

CANADIAN COMPETITION RECORD

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

THE INTERNATIONAL COMPETITION NETWORK: “ALL COMPETITION ALL THE TIME”

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Four months shy of its first birthday, the International Competition Network (ICN) is well on its way to becoming one of the principal forums for competition agencies to discuss and develop optimal methods for addressing the substantive and procedural convergence issues of competition law enforcement.

ICN membership now totals 59 agencies from 50 countries. Members are working closely with non-governmental advisors from the relevant legal, academic, consumer, economic and business communities to develop best practice proposals leading up to the first annual conference in Naples, Italy, September 28-29, 2002.

The ICN is also supported by contributions and input from competition law experts in the World Trade Organization, the United Nations Conference on Trade and Development and the Organization for Economic Co-operation and Development.

Already, we have seen significant interest from Canadian competition law practitioners and experts who are volunteering their time and effort to ICN projects underway. The ICN's consensus-based platform ensures that all participants have meaningful input throughout the process. Indeed, these non-

governmental players are essential in balancing perspectives around the table and identifying potential projects for future consideration. This inclusive approach helps to ensure that ICN proposals will be widely accepted.

The substantive work takes place within the ICN's two project-oriented working groups focussed on merger review in the multi-jurisdictional context and the advocacy role of competition agencies.

For example, the Mergers Working Group, chaired by the United States Department of Justice Antitrust Division, is examining national merger requirements, diverse notification thresholds, review schedules and waiting periods with a view to promoting mutually supportive approaches and best practices to multi-jurisdictional merger review.

Given the broad scope of merger review activities, three Merger Review Subgroups have also been established:

1. the Merger Notification and Procedures Subgroup, chaired by the United States Federal Trade Commission;
2. the Analytical Review Framework Subgroup, chaired by the United Kingdom Office of Fair Trading; and,
3. the Investigative Techniques Subgroup, chaired by the Israel Antitrust Authority.

In terms of addressing advocacy, the Advocacy Working Group, chaired by the Mexican Federal

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Competition Commission, is examining how educating the public and promoting economic development and procompetitive reform within government can contribute to members' shared goals of enhancing economic efficiency.

The Advocacy Working Group will take into consideration a number of questions, including:

1. Institutional and political structures - are they impediments or facilitators?
2. Advocacy's role in developing and transition economies - issues of de-regulation and national champions.
3. How to measure the efficacy of advocacy efforts.

More information about the ICN, its working groups and annual conference, can be found at: www.InternationalCompetitionNetwork.org.

The overall goal is to produce best practice proposals, mutually agreed upon by competition experts throughout the world to encourage substantive and procedural convergence.

It is important to recognize that the ICN is not a negotiating forum. It is a flexible and nimble organization designed to encourage the sharing of competition expertise and to facilitate international cooperation and convergence between agencies in developed and developing countries alike. These key features and characteristics are what set it apart from other international fora examining competition issues.

With the continued support and active participation of all competition players, the ICN is well positioned as a principal forum for producing best practice proposals that are world-class.

AUSTRALIAN NEWSLETTER

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Australia/New Zealand – Competition Law and Administration: What Next Across the Tasman?

The Australia/New Zealand Closer Economic Relations Trade Agreement ("CER") was designed to bring about a free trans-Tasman market. The objectives of CER have been largely achieved, but in some areas of law the progress has stopped short of complete harmonisation or integration. Competition law is one such area where, while there have been dramatic advances, the current state of regulation still falls somewhat short of what would be ideal in a free market context.

There is no doubt that significant benefits¹ have accrued to both Australia and New Zealand as a result of CER. There is also no doubt that the extensive harmonisation between the Australian *Trade Practices Act 1974* and the New Zealand *Commerce Act 1986* is important to both countries. However, there reaches a point where it is insufficient (and inefficient and impractical) for these laws merely to be similar and the final step to completely harmonise them should be taken and a rationalisation of administration and the formation of a regulatory 'partnership' should be seriously looked at. Australia and New Zealand have largely moved their competition laws into alignment and should now look at making other efforts towards joint competition law enforcement.

Unfortunately, there are now clouds on the horizon from Australia. It is possible that its law may change again, just as New Zealand has moved closer to harmonisation. Not that all the clouds are bad, but if

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there is to be change in Australia the relationship with New Zealand should not be overlooked.

Changes have recently been made by New Zealand to harmonise Australia and New Zealand's respective treatment of misuse of market power and mergers. In relation to mergers, New Zealand still used the dominance test, rather than the substantial lessening of competition test used in Australia. The result of this was that it was easier for a merger to 'get through' in New Zealand. These differences were significant. Businesses in the trans-Tasman marketplace had to comply with two different sets of domestic regulation even though they were competing in what is, to a large extent, a single trans-Tasman market. This has now been largely remedied.

What happens next? Before we look at the future, a brief outline of the history of CER.

NAFTA

In August 1963, the New Zealand/Australia Free Trade Area Agreement (NAFTA) was signed. The agreement came into effect on January 1, 1966. It was aimed at facilitating the reduction of protection for a small number of commodities.

In the context of creating a free trans-Tasman market, there were a number of problems with NAFTA. The major problems were that:

- (i) it only applied to a very narrow range of goods;
- (ii) many goods were specifically excluded from the agreement – including many goods that would have benefited from having a wider market;
- (iii) there was no set timetable for the reduction of tariffs;
- (iv) there was a policy determination by both countries that the agreement was to be carried

out so as to avoid any serious injury to existing industry;

- (v) 'consultative committees' were often set up when the trade of either nation became threatened – usually in areas where competition between the countries was actually increasing; and
- (vi) the agreement was not actually committed to eliminating barriers to trade.

CER

To a certain extent the shortcomings of NAFTA were overcome when, on January 1, 1983, CER came into effect.

CER was designed:

- (a) to strengthen the broader relationship between Australia and New Zealand;
- (b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
- (c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
- (d) to develop trade between New Zealand and Australia under conditions of fair competition.²

The fact that CER was designed to reduce barriers to trade set it apart from NAFTA. In addition, CER set down a timetable for when its objectives were to be achieved. Initially, the CER reforms were to be

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implemented by 1995, but in November 1987 it was agreed to implement CER fully by 1993.

However, it is important to note that the obligations imposed by CER to harmonise business laws were quite limited. The agreement required that Australia and New Zealand:

- (a) examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labelling and restrictive trade practices; and
- (b) where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.³

1988 Review of CER

In 1988, a review of CER was conducted. This review resulted in a Memorandum of Understanding on the Harmonisation of Business Law being executed by the Australian and New Zealand governments. This Memorandum committed Australia and New Zealand to examining possible harmonisation of their business laws and regulatory practices in the areas of company and securities law, intellectual property, competition policy and consumer protection. This harmonisation was perceived to be necessary to bring the economies of Australia and New Zealand closer together. Further, Article 4 of the 1988 Protocol to CER on the Acceleration of Free-Trade in Goods recognised that the maintenance of anti-dumping provisions in respect of goods originating in Australia and New Zealand would be inappropriate upon the achievement of full free trade.

As a result of these developments, both Australia and New Zealand undertook ground breaking and significant legislative reform in 1990. Australia enacted section 46A of the *Trade Practices Act* and the *Custom Tariff (Anti-dumping) Act* 1975 was changed to exclude goods originating from New Zealand from its scope. New Zealand enacted similar legislation.⁴

As a result of these changes, the provisions against misuse of market power in the *Trade Practices Act* extend to businesses involved in trans-Tasman trade, whether based in Australia or New Zealand and irrespective of where the conduct takes place. The Federal Court of Australia may sit in New Zealand and the equivalent New Zealand court may sit in Australia to deal with any action under these provisions. Another aspect of these amendments is that the respective competition agencies are empowered to act on behalf of each other in relation to statutory demands for information as part of investigations. Changes were also made to the *Federal Court Act* and the *Evidence Act* to accommodate the introduction of section 46A. New Zealand made similar changes to its legislative scheme.

Some Suggested Further, and Perhaps Final, Steps

Expanding Court Powers to Apply to all the Competition Law Provisions

The respective Australian and New Zealand courts are only able to use the trans-Tasman powers with respect to matters relating to sections 36A/46A and 155A/98A of the *Trade Practices Act* and *Commerce Act*, respectively, i.e. misuse of market power and related evidence collection and court procedures.

However, there is no reason why these provisions should not be extended to apply to all competition matters. Such an extension of the existing law would

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facilitate investigation in all trans-Tasman competition cases. In addition, this change would be quite simple to achieve – the necessary extensions could be made through some fairly minor changes to the existing legislation.

In fact, one could go further and give the courts on each side of the Tasman full jurisdiction under either Act or provide that evidence can be obtained in either jurisdiction and be admissible in respective Courts. It would follow that either regulator could obtain evidence in either country, although some protocol of keeping each other informed would be necessary. A regime of this kind was agreed to by both countries, in principle, some years ago but interest waned and it was not proceeded with. Interest is now likely to be revived as the two countries get closer and closer in economic relations and business expects a seamless regime.

Trans-Tasman Court/Tribunal/Commission

Several commentators have suggested that a trans-Tasman Court, Tribunal or Commission could be established to deal with trans-Tasman competition matters. However, these suggestions have usually met with opposition – usually on the grounds that such a body would cause constitutional problems in Australia.⁵ This article will not engage in an in-depth discussion of this issue. However, it is suggested that government consider the establishment of a trans-Tasman competition agency, by either legislation or treaty.

Closer Links Between the New Zealand Commerce Commission (NZCC) and the Australian Competition and Consumer Commission (ACCC)

The ACCC and the NZCC have long had a very close working relationship, both formal and informal. This could be closer. One way of facilitating this could be for a New Zealand Commissioner to become an

associate ex-officio member of the ACCC and vice versa.

Another possibility is that the ACCC and NZCC could merge their ‘back office’ operations. Both Commissions could maintain their separate identities while pooling their administrative, enforcement and operational staff. Such an arrangement would benefit both the ACCC and NZCC. It would allow them to access a wider range of skills and experience; it would encourage closer relations between the two agencies, as well as coordinated enforcement activities; and could provide significant synergies, efficiencies and cost savings. Significantly, such an arrangement could stop a great deal of work being duplicated by both agencies.

The Possible NZCC/ACCC ‘Partnership’ Model

We would suggest initially a European Union type model, but allowing for future integration. In any case, integration at the staff level is quite possible now. In future, additional jurisdictions such as Fiji and Papua New Guinea could join.

The following is suggested.

- The two legislative schemes on each side of the Tasman stay as separate Acts but there may need to be some changes to meet some of the issues discussed in this note. Any changes to either Act to be the subject of consultation, or if the Governments differ on changes this is to be put to both Parliaments for advice. In Australia under National Competition Policy, changes have to be agreed with States and Territories in any case.
- The partnership process to apply to most of the *Trade Practices Act* but not, initially at least, to the regulatory provisions of either country’s legislation.
- The two Commissions continue as is, but each only considers intra-national issues. Any cross border issues to be considered by a joint sitting of

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three members from each, jointly chaired. If there is a deadlock, then the matter goes back to each individual Commission for decision based on the local circumstances.

- The alternative would be that there is only one body to consider all issues, but this seems premature. Even if this were the case, if there is disagreement on any issue a default mechanism is needed.
- Courts and tribunals of each country will have jurisdiction over their respective legislation.
- The legislation will need to be amended to define 'market' as any market in Australia, in New Zealand or in Australia and New Zealand.
- The same to apply to 'public benefit': it will need to be expanded to cover both countries.
- Each agency will be able to issue statutory demands for information in either country which can be enforced in either country.
- Court or tribunal judgments in one country will need to be enforceable in the other and have precedent value in both.
- All publications, guidelines etc. to be joint but the default mechanism of resorting to each individual commission to apply where agreement cannot be reached.
- Each agency to report to its Parliament, but part of such reports to be joint, if not all.
- At the staff level, there is full integration so far as respective work place relations laws allow. There is to be one CEO with Deputy CEOs for each country.
- In relation to information exchange, there will need to be supporting legislative changes to make a seamless information regime between the two countries.

This regime to be reviewed in three years with a view to total integration of law and administration. As a first step, the Chairmen of the Australian and New Zealand competition agencies could become ex officio members of their respective trans Tasman counterparts.

Notes

¹ It seems generally accepted that CER reforms, including the removal of regulatory inconsistencies between Australia and New Zealand, have been beneficial. They have led to greater business certainty, opened-up Australian and New Zealand markets to increased competition and reduced compliance costs.

² Australian New Zealand Closer Economic Relations Trade Agreement, Article 1.

³ *Ibid.*, Article 12.

⁴ *Trade Practices (Misuse of Trans-Tasman Market Power) Act* 1990 came into effect July 1, 1990.

⁵ All courts and tribunals created by Australian legislation are subject to prerogative review by the High Court of Australia. This creates problems for a trans-Tasman Competition Court.

EC COMPETITION LAW DEVELOPMENTS

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Editor's Note: The following recent developments in EC competition law will be covered in the next issue of the *Record*: Mario Monti's June 4 Brussels speech on reform of the EC Merger Regulation, the judgment by the Court of First Instance in the *Airtours* case allowing the first ever appeal against a merger review decision by the European Commission and the judgments by the Court of Justice concerning so-called "golden shares".

New Notice on Leniency in Cartel Cases

On February 19, 2002, the EC Commission published its *Notice on immunity from fines and reduction of fines in cartel cases* (the "New Leniency Notice").

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The New Leniency Notice, effective February 14, 2002, replaces a Notice that had been in effect from July 1996 (the "Old Leniency Notice").¹

The New Leniency Notice describes the Commission's current policy with respect to leniency for undertakings that co-operate in the identification and investigation of "hardcore" infringements of Article 81 of the EC Treaty. These include agreements and concerted practices with respect to price fixing, limiting production or sales, market sharing (including bid rigging) and restricting imports or exports.

The New Leniency Notice is more comprehensive than the Old Leniency Notice and reflects the experience that the Commission has built up through its enforcement of the policy described in the Old Leniency Notice. The principal substantive and procedural differences between the two Notices are as follows:

- (i) The New Leniency Notice abolishes the requirement under the Old Leniency Notice that, in order to receive full immunity, an undertaking should not have acted "as an instigator or played a determining role in the illegal activity". That requirement was felt to be ambiguous and has been replaced by the condition that the undertaking claiming immunity should not have taken steps to coerce others to participate in the cartel.²
- (ii) The New Leniency Notice introduces the concept of evidence having "significant added value". Undertakings that do not satisfy the requirements for full immunity, but which provide evidence having significant added value may be entitled to benefit from a reduction of the fine that otherwise would have been imposed upon them. The concept of added value refers to the extent to which the evidence, by its nature and/or level of detail, strengthens the Commission's ability to prove the facts at issue³.

- (iii) Under the Old Leniency Notice, when undertakings applied for immunity from, or a reduction in fines, the Commission did not inform them whether their application had been successful until it adopted its formal decision upon completion of the investigation. Often, completion of an investigation into a complex cartel takes several years. Under the New Leniency Notice, an undertaking that the Commission determines to be eligible for immunity will be informed by the Commission of this finding immediately after it has submitted its application for immunity. Similarly, undertakings qualifying for a reduction in fines will be informed whether their application has been granted no later than upon issuance of a statement of objections by the Commission. (A statement of objections is a formal allegation of infringement addressed to those suspected of having participated in the infringing conduct. Typically, a statement of objections is not issued until several months, or even a year or more, after commencement of a cartel investigation by the Commission).

The New Leniency Notice seeks to enhance the effectiveness of the Commission's leniency policy by making it easier for companies to obtain full immunity and by making the procedure more user-friendly for those seeking leniency. The Commission hopes that by doing so, it will create greater incentive for companies to come forward and disclose the existence of secret cartels in which they are participating.

Proposed New Block Exemption for Motor Vehicle Distribution Agreements

On February 5, 2002, the Commission published a draft *Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle industry* (the "proposed new block exemption"). The proposed new

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block exemption will replace the current block exemption Regulation applicable to agreements for the distribution of certain motor vehicles.⁴

The proposed new block exemption applies to agreements for the sale and after-sales repair and service of vehicles having three or more wheels which are intended for use on public roads. Generally speaking, it is considerably stricter than the current EC block exemption applicable to the motor vehicle sector. In particular, the proposed new block exemption introduces a number of new conditions that have to be satisfied in order for an agreement to be eligible to benefit from safe harbor treatment under Article 81.

The policy aim underlying the proposed new block exemption is to increase competition in the sale and repair of motor vehicles in the European Union. Historically, there have been high price differentials between EU Member States in the price of new cars, a factor that the Commission attributes to the relative freedom given under the current block exemption to motor vehicle manufacturers to restrict the activities carried out by their distributors. In addition to this objective, the proposed new block exemption seeks to create greater uniformity in the treatment of vertical agreements under EC antitrust law. In this regard, the proposed new block exemption incorporates a number of the features of the Commission's block exemption Regulation relating to vertical agreements occurring in sectors other than the motor vehicle sector.⁵

In general terms, the principal changes introduced by the proposed new block exemption are as follows:

- (i) Among the various pre-conditions to the applicability of the proposed new block exemption is a newly introduced market share test. The test requires that, in the case of agreements that do not form part of a selective distribution system, the supplier's share of the relevant market must not exceed 30%, and in

the case of agreements that form part of a quantitative selective distribution system, the supplier's share of the relevant market must not exceed 40%.

- (ii) Distributors are given more extensive rights than under the current block exemption to sell more than one brand of motor vehicle.
- (iii) The proposed new block exemption introduces measures to facilitate the activities carried out by intermediaries engaged to purchase motor vehicles for customers from sources located outside the purchaser's home Member State.
- (iv) Distributors are given rights pro-actively to seek customers and establish delivery points outside the Member State in which they are established.
- (v) The proposed new block exemption prohibits motor vehicle manufacturers from forcing their distributors to provide after-sales repair and maintenance services in relation to vehicles that they sell.
- (vi) Independent repairers are given the right to become authorised by manufacturers to repair their vehicles without the requirement for the repairer to be involved not only in the provision of repair services, but also in the sale of new vehicles.
- (vii) Motor vehicle manufacturers are required to give clear reasons for terminating agreements with their distributors. This requirement aims to prevent manufacturers from using the threat of termination to coerce their dealers into acquiescing in unlawful conduct such as selling vehicles only at prices set by the manufacturer.

In view of the extensive changes that the proposed new block exemption will introduce, it has aroused opposition from motor vehicle manufacturers in Europe. Even so, it is scheduled to enter into force on October 1, 2002.

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Notes

¹ *Notice on the non-imposition or reduction of fines in cartel cases.*

² In order to qualify for immunity from fines, an undertaking must: (a) be the first to submit evidence which, in the Commission's view, may enable it to conduct a "dawn raid" investigation into the alleged cartel, or which enables the Commission to reach a finding as to the existence of a cartel; (b) co-operate fully and continually with the Commission; (c) end its involvement in the cartel no later than when it submits the evidence upon which its application for leniency is based; and (d) not have taken steps to coerce others to participate in the cartel.

³ In order to qualify for a reduction in fines, an undertaking must: (a) submit evidence to the Commission which represents significant added value with respect to evidence already in the possession of the Commission; and (b) end its involvement in the cartel no later than when it submits the relevant evidence to the Commission.

⁴ The current block exemption in relation to such agreements is Commission Regulation 1475/95 *on the application of Article 85(3) of the Treaty to certain categories of motor vehicle and servicing agreements*. The current block exemption expires on September 30, 2002. Agreements that satisfy the conditions set out in one of the various block exemption Regulations benefit from a "safe harbor" presumption of compatibility with Article 81.

⁵ Commission Regulation 2790/99 *on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*.
