC decides that all requirements have been fulfilled, it will grant final immunity. However, if the ACCC later forms the view on reasonable grounds that the applicant has not satisfied all of the conditions, or failed to give full disclosure, it has the power to revoke the grant of immunity.

Confidentiality

Under the Policy, the ACCC will use its best endeavours to protect any confidential information provided by applicants for immunity. However, the Policy does not provide applicants with the same kind of paperless process that, for example, exists in the United States and Canada. Arrangements can be made whereby the

CANADIAN COMPETITION RECORD

party applying for immunity is not required to provide any documentation to the ACCC. However, this does not preclude ACCC officers from creating their own notes or documents, which could then arguably be discovered by other parties in subsequent litigation. The Australian law on this question is unsettled.

The Immunity Policy and Document Discovery: *ACCC v. Visy Industries*

The introduction of the cartel immunity policy will increasingly place sensitive documents from high-profile companies into the hands of the ACCC. The potential disclosure of documents collected during cartel investigations has been highlighted during the recent Australia Federal Court case of *ACCC v. Visy Industries [Visy Discovery]*.¹ In this case, the court allowed access to some confidential documents acquired by the ACCC through an immunity application by Amcor Limited (“Amcor”) to its main industry competitor.

Background – Major Competitor Requests Confidential Documents

In the primary case of *ACCC v. Visy Industries Holdings Pty Limited & Ors [ACCC v. Visy]*², which is still underway, the ACCC is pursuing allegations of price fixing and market sharing against Visy Industries Holdings Pty Ltd (“Visy”). These proceedings were brought against Visy based on information provided by Amcor. In return for immunity, Amcor has agreed to provide the ACCC with ongoing assistance in its investigations against Visy. In *Visy Discovery*, Visy applied for an interlocutory injunction for the disclosure of documents that had been provided to the ACCC by Amcor during its immunity application. Amcor, to no avail, claimed that certain pricing and other information contained in the disputed documents was confidential, and would therefore be damaging if released to Visy, its major competitor in the Australian

market for the supply of corrugated fibre packaging. On April 12, 2006, having gained access to some of Amcor’s documents, Visy lodged its defence to the ACCC allegations.

Decision – Some Access Is Allowed

Justice Heerey rejected Amcor’s submissions in the interlocutory application against discovery and ordered that some of the documents held by the ACCC should be disclosed to Visy. Heerey J held that a number of documents had been provided to the ACCC by customers of Amcor, and that there was no evidence to suggest that Amcor had given these documents to its customers “in circumstances which imposed obligations of confidentiality.” The judge noted that the assessment of prices charged by Amcor to customers may become an important part of the ACCC’s price-fixing case against Visy. As such, it would not be possible for Visy to adequately deal with such price assessments “without input from the individual Visy respondents and other officers of the Visy companies who are familiar with these factors and how they impact on ultimate dollar figures.” Indeed, even if Amcor could cite confidentiality in relation to the disputed documents, this was outweighed by the centrality of the documents to the issues in the case.

The judge did stop short of adopting Visy’s submission that in disclosing the documents to the ACCC, Amcor “must have known it was inevitable that documents such as these would be used in proceedings commenced by the ACCC against Visy, and took the risk of disclosure when facilitating serious proceedings against its major trade rival”. This argument was rejected by Heerey J who said that “in disclosing to the ACCC what it believed, on legal advice, to be unlawful conduct Amcor was complying with its legal obligations. The Court could not use Amcor’s action as a ground for depriving it of rights it might otherwise have.”

CANADIAN COMPETITION RECORD

Implications

This decision may have implications for companies wishing to seek immunity from the ACCC. The lack of guaranteed confidentiality could potentially undermine the effectiveness of the Policy if cartel members, fearing the exposure of commercially sensitive information, become less inclined to come forward with incriminating information. As demonstrated in *Visy Discovery*, this information could be disclosed in the course of the litigation, even if such information was obtained by the ACCC from third parties.

Apart from the disclosure of sensitive documents to competitors, there is also a possibility of follow-on suits by consumers arising out of price fixing actions by the ACCC. This is discussed in general form in the following case of *Jarra Creek Central Packing Shed Pty Ltd & Ors v. Amcor Limited & Ors [Class Action]*.³

The Dangers of Seeking Immunity – Class Action Over Price-Fixing Cartel

There is always a danger that a company that has been granted immunity from the ACCC with regard to the cartel proceedings, could still be exposed to civil actions by third parties who have been harmed by the cartel behaviour, as the ACCC immunity policy does not extend immunity to such claims. This threat has now become a reality, with an announcement on April 11, 2006 that around 17,000 businesses have filed a *Class Action* in the Federal Court.

The *Class Action*, administered by Maurice Blackburn Cashman (“MBC”), could involve third parties seeking access to confidential documents. Customers have accused both Amcor and Visy of overcharging them through illegal price-fixing and market sharing arrangements. The damages sought are estimated to be between \$200 million and \$300 million, with many

of the claimants involved in the food and beverage market, including fruit and vegetable producers, and producers of meat, milk, beer and wine. According to the lawyers for the *Class Action*, plaintiff firm MBC, the action represents the biggest class action ever brought in Australia. Obviously this may have implications for other corporations considering whether to seek immunity from the ACCC in the future.

ACCC Refuses Access

Of course, if access to documents is not allowed to third parties, it will be difficult for them to gather enough information to support a case. Weighed against this is the ACCC’s need to protect the integrity of the Immunity Policy.

To this effect, the ACCC has announced that it will not be cooperating with MBC in the *Class Action*. MBC has sought evidence and witness statements from the ACCC but the regulator has announced it will not provide MBC with information received from Amcor under the Policy. ACCC Chairman Graeme Samuel stated that although “third-party actions will endeavour to ride on the back of [ACCC] prosecutions, they are entirely separate actions”

MBC has indicated that it will challenge the ACCC decision not to release documents and the outcome will have a significant impact on the future of the ACCC’s Immunity Policy. The class action was set for a first directions hearing on May 9, 2006 in the Federal Court.

Litigation Funding

IMF (Australia) Ltd (“IMF”) has recently declined an application by MBC for litigation funding in the *Class Action*. IMF is Australia’s largest litigation funder, providing funding of legal claims and other related services where the claim size is over AU\$2

CANADIAN COMPETITION RECORD

million. The Australian legal system does not allow for contingency fees, so it can be difficult for individuals or small companies to finance a case against a larger company with significantly greater assets. This is especially the case where the sums claimed by each plaintiff are too small to contemplate individual legal action. Litigation funding allows a law firm, with the leave of the court, to apply to a finance company to underwrite the costs of litigation. This procedure can provide funding for litigants who would not otherwise be able to afford it, without breaching the champerty rules preventing a non-party from helping a litigant by participating in a lawsuit in exchange for a part of the outcome of the case.

On April 4 this year, the High Court heard an important case dealing with the matter of litigation funding *Fostif Pty Ltd v. Campbells Cash & Carry Pty Ltd [2006]*.⁴ In this case the plaintiffs, retailers of tobacco products, launched an action on behalf of approximately 2000 retailers against the defendant wholesaler seeking recovery of allegedly overpaid state-based tobacco licence fees. The plaintiffs were externally funded by a third party, Firmstone. Under the funding arrangements, Firmstone undertook to pay all costs in return for a fee of one-third of any judgment or settlement. Firmstone also sought to discover documents to help locate as many potential plaintiffs as possible to join in the class action. The defendant wholesaler argued that the funding arrangements amounted to trafficking in litigation and gave rise to an abuse of process. The argument put before the High Court was that Firmstone had initiated proceedings with merely an idea that there would be a large number of retailers seeking damages against wholesalers. As such, Firmstone had used the court as “an instrument in what was primarily a profit-making activity on behalf of the litigation funder”.

The High Court has reserved judgment on this case but the final decision will have a significant impact on the future of litigation funding and class actions in Australia.

Proposed Media Reform – Prepare for a Game of Media Musical Chairs

Amidst much anticipation, the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, released a discussion paper on March 14, 2006 in relation to reform options for Australia’s media industry, particularly with regard to digital technologies. The government has indicated that some media ownership reforms could take effect as soon as 2007, following automatic changes to the regulatory framework.

Key Proposals

The discussion paper details a broad range of proposals affecting the media industry. Key proposals include:

- a “Digital Action Plan” aimed at achieving a switchover from analogue to digital broadcasting, now estimated to be achieved by 2010-2012;
- the relaxation of laws relating to cross-media transactions. The current cross-media restrictions prohibit a person from controlling any combination of a commercial television licence, commercial radio licence or an associated newspaper, in the same licence area;
- the removal of newspaper and television specific foreign ownership rules; and
- the removal of restrictions on commercial television multichanneling, with the possibility of an earlier relaxation of regulations if there are “any significant changes in the lead up to analogue

CANADIAN COMPETITION RECORD

switchover which alters the balance in favour of an early adjustment”.

The ACCC's Role

In the course of the discussion paper, the Minister stressed that the ACCC would continue to have an important role in regulating the actions of corporations in the telecommunications sector. In particular, under the proposed reforms, any media merger would continue to be subject to the TPA's merger provisions. This would ensure an ongoing role for the ACCC in preventing any merger that would have the effect, or the likely effect, of substantially lessening competition, particularly in relation to potential media transactions that may result from the relaxed regulations of media ownership rules.

In response to these issues, the ACCC has flagged a potential change in its definition of a media market, as a result of the emergence of new information and broadcasting technologies.

Legislation Backlog

Many of the legislation reforms outlined in the Australian Newsletter in the last issue of the *Record*, have been stalled in the Australian Parliament due to the recent introduction of controversial new workplace relations legislation. However, the numerous reforms initiated as a result of the Dawson Review of the TPA and other formal inquiries continue to pile up. In terms of competition law legislation, three Bills are passing through Parliament and at least three more have been proposed. The issues covered include:

- small business protection;
- collective bargaining;
- cartel conduct;
- component pricing;

- national access; and
- natural monopolies.

Notes

¹ [2006] FCA 136.

² File No. VID1650/2005. This case was filed in December 2005. Visy filed their defence in this case on April 21, 2006 and a direction hearing was set for July 28, 2006 (http://research.fedcourt.gov.au/Esearch?p=show&data_type=file&data_key=VID1650/2005).

³ File No. NSD702/2006. This case is still in its preliminary stages. It was filed on April 11, 2006 and a first directions hearing was set for May 9, 2006 (http://research.fedcourt.gov.au/Esearch?p=further_details&det=coa_detail&mat_id=3486486).

⁴ HCA Trans 160 (April 4, 2006). Judgment has been reserved in this case but a transcript of the High Court hearing is available at: <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/HCA/Trans/2006/160.html?query=fostif>.

EC COMPETITION LAW DEVELOPMENTS

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EC Commission Issues Draft Preliminary Report in Energy Sector Investigation

The Commission began a general investigation into the gas and electricity sectors in June 2005.¹ On February 16, 2006, the Commission issued a draft Preliminary Report setting out its findings.² The Preliminary Report concludes that competition in the EU gas and electricity markets is being impeded as a result of five factors: (i) the generally high level of concentration at the wholesale level of the gas and electricity supply chain and the retention of a significant market position by incumbent operators; (ii) vertical foreclosure as a result of long term supply agreements and vertical integration at the supply and transmission levels; (iii) low level of market integration among the EU member states; (iv) insufficient transparency regarding

CANADIAN COMPETITION RECORD

the availability of capacity in gas and electricity infrastructure and electricity generating capacity; and (v) price formation practices that are not conducive to lively competition.

The Commission is expected to issue its final report later this year which will indicate the follow-up action that it expects to take (or be taken by other bodies) in order to eliminate the problems identified through the investigation. Such action could include proposing changes to the existing EC Directives that regulate the gas and electricity sectors and the launching of investigations by the Commission or national competition authorities to assess whether specific agreements or practices in the gas and electricity sectors could be in violation of Articles 81 or 82 of the EC Treaty. To some extent, the Commission appears already to be acting on the findings contained in the Preliminary Report because on May 16, 2006, the Commission carried out "dawn raid" investigations at the offices of companies operating in the gas sector in five member states, Austria, Belgium, France, Germany and Italy. The aim of the dawn raids was to gather information relating to possible violations of Articles 81 and 82 of the EC Treaty.³ The final outcome of these investigations will not be known for some time.

New Notice on Access to the Commission's File in Competition Cases

On December 20, 2005, the Commission published a new Notice governing the rules and procedures for access to the Commission's file in antitrust and merger investigations (the "New Notice").⁴ The New Notice replaces a previous Notice that had been in force since 1997 (the "Old Notice") and reflects a number of legislative and case law developments since 1997. Although the New Notice does not introduce major substantive changes in the rules governing access to the Commission's file, it is more detailed and written in clearer terms than the Old Notice. Given the

importance of the right of access to the Commission's file for undertakings suspected of violating Articles 81 and 82, as well as for parties to mergers that are the subject of a Phase II investigation by the Commission, the New Notice provides helpful clarification of the Commission's practice in this area. The following features of the New Notice are worthy of mention.

(i) The New Notice makes clear that the right of access to the Commission's file can be invoked only by undertakings that have received a Statement of Objections ("SO").⁵ Hence, interested third parties, such as complainants, do not have a right of access to the Commission's file although they have more limited rights of disclosure (discussed in (iii) below). Undertakings that are the subject of investigation for alleged violation of Articles 81 or 82 and parties that have notified mergers under the EC Merger Regulation are entitled to have access to the Commission's file but only after they have received an SO from the Commission.

(ii) The New Notice describes in detail the two categories of documents that, generally speaking, will not be disclosed as part of the access to file procedure: (i) non-accessible documents, for example, the Commission's internal documents and correspondence with other public authorities; and (ii) documents that contain confidential information, for example, business secrets pertaining to third parties involved in the investigation and information which does not constitute a business secret but which is considered to be confidential because its disclosure would cause significant harm to a person or undertaking. Typically this latter category comprises documents that would enable their recipient to identify complainants in the relevant proceedings.

(iii) The New Notice describes the rights of interested third parties to receive documents relating to antitrust

CANADIAN COMPETITION RECORD

and merger review proceedings conducted by the Commission. This category of persons includes complainants in proceedings under Articles 81 and 82 of the EC Treaty and in merger investigations and target companies in certain types of acquisitions.⁶ Although such parties have certain rights to require disclosure of documents on the Commission's file, their rights are more limited than the access rights given to undertakings that are the direct focus of the Commission's investigation.

(iv) The New Notice confirms that access to the file can occur by electronic transmission of the relevant documents or by their disclosure in hard-copy form. The New Notice warns that in the absence of a request for confidential treatment, the Commission presumes that materials submitted to it in the course of its investigations are not confidential in nature, and therefore can be disclosed to parties that have a right of access to the Commission's file. In addition, the New Notice warns that materials disclosed to undertakings pursuant to the access to the file procedure are to be used only for the purposes of the proceedings to which they relate. The New Notice warns legal counsel that their involvement in impermissible use of materials received through access to the file procedure may result in the Commission reporting the matter to the relevant bar with a view to disciplinary action being taken against the lawyer concerned.

Green Paper on Damages Actions for Breach of EC Competition Law

On December 20, 2005, the Commission issued a *Green Paper on Damages Actions for Breach of the EC Antitrust Rules* (the "Green Paper"). The Green Paper seeks to stimulate a debate on the factors that, historically, have impeded the development of damages actions based on Articles 81 and 82 and on the measures that could be taken to encourage greater recourse to damages litigation by undertakings that have suffered

loss as a result of violation of Articles 81 and 82. Although the Green Paper addresses certain issues of EC antitrust law, its primary focus is the substantive and procedural rules of civil litigation before the courts of EU member states.⁷ The Green Paper identifies certain aspects of the civil litigation process that appear to have affected the development of damages actions based on Articles 81 and 82. Specifically, the Green Paper highlights and poses a number of questions on the following aspects of the litigation process:

- (1) access to evidence in the context of damages proceedings based on Articles 81 and 82;
- (2) the requirement for the claimant to prove fault by the defendant;
- (3) the basis for calculating damages;
- (4) availability of the passing-on defence and standing by indirect purchasers to seek damages;
- (5) ways to defend consumer interests (including possible class actions);
- (6) the awarding of costs;
- (7) coordination between courts adjudicating on damages claims and competition authorities, particularly, how the position of leniency applicants should be safeguarded in the context of damages litigation against cartel members;
- (8) rules on choice of jurisdiction and applicable law for damages claims; and
- (9) other issues, namely court appointed experts and suspension of limitation periods.

The deadline for responses to the Green Paper expired on April 21, 2006. The Commission is currently in the

CANADIAN COMPETITION RECORD

process of analysing the various submissions that it has received and may publish proposals for further action later in the year. At this stage, the nature of any further action is unclear. It could include new legislation in the form of one or more EC Regulations or Directives or “softer” forms of harmonization, such as through the adoption of guidelines.

Commission Discussion Paper on Article 82 of the EC Treaty

On December 19, 2005, the Commission published a *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (the “Discussion Paper”).⁸ The Discussion Paper is an important first step in the modernisation of the Commission’s approach to the enforcement of Article 82 and attempts to respond to the criticism that modernisation of the enforcement of Article 82 is overdue, particularly in view of the Commission’s various initiatives in recent years to modernise the enforcement of Article 81. Specifically, there has been criticism that the enforcement of Article 82 is less transparent, and therefore less predictable, than the enforcement of Article 81 and that the Commission’s approach to Article 82 is overly formalistic and insufficiently grounded in economics.⁹ The Discussion Paper invites public comment on a set of key principles that would guide the Commission’s application of Article 82 to abusive conduct that is exclusionary in nature (i.e., conduct aimed at excluding or weakening its perpetrator’s competitors).¹⁰ It is likely that following its analysis of responses to the Discussion Paper, the Commission will propose a Notice setting out guidelines on the application of Article 82 to exclusionary abuses.

The Discussion Paper provides background discussion on the concept of dominance but is devoted largely to setting out a detailed analytical framework for the assessment of whether specific types of conduct will be in violation of Article 82. The proposed framework

for analysis begins with a general explanation of the factors that are relevant for the analysis and highlights that Article 82 does not aim at insulating competitors from “genuine competition” by dominant firms as a result of factors such as higher quality or novel or innovative products. The general explanation set out in the Discussion Paper also highlights that exclusionary abuses can be committed not only by pricing practices, but also through conduct in relation to other terms of sale such as contractual tying, single branding and refusal to supply. As regards price-based abuses, the Discussion Paper highlights the importance of the economic concept of the “as efficient competitor” and explains that, as a general rule, only conduct that would lead to the exclusion of a hypothetical “as efficient competitor” should be characterized as abusive under Article 82. Importantly, the Discussion Paper also explains how the Commission treats three possible lines of defence to violation of Article 82, namely objective justification for the conduct at issue, “meeting competition” defences and efficiency defences.

As well as giving a general presentation of the Commission’s analytical methodology, the Discussion Paper explains how the Commission analyses four specific types of exclusionary abuse: predatory pricing, single branding and rebates, tying and bundling and refusal to supply. The Discussion Paper analyses each of these types of conduct from three perspectives: first, a general explanation of the nature of the conduct at issue; second, a description of the factors that will lead the Commission to conclude that the conduct will have a foreclosure effect, and in the absence of a valid defence, will constitute a violation of Article 82; and third, how the three possible lines of defence can be applied in the context of each of the four types of exclusionary abuse.

The deadline for responding to the Discussion Paper expired on March 31, 2006.

CANADIAN COMPETITION RECORD

The Discussion Paper is the first time that the Commission has attempted to formulate general guidelines on the application of Article 82 and may be long overdue. The focus given to economic analysis in the proposed analytical methodology is to be welcomed. It remains to be seen whether the Discussion Paper will lead to a set of guidelines that pay sufficient heed to the economic analysis of whether dominant firms' conduct should be regarded as exclusionary, and therefore in violation of Article 82, or a justifiable commercial response to technological development or market conditions.

Notes

¹ Article 17 of Council Regulation (EC) 1.2001 gives the Commission general powers to conduct investigations into sectors when there is prima facie evidence that competition is being restricted or distorted.

² The Preliminary Report can be found at http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiry_energy_Pr-1.pdf. It follows the Issues Paper issued by the Commission on November 15, 2005.

³ "Commission has carried out inspections in the EU gas sector in five member states", Commission press release dated May 17, 2006.

⁴ *Commission Notice on the rules for access to the Commission's file in cases pursuant to Arts 81 and 82 EC, Arts 53, 54 and 57 EEA and Council Regulation 139/2004*, published at [2005] O.J. C325/7.

⁵ Issuance of an SO by the Commission is a major procedural step in the investigation of alleged violations of Articles 81 and 82 and in Phase II merger review pursuant to the EC Merger Regulation.

⁶ These are transactions that lead to an undertaking acquiring sole control of another undertaking. As it is only the acquirer that has the obligation to file a notification under the EC Merger Regulation in relation to such transactions, the target has the status of an "other involved party", not that of a "notifying party".

⁷ Civil procedure has been the subject of very little harmonization across the EU and remains largely a matter of national law in each member state.

⁸ Article 82 prohibits conduct by dominant undertakings that can be characterized as an abuse of their dominance and which affects trade between EU member states. In order to violate Article 82, an undertaking has to be in a dominant position on the relevant market and its conduct has to fall within one of the types of conduct considered to be abusive for purposes of Article 82.

⁹ The various Notices and block exemption Regulations that apply with respect to Article 81 have enhanced transparency

in the enforcement of Article 81. In addition, given that the Notices and block exemption Regulations are relatively recent, they reflect an economics-based approach to the enforcement of Article 81.

¹⁰ The Discussion Paper is limited to so-called exclusionary abuses. The Discussion Paper does not touch upon the other types of conduct that can constitute abuse under Article 82, namely discriminatory and exploitative abuse. These types of abuse are expected to be the subject of further work by the Commission.

U.S. ANTITRUST LAW DEVELOPMENTS

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Overview of U.S. Antitrust Developments¹

While the overall level of merger activity remained slow in the first part of 2006, there were a number of important cases reviewed and decided by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). The cases reviewed covered a broad spectrum of industries, including "white goods" (water heaters and home appliances), pharmaceuticals, dialysis centers and industrial gases. Interestingly, several of the mergers involved "repeat business" for the agencies in the form of more recent transactions by parties involved in prior deals (where AOSmith, which previously had acquired State Industries in 2001, was involved in a transaction with GSW/American) or additional transactions in industries undergoing consolidation (e.g., Fresenius acquisition of dialysis centers from RCG following shortly after the DaVita-Gambro merger).²

The issues raised among these mergers were reflective of the broad range of issues in prior years' mergers, which were addressed in the March 2006 issuance by the DOJ and the FTC of the *Commentary on the Horizontal Merger Guidelines* (the "Commentary"). The Commentary is a useful resource, in large part

CANADIAN COMPETITION RECORD

because it provides more detailed descriptions of the analytical framework used and key issues than are usually provided in merger decisions, particularly at the DOJ in cases where the merger is approved.

Comparison of the Commentary with the recent case decision announcements reveals increased use of empirical analyses, and a greater level of specificity or at least detail in the empirical questions posed and their relationship to the case decision. This is particularly noticeable in mergers involving branded products, but also is highly relevant for more detailed qualitative assessment of coordinated and unilateral effects. The following highlights some of the key matters decided in 2006 to date and cross references them with more detailed commentary on similar matters in the Commentary.

Consummated Mergers and Competitive Effects

The trend particularly by the FTC toward investigation of and, in some cases, eventual challenge of already consummated transactions, continued in 2006. The FTC challenged a consummated merger by Hologic of Fischer Imaging Company,³ a supplier of breast cancer screening and diagnosis equipment and imposed divestiture requirements. The case is interesting for a number of reasons. First, the initial transaction was below the Hart-Scott-Rodino reporting thresholds and hence had occurred without review in 2005. Second, in threatening challenge of the transaction – alleging that “Hologic’s acquisition of Fischer’s prone stereotactic breast biopsy systems (“SBBSs”) business harmed American consumers by eliminating its only significant competitor for the sale of SBBSs in the United States” – the FTC required divestiture of Fischer’s prone SBBS assets to another firm (Siemens). The challenge was initiated on an already consummated acquisition because it was not reportable under HSR as it was valued at less than \$56.7 million. The businesses

involved were breast cancer screening and diagnosis. The divestiture required Hologic to sell Fischer prone stereotactic breast biopsy systems to Siemens AG. The FTC concluded that Hologic’s acquisition eliminated the only significant competitor for the sale of prone SBBSs in the United States. Although other minimally-invasive biopsy systems are used, ultrasound and magnetic resonance systems, these systems were determined to be complementary to prone SBBSs rather than competitive substitutes. Other diagnostic systems and procedures were examined but found by the FTC to provide no meaningful competition. The only other seller of prone SBBSs was determined to be insignificant, having gained only a minimal level of sales in three years. Among the major elements considered in the decision were the evaluation of entry and the role of patent licensing. The FTC allowed Hologic to retain a license to Fischer’s prone SBBS patents to enable it to compete in the SBBS market after the divestiture.

The order also sought divestiture to Siemens, and while a divestiture in and of itself is not novel, the FTC also required a revision of the divestiture to contemplate a different purchaser if the FTC were to determine at the date at which the Order becomes final that the divestiture was not addressing the relevant competition issues.⁴ The issue of “revisiting” a divestiture has raised considerable questions about the process and the attendant uncertainty that could be created for all parties involved in this particular transaction in the event that the FTC were to conclude that the divestiture would have to be unwound.

The Commentary provides detail on other consummated merger challenges (e.g., Chicago Bridge and Iron involving a consummated merger of two tank suppliers) and provides a discussion of the relevant competitive effects theories in such cases. A related set of case descriptions includes those that address the use

CANADIAN COMPETITION RECORD

of empirical evidence on actual or prospective price increases to demonstrate competitive effects and the prospect that such evidence can be used as evidence with regard to market definition:

Evidence pertaining more directly to a merger's actual or likely competitive effects also may be useful in determining the relevant market in which effects are likely. Such evidence may identify potential relevant markets and significantly reinforce or undermine other evidence relating to market definition.⁵

The logic of using empirical evidence to define relevant markets was taken a step further in another consummated merger matter, that involving the appeal of an administrative law judge opinion of a five-year old consummated hospital merger in Evanston, Illinois, outside of Chicago. In that case, the FTC staff urged the Commission to use claimed post-merger anticompetitive price increases as a sufficient basis on which to order divestiture and argued that one could assess effects without defining relevant markets.⁶

Branded Products, Entry and the Role of Major Retailers

A major case decision at the DOJ was Whirlpool's acquisition of Maytag, where the DOJ declined to challenge after an extensive investigation.⁷ The DOJ concluded that competitors – such as new entrants LG and Samsung, and established names such as Kenmore, General Electric and Frigidaire – had the ability to expand sales significantly and therefore could discipline potential supracompetitive price increases. The ability of these competitors to discipline pricing was related to excess capacity, demonstrated ability to enter, and the fact that major retail chains (e.g., Home Depot) had the ability to switch in the event of anticompetitive pricing.⁸ In addition, the parties were

able to show large cost savings and efficiencies arising from the acquisition, which was a factor in the DOJ's decision not to challenge the acquisition. The DOJ focused its investigation on residential clothes washers and dryers, although overlaps in other products were also significant.⁹

“Repeat” Mergers

A number of key merger decisions came in industries with some history of prior case decisions and investigations. The following summarizes some of the key ones in sectors such as pharma, industrial gases and dialysis.

Pharma Mergers

The FTC challenged Teva's acquisition of IVAX in a deal involving the manufacture and sale of generic pharmaceutical products.¹⁰ As such, the case represented an opportunity to evaluate generic–generic as opposed to generic–branded issues, which have been the subject of several prior investigations and decisions. The challenge resulted in the FTC requiring the divestiture of certain generic drugs, namely amoxicillin clavulanate potassium, leuprolide acetate, nabumetone, amoxicillin, propoxyphene hydrochloride capsules, nicardipine hydrochloride, flutamide capsules, clozapine and estazolam. According to the FTC, the acquisition would have resulted in Teva having over 50% market share of these drugs in the United States. In addition, the deal required the divestiture of Cefaclor LA tablets, perolide mesylate tablets. Teva and IVAX are the only two generic manufacturers of these drugs. The FTC defined the relevant market to include only generic drugs and did not consider competing branded drugs as part of the relevant market. In addition, the FTC determined that the acquisition would eliminate potential entry by the other party into certain drugs, namely tramadol/

CANADIAN COMPETITION RECORD

acetaminophen, glipizide and metformin hydrochloride tablets, calcitriol and cabergoline tablets.

A more detailed description of the analytical framework employed in pharmaceutical mergers is provided in a recent summary of enforcement principles and matters in the health care sector at the FTC: "Overview of FTC Antitrust Actions in Healthcare Products and Services" at Chapter III.¹¹ The Overview addresses marketing and other ventures, mergers and competitive effects theories. While aimed specifically at healthcare, many of the principles are common across industries.

Industrial Gases

The FTC challenged Linde's acquisition of The BOC Group,¹² requiring the divestiture of certain products within particular local geographic markets. Just a few years prior (2000), the FTC had reviewed the *Air Products-L'Air Liquide* merger (which is described in the Commentary) where the parties had abandoned the transaction due to the threat of a challenge. The acquisition involved the manufacture and sale of liquid oxygen, liquid nitrogen and bulk refined helium. The geographic markets for liquid oxygen and liquid nitrogen were considered local while the relevant geographic market for bulk refined helium was found to be global. At issue in this acquisition were the Northeast U.S., Chicago-Milwaukee metropolitan area, the Eastern Midwest U.S. and the Southeast United States. Interestingly, the FTC found a likelihood of unilateral and coordinated effects in liquid oxygen and liquid nitrogen in these geographic markets and an enhanced likelihood of coordinated effects in the bulk refined helium market. Barriers to entry were a prominent factor in the FTC's decision in this case and in the earlier one. The FTC required the divestiture of air separation units and related assets owned and operated by Linde in eight locations: Canton, OH; Dayton, OH; Madison, WI; Waukesha, WI; Carrollton,

GA; Jefferson, GA; Rockhill, SC; and Bozrah, CT., and also required Linde to divest bulk refined helium assets to Taiyo Nippon Sanso.

Dialysis

In another "repeat" merger, the FTC – having just completed the DaVita–Gambro merger subject to divestitures – approved the acquisition by Fresenius of the Renal Care Group¹³ subject to commitments by Fresenius to divest certain assets as part of the remedy to proceed with the acquisition. Fresenius was required to divest to National Renal Institutes 91 dialysis clinics and RCG's joint venture equity interests in an additional 12 clinics, in 66 markets across the United States. The acquisition makes Fresenius the largest outpatient provider of dialysis services in the United States. The FTC defined the relevant market to be outpatient dialysis services and the relevant geographic market to be local due to the nature of the service provided. Services are generally provided to patients 3 times per week for a period of 3 to 5 hours each visit. The FTC found evidence of an increased likelihood for unilateral effects in 66 highly concentrated geographic markets. Third-party payors are largely the customers affected by the acquisition, according to the FTC, and the FTC found that these payors benefit from direct competition between Fresenius and RCG in these 66 markets. (The focus on third-party payors as the relevant customers rather than the ultimate customers is similar to the FTC's focus on third party payors in hospital cases rather than the customers on whose behalf the payors are doing the purchases.¹⁴) Entry barriers were found to be a factor in the FTC's analysis.

The Commentary provides additional insights into the specific types of empirical analyses that were conducted in these matters in its description of the DaVita–Gambro matter. The methodology may have relevance for retail and other matters as well, and was

CANADIAN COMPETITION RECORD

based on patient data to map out a draw area and assess the extent to which there was overlap to any major alternative supplier, as well as the distances patients tended to travel.¹⁵

Non-merger Developments

The DOJ continued its advocacy for reduced regulation and promotion of competition in the real estate industry¹⁶ through speeches and other competition advocacy efforts to discourage state policies such as restricting who can provide real estate services and minimum service thresholds. The campaign to assess and address competitive issues in real estate has been underway for about a year.

Finally, the Antitrust Modernization Commission has finished more than a year of hearings on a variety of topics including mergers, exclusive business practices and exemptions, and is commencing the final stage of its endeavors. The hearings provide an extensive set of filings on each of the major topics and provide a rich record for review, particularly on issues related to merger enforcement.¹⁷

Summary

Thus far, 2006 has been one of intense and deep agency scrutiny of a somewhat smaller number of transactions, with the key themes remaining market definition (and the role of empirical analysis in it), entry and competitive effects. The cases investigated involved generally more concentrated industries, which is not surprising in itself, with competitive effects theories generally weighted somewhat more toward coordinated effects than to unilateral effects. Key elements of decisions supporting approval or challenge focused substantially on entry, with concerns about the lack of entry and expansion being decisive factors in several matters, as well as evidence concerning mechanisms available to customers to discipline pricing even in more concentrated industries.

Notes

¹ Susan Manning, Senior Vice President of Compass, also contributed to this article.

² Hologic's Acquisition of Fischer Imaging Corporation: http://www.ftc.gov/os/caselist/0510263_0510263_analysis.pdf; Linde Acquisition of The BOC Group: http://www.ftc.gov/os/caselist/0610114_0610114LindeBOCAnalysis.pdf; http://www.ftc.gov/os/caselist/0510154_0510154FreseniusAnalysis.pdf; Whirlpool-Maytag transaction: http://usdoj.gov/atr/public/press_releases/2006/215326.pdf; AOSmith acquisition of GSW, Inc.; Teva Acquisition of IVAX; and Fresenius acquisition of RCG: http://www.ftc.gov/os/caselist/0510154_0510154FreseniusAnalysis.pdf

³ Hologic's Acquisition of Fischer Imaging Corporation: http://www.ftc.gov/os/caselist/0510263_0510263analysis.pdf

⁴ See http://www.ftc.gov/os/caselist/0510263_0510263do.pdf at 7.

⁵ The Commentary sets out the analysis employed in the Staples-Office Depot case and also sets out detailed commentary on the rationale behind the decision not to challenge the Federated May department store merger. The latter is of consequence because the DOJ sets out in the Commentary the fact that the merger decision was not sensitive to precise choice of market definition and sets out useful analysis of the way in which the agency assessed market definition. Commentary at 10-11.

⁶ Just a few years prior (in 2000), the FTC had reviewed the *Air Products-L'Air Liquide* merger and the parties had abandoned due to the threat of a challenge.

⁷ See Answering and Cross Appeal Brief of Complaint Counsel, starting at 22. The Brief and responding filings by Respondents and other parties addressing issues surrounding the empirical analyses of pricing and others issues can be found at: <http://www.ftc.gov/os/adjpro/d9315/index.htm>.

⁸ The Commentary also sets out the role of customer testimony in DOJ decision-making; see Commentary at 10.

⁹ Another merger approval of home products, the AO Smith acquisition of GSW, Inc. and its American Water Heater Company subsidiary, is worth mentioning, as it too was approved by the DOJ after a long investigation. The transaction involved two of the four major incumbent water heater manufacturers in the United States, with sales in Canada, as well.

¹⁰ The consent agreement and related filings can be found at: http://ftc.gov/os/caselist/0510214_0510214consent_agreement.

¹¹ <http://www.ftc.gov/bc/0510hcupdate>.

¹² Linde Acquisition of The BOC Group: http://www.ftc.gov/os/caselist/0610114_0610114LindeBOCAnalysis.pdf.

¹³ This matter can be found at: http://www.ftc.gov/os/caselist/0510154_0510154FreseniusAnalysis.pdf.

CANADIAN COMPETITION RECORD

¹⁴ See briefs in the Evanston matter cited above for views on this issue.

¹⁵ The framework and maps were used to evaluate the competitive implications and practical alternatives, including the need for divestiture. See Commentary at 6.

¹⁶ J. Bruce McDonald, "Competition in the Real Estate Brokerage Services" (<http://www.usdoj.gov/atr/public/testimony/217299.htm>).

¹⁷ http://www.amc.gov/commission_documents.htm.
