

## CANADIAN COMPETITION RECORD

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## COOPERATION IN THE INTERNATIONAL COMPETITION ARENA

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### INTRODUCTION

Competition law is no longer a purely domestic endeavour. As each nation's economy has had to adjust to the realities of international trade and commerce, so have competition authorities. Accordingly, the application of national competition laws to international business activity has significantly increased over the last fifteen years.

National competition authorities have focused their efforts on combating international cartels, considered to be one of the "most egregious violations of competition law".<sup>1</sup> However, for a number of reasons international cartels are generally difficult for national competition authorities to prosecute. First and foremost, members of international cartels and evidence relevant to the cartel's violations of national competition laws may be located in different countries. As a result, both cartel members and evidence may be beyond the jurisdictional reach of any single national competition agency. Further, the members of these cartels tend to be sophisticated and extremely careful about keeping their agreements, and conduct, a secret. For these reasons, the successful detection and prosecution of international cartels depends in part on the ability of national competition authorities to cooperate with each other in their investigative efforts.

Countries with competition legislation have provisions that address cartels that conspire to influence competition within a specific market. In Canada, section 45 of the *Competition Act* sets out the conspiracy provision. In the United States, section 1 of the *Sherman Act* addresses conspiracy, while in the European Union, Article 81 of the *EC Treaty*<sup>2</sup> governs this issue. Each piece of legislation acknowledges the harm that can result from cartels, but they are silent on the extraterritorial reach of these provisions in dealing with international cartels.

While the overall incidence of enforcement against international cartels has increased dramatically to date, it is very likely that it could be further improved if competition authorities in Canada, the United States and the European Union did not face the hurdles associated with their jurisdictional limitations. If a cartel participant does not voluntarily submit to a specific jurisdiction, what powers does a nation have to prosecute a foreign corporate entity? Establishing generally accepted international legal standards that govern extraterritorial jurisdiction is one option, however there are no such standards in place. As a result, competition authorities must pursue different forms of cooperation in order to avoid potentially serious jurisdictional disputes and improve the effectiveness of investigating and prosecuting violations.

Comity is cited as a form of cooperation with the potential to improve enforcement and avoid jurisdictional disputes, a claim that will be analysed in

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greater depth in this article. Other forms of cooperation used to improve the investigation and prosecution of international cartels will also be explored, including the establishment of international rules, the use of bilateral agreements and the International Competition Network.

### ANALYSIS

#### **The Absence of an International Standard for Extraterritoriality**

In the past, each nation regulated the economic activity that took place within its territorial jurisdiction and, in some cases, the transactions entered into by their residents elsewhere.<sup>3</sup> Today, nations find themselves in a difficult situation with respect to applying competition law to activities that have an effect on the nation but would result in the extraterritorial application of law (e.g. as against participants in an international cartel located abroad). It is clear that nations cannot regulate and enforce their legislation where the jurisdiction to do so is absent.

In most common law countries, in order to establish jurisdiction of the nation's courts over a specific criminal act, two elements are necessary: personal matter jurisdiction and subject matter jurisdiction.<sup>4</sup> For example, in order for Canadian courts to establish subject matter jurisdiction over a criminal act such as conspiracy, it is necessary to show that a "significant portion of the activities took place in Canada", or in other words, that there is a "real and substantial link" between the offence and Canada.<sup>5</sup> With respect to personal matter jurisdiction, at common law there is a presumption that jurisdiction lies only over a person present within the jurisdiction of the court. In order to initiate a criminal prosecution, a summons must be served personally on an accused person within the territory of the court.<sup>6</sup> The *Criminal Code* is silent on the possibility of service *ex juris* on a person who

is outside of Canada. In light of the jurisdiction tests, participants in international cartels can avoid prosecution by simply not submitting to the jurisdiction. In fact, in Canada there have been no contested cases in which the jurisdictional question has been confronted in an international cartel case.<sup>8</sup>

How then would a nation enforce its competition laws against the criminal conduct of foreign corporate entities involved in a conspiracy on the basis that such foreign activity had a detrimental effect within the nation's borders? Specifically, how would a nation deal with a conspiracy plotted and implemented outside of its borders, where only the effects of the conspiracy (i.e. the sale of the goods) were felt within the nation's borders? If several nations were affected by this hypothetical conspiracy and attempted to extraterritorially assert their competition laws over the international cartel, the inevitable outcome would be jurisdictional conflict. The result would be a *de facto* competition between nations to determine which state would gain prosecutorial priority, creating serious tensions between countries, specifically with respect to principles of national sovereignty. Furthermore, with each nation applying slightly different competition laws (whether in substance or in the resulting penalties), there would be the potential for inconsistent results across the different jurisdictions dealing with the same conspiracy.

One possible solution to these jurisdictional problems would be establishing a public international law standard. However, as Gabriel Marceau suggests:

The principle of territorial jurisdiction is a corollary of the principle of sovereignty and equality of states, i.e. the characteristics of statehood and two pillars of the international system. However, there is no internationally agreed standard or

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definite international customary law on the extraterritorial application of national competition laws.<sup>9</sup>

To date, there exists no generally accepted international legal standard governing extraterritorial jurisdiction, including the extraterritorial application of competition laws. As a result, the possibility of serious jurisdictional disputes remains a reality.

A country's effectiveness in extraterritorially applying its competition laws depends on its ability to obtain jurisdiction over the defendants and its ability to enforce any resulting judgment.<sup>10</sup> The United States and the European Union enjoy a distinct advantage in obtaining jurisdiction by virtue of their economic and political power. Foreign defendants in an international cartel case are likely to have some connection to either of these jurisdictions upon which personal jurisdiction might be based, as well as assets within the jurisdiction against which a judgment might be enforced. Thus, even though extraterritoriality could potentially result in serious jurisdictional disputes amongst countries, economic power limits the number of effective decision makers.

In addition to the jurisdictional issues associated with the extraterritorial application of a nation's competition laws, many other factors may influence a state's ability to enforce its laws, such as international political pressures, nationalistic (and sometimes very emotional) interests and an economic protectionist attitude. Consequently, the extraterritorial application of a nation's competition laws is a complex area.

On the one hand, jurisdictional limits on unilaterally enforcing competition laws restrict the ability of competition authorities to stop anti-competitive conduct of an international cartel. On the other hand, there is the potential for serious jurisdictional disputes due to the absence of coherent international standards or defined

international customary laws on the extraterritorial application of national competition laws. This dichotomy illustrates the need for cooperation between competition authorities. As suggested in the OECD's CLP Report on Positive Comity (the "OECD Report on Comity"),<sup>11</sup> in an effort to improve the efficiency and effectiveness of enforcement in international cartel cases, competition authorities should turn to comity as a form of cooperation to deal with many of these problems.

### **The Role of Comity**

#### *What is Comity?*

There are many possible forms of cooperation between competition authorities, from providing investigatory assistance to opening or expanding an enforcement proceeding specifically to aid enforcement authorities in another jurisdiction. In cases where jurisdiction over criminal conduct is not an issue, cooperation between competition authorities in an investigation and prosecution can include gathering information on behalf of the requesting country, sharing information and discussing relevant case facts and theories. However, in cases where jurisdiction is an issue, the requested country's assistance may be more difficult to obtain because of the principle of national sovereignty. In these cases, the requested country may want to conduct an investigation of its own, and consequently only be willing to fulfill an enforcement request. This latter form of cooperation amongst nations is known as comity. The OECD Report on Comity defines comity as a policy where:

a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting

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another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.<sup>12</sup>

The OECD Report on Comity distinguishes between comity and other cooperative practices. Comity is described as a "request that another country open or expand an enforcement action", whereas cooperation is defined as "a request for assistance in the requesting country's enforcement action"<sup>13</sup>

Cooperation amongst competition authorities, in its many forms, can improve the overall effectiveness of international competition enforcement and also reduce jurisdictional disputes. According to the OECD Report on Comity, these two outcomes of cooperation are entwined because resentment over jurisdictional disputes may act as an obstacle to cooperation, while cooperation can help avoid such disputes in the first place and also improve enforcement.<sup>14</sup> The Report indicates that comity is the best option to achieve these two outcomes, however, there are numerous factors to consider in a comity request.

### *Considerations Regarding Comity*

In situations where one country requests comity assistance from another, several important factors must be considered. Firstly, differences between the two countries' laws may affect the initial analysis of an international cartel and the economic and social impact of the potential remedy (for example, remedial powers such as the treble damages that are available in the United States). This may affect the analysis of whether to make or grant a comity request. This would not, however, alter the availability of comity as a course of conduct.<sup>15</sup>

Secondly, in situations where comity is pursued as a cooperative option, the requested country's law will govern all proceedings,<sup>16</sup> regardless of whether the requesting country's allegations are sufficient to open an investigation. The requesting competition authority must thus accept that the requested country's laws will serve as proper punishment and deterrent. This can be difficult for any law enforcement agency because it may not want to risk appearing powerless by deferring to another nation.

Thirdly, different national laws that may require different levels of proof in enforcement proceedings can increase the cost of an investigation undertaken by the requested competition authority. However, the cost factor is often mitigated by the desire of the requested country to deal with illegal conduct.

Finally, critics of comity claim that it may have limited potential in international cartel cases because competition authorities will want to impose their own punishment in order to show the effectiveness of their agencies and legislation. However, comity can be useful as part of a coordinated challenge in which a competition authority of a requested country initially takes the lead in an investigation with the understanding that roles may shift and that there may be multiple legal challenges throughout the enforcement proceedings.

### *Benefits of Comity*

Comity can provide benefits in the form of jurisdictional remedies, increased efficiency, and control over decisions to grant requests. The first and most obvious benefit to the use of comity is that it provides a means for avoiding jurisdictional conflicts through its use of the requested country's laws in any enforcement proceeding: it therefore provides a remedy for a requesting country that may lack jurisdiction over a criminal activity. It further provides a remedy where

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a requesting country may have jurisdiction but cannot prove the conduct's illegality because it is unable to conduct a thorough investigation (a situation that may arise often in the case of international cartels), or where the requesting country has jurisdiction over criminal conduct and can prove the conduct's illegality but cannot impose an effective remedy (another situation that would be especially applicable to an international cartel).<sup>17</sup> These means of remedying illegal cartel activity make comity an attractive option for nations that may find themselves with less than ideal jurisdictional, prosecutorial or enforcement conditions.

Another benefit of comity as a form of cooperation are the potential efficiency gains achieved by reducing the possible number of proceedings in an international cartel case to one. Both legal and investigatory risk and cost are likely to be significantly lowered if the requested country conducts an investigation and brings the first case against the accused. Efficiency gains are achieved even if the requesting country eventually brings a case on its own in order to vindicate its interests.<sup>18</sup> In light of limited public resources, this benefit makes comity an attractive option.

Since comity is a voluntary form of cooperation, competition authorities have an incentive to avoid unreasonable requests in order to minimize unreasonable requests that they themselves receive, and in order to maximize the chances that such requests will be acted upon. The risk of abusing this form of cooperation, and wasting another competition authority's time or resources, is therefore significantly decreased. From a political perspective, the voluntary nature of comity ensures that the requested country will not lose control of its competition agenda, nor that it will be forced to investigate a case when it is not in its interests to do so. As a result of remaining in control of the proceedings, the requested country ensures the application of

its competition policies and the protection of its interests.<sup>19</sup>

### *Limitations of Comity*

The OECD Report on Comity also sets out the limitations that the use of comity presents to competition authorities. Firstly, comity is only available in situations where the conduct in question is illegal in both the requesting and requested country.<sup>20</sup>

Secondly, although the voluntary nature of comity can be a benefit, it can also be a limitation because a requested country cannot be forced to deal with a specific matter. A requesting country may thus find itself powerless if it cannot gain jurisdiction. Further, despite its voluntary nature, some countries have expressed concern that comity will limit control over their enforcement agendas.<sup>21</sup>

Another key area of concern in an international cartel enforcement proceeding is the exchange of information between different jurisdictions. When dealing with a comity request, the requested country may face statutory bans on sharing non-public investigatory information, making it unlikely that the requesting country will get investigatory assistance.<sup>22</sup>

Finally, any comity process requires experience, confidence and trust. Competition authorities must have confidence and trust in each other's willingness and ability to safeguard confidential information, operate free from political and outside influences, conduct effective enforcement proceedings in a timely manner, secure effective relief, and engage in appropriate consultations. Confidence and trust are particularly important in situations where the requesting country agrees to defer to the requested country's proceedings, thus foregoing the opportunity to remedy the conduct itself and relying on the requested country to protect its interests.<sup>23</sup> Given the relatively new international

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approach to investigating and prosecuting international cartels, developing experience, confidence and trust among competition authorities is a process that will take time.

### **Current Forms of Cooperation**

#### *International Rules and Laws*

An alternative form of international cooperation available to competition authorities when dealing with international cartels is the establishment of harmonized national competition laws or the establishment of unified supranational competition rules.<sup>24</sup> Attempts have been made to draft a set of international rules, however they have been largely unsuccessful: a draft international code prepared for discussion by a group of German scholars in the early 1990s received a mixed reaction,<sup>25</sup> while the results of the World Trade Organization (WTO) formal working group set up to reach a consensus on draft rules<sup>26</sup> faltered due to the collapse of the 2003 meeting in Cancun. It is of note that both the German and WTO proposals contained provisions that prohibited hard-core cartels.

Scholars have hotly debated the idea of implementing supranational or harmonized competition rules. For example, Diane P. Wood recently proposed an international competition code that would be administered by the national authorities and courts of each signatory country.<sup>27</sup> She points out that international rules must establish definitions and the scope of matters to be covered by such rules (i.e. domestic versus foreign matters), supplemented by substantive and procedural rules. Each country would need to commit to the same competition law principles and an economically sound set of rules.

Conversely, there are those who argue against such a form of international regulation. The scholar John O. McGinnis set out the most common and compelling

arguments against international cooperation.<sup>28</sup> McGinnis notes that sophisticated opponents of international cooperation argue that policymaking at the international level is inefficient, undemocratic and corrupt. He believes that the greatest risk posed by international cooperation in competition law is that the international process itself will generate undesirable outcomes, specifically an international public choice problem whereby negotiators might favour the interests of one group over another. Other scholars, such as Andrew T. Guzman, note that this argument focuses on the form of cooperation rather than its merits. If international cooperation is desirable, concerns about bureaucracy should not frustrate attempts to implement it.<sup>29</sup>

Another strong argument against international competition cooperation revolves around concern about enforcing international rules. McGinnis argues that any centralized enforcement would require significant costs, whereas decentralized enforcement by each nation would lead to problems of divergent standards.<sup>30</sup> However, Guzman counters that a modest level of cooperation and enforcement would avoid these problems. He suggests that an adjudicatory body, such as the WTO's Appellate Body, may adjudicate any disputes that arise with respect to a small number of general rules while leaving other issues to the determination of the states themselves.<sup>31</sup> This type of arrangement, he argues, would also leave room for innovation and experimentation and avoid potential problems of rigidity and inflexibility. Wood, on the other hand, argues that there is no need for an international body to have control over the individual national decisions, citing that no such body exists for the Warsaw Convention or similar international conventions. She argues that it is unlikely that an international institution could resolve conflicts more effectively than the current method - on an *ad hoc* basis.<sup>32</sup>

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The push to establish international rules to cover all aspects of competition law has stalled. Despite this, the recent U.S. Supreme Court decision in *Empagran* may operate to restore the principle of comity by clarifying the extraterritorial limits of competition law jurisdiction.<sup>33</sup> This may prompt discussions about the possibility of an international set of competition rules and, perhaps, an international body. Further, it is possible that once the EU framework has been in place for some time, it may serve as an example of the sort of mechanism that could function in the administration and enforcement of a set of international rules.<sup>34</sup> In any event, each of these approaches will take time to develop within the international community.

There has been some progress in the area of international cartels. Although there are no internationally agreed upon rules or laws against such cartels, there has been a convergence of national laws that regulate these criminal entities. A “soft” convergence occurred due to the common opposition to, and will to combat, international cartels and the acknowledged harm they present to countries and their citizens. One of the main tools that enabled the convergence was the International Competition Network (ICN), on which more detail is provided below.

Broad convergence, encompassing all areas of competition law, is unlikely to be achieved in the near future. Each of the 100 countries with competition laws is at a different stage of development, limiting the ability to find consensus beyond the areas of mergers and international cartels. Due to the lack of global consensus as to the form and scope of an international competition policy framework, the daunting task of trying to negotiate and implement an international framework will have to be tackled by governments and international agencies (such as the WTO, the OECD or the ICN) at some future time. In the meantime, individual countries have begun developing bilateral

agreements with other countries to address these issues.

### *International or Bilateral Agreements*

Given the lack of convergence on internationally agreed upon standards on extra-territoriality and competition laws, competition enforcement agencies around the world have had to make progress through increased cooperation, information sharing and networking. Notably, comity principles are used in bilateral cooperation agreements in which many jurisdictions have agreed to limit their enforcement activities when the interests of a foreign state are involved. Since 1976, when the first bilateral dedicated competition agreement was signed between the United States and Germany, competition cooperation agreements have multiplied in number. In all but one case (that of Canada, Australia and New Zealand) these agreements are bilateral.<sup>35</sup>

Canada, the United States and the European Union have entered into bilateral cooperation agreements with each other and with other states as well.<sup>36</sup> As previously mentioned, bilateral cooperation occurs both formally and informally between domestic competition enforcement officials. However, many countries have developed and are currently developing agreements with close partner countries that address the issue of extraterritorial competition enforcement.

The OECD Report on Hard Core Cartels<sup>37</sup> indicates that the number of international cooperation agreements is continually increasing, including both cooperation between OECD members and between OECD members and non-members. Types of international agreements may include state-to-state cooperation agreements, inter-agency cooperation agreements, mutual legal assistance treaties (MLATs),<sup>38</sup> as well as competition-related provisions in bilateral free trade agreements.

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Cooperation agreements were initially intended to avoid conflicts arising from the extraterritorial enforcement of other nations' competition laws. In fact, most cooperation agreements currently contain provisions permitting active cooperation between authorities. Although details of the agreements vary, they all have similar structures and provisions. Further, a significant number of bilateral agreements follow the structure of forms of cooperation established by the OECD in the 1995 OECD Recommendation:<sup>39</sup>

- 1) The notification by the competition authority of one contracting party to that of the other party when important interests of that party may be affected by enforcement or other activity taken in the notifying jurisdiction.
- 2) The coordination of parallel investigations where "appropriate and practicable"
- 3) The sharing of information in order to permit the party whose interests are affected to comment and consult the notifying party.
- 4) Consultations aimed at developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices that affect international trade.
- 5) The supply of relevant information on anticompetitive activity, subject to national confidentiality laws.
- 6) The use of the principles of negative comity.
- 7) The use of the principles of positive comity.

The ICN reports that in cases where agencies have developed a close working relationship, it is not always necessary to make a formal reference to a cooperation agreement when requesting or offering cooperation.<sup>40</sup> This occurs because the parties have developed a relationship and mutual respect that allow a formal agreement to work. Likewise, cooperation that is

impossible without an agreement cannot be legislated into existence.

It has been argued that with enough bilateral agreements in place, they could serve as evidence of the creation of a new custom of international law based on the doctrine of state of practice.<sup>41</sup> Although this argument is debatable, it does highlight the benefits of communication amongst the competition enforcement authorities of the world. It is only through communication that increased cooperation, and therefore more effective and efficient enforcement, can be achieved. Significantly, in recent years, the ICN has proven to be the most effective vehicle for communication and cooperation.

### *International Competition Network*

The ICN was launched in October 2001 by 14 competition authorities, including Canada. Members are competition authorities entrusted with the enforcement of competition legislation that have acceded to the "Memorandum on the Establishment and Operation of the International Competition Network" or that were members of the Interim Steering Committee. The Memorandum sets out the mission and activities of the ICN, which include addressing competition policy and enforcement issues of common interest to its members and formulating proposals for procedural and substantive convergence through a results-oriented agenda and structure.<sup>42</sup> In a short time the ICN has developed into an extensive network of nearly one hundred competition enforcement authorities around the world.

The ICN is a unique organization because it encourages the dissemination of competition experiences and best practices through a virtual network with little funding. It further seeks to facilitate international cooperation amongst competition agencies. Another objective of the ICN is the convergent application of competition law to the worldwide activities of multinational corporations.

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Since the ICN is a network of competition enforcement authorities, it does not have the ability to make rules. Instead, the ICN is limited to improving convergence in the administrative practice of the various competition authorities that are members of the ICN. The ICN focuses its work on certain areas where consensus is possible. When consensus is reached, either in the form of recommendations or “best practices”, it is left to each individual competition authority to decide whether to implement these initiatives.

Within the ICN, working groups were originally set up to concentrate on merger control issues, with a special emphasis on convergence in merger control proceedings and providing assistance to newly established competition enforcement agencies in developing countries.<sup>43</sup> However, in recent years, the ICN has made the most progress in the area of cartels.

At its April 2004 conference in Seoul, the ICN addressed the issue of effective law enforcement against cartels. The ICN has also established a special Cartel Working Group, which focuses on several different areas of international cartel enforcement. Subgroup I of the Group deals with general framework issues such as obstruction of cartel investigations, private/public enforcement and international cooperation in cartel investigations. Subgroup II deals with enforcement techniques, and is working on an anti-cartel enforcement manual for its developing members to include chapters on practical aspects of international cooperation, practical aspects of obstruction, and on detection and investigative powers other than searches, raids, inspections and leniency.

Notably, the ICN focuses on practical enforcement issues instead of academic policy matters. Most recently, the Cartel Working Group prepared a report providing a detailed analysis of the types of international cooperation that are currently being used

in combating international cartels, and identifying issues and problems that arise from this struggle.<sup>44</sup>

In five short years the ICN has provided competition authorities with a venue within which to communicate and has successfully focused its work on procedural and substantive convergence. The importance of communication amongst competition authorities cannot be over emphasized. It is only through communication and dissemination of information and best practices that nations will be informed about each other’s extraterritorial policies and enforcement objectives. Furthermore, it is through this type of communication that international cooperation and possibly the development of an international framework can progress.

### CONCLUSION

Over the last fifteen years, competition authorities have increased their focus on combating international cartels. The competition enforcement community has become aware of international and global cartels and the substantial harm they cause. As a result, the overall record of enforcement against international cartels has dramatically increased. However, each jurisdiction must deal with the limits of the extraterritorial application of their national competition laws. To date, there remains no generally accepted international legal standard governing extraterritorial jurisdiction and, therefore, the possibility of serious jurisdictional disputes over the prosecution of cartel members remains a reality.

To be able to effectively apply its competition laws extraterritorially, a country must be able to obtain jurisdiction over the defendants, and it must also be able to enforce any resulting judgment. The United States and the European Union have a distinct advantage in these areas. There is a higher likelihood that any defendants in an international cartel case

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that are multinational corporations will have some connection to either of these two jurisdictions upon which personal jurisdiction may be based, as well as assets within the jurisdiction against which a judgment may be enforced. In practical terms, the economic power of the enforcer's jurisdiction directly influences effective enforcement.

In the face of jurisdictional limits on unilateral competition law enforcement, and the absence of a coherent international standard on the extraterritorial application of national competition laws, cooperation between competition authorities has become even more important. The OECD has proposed that comity is a good form of bilateral cooperation with the potential to improve international enforcement and avoid jurisdictional battles. However, this is simply one of many possible forms of cooperation. Canada, the United States and the European Union each have different approaches to the extraterritorial application of their competition laws.

Canada has recognized the limited right of a state to exercise extraterritorial jurisdiction, except where to do so would infringe on the right of another state to regulate conduct within its own territory. In *Empagran*, the United States clarified the extraterritorial limits of its competition jurisdiction, opting for a narrow interpretation giving considerable weight to international comity considerations. The European Union, through the establishment of the European Competition Network, allows for the coherent application of EU competition laws. Although the EU might serve as a guide for the establishment of harmonized national competition laws and or the establishment of supranational competition rules, recent attempts have failed. Hopefully, as the EU region matures, this geographic region can serve as an example of the possible benefits of a coordinated international approach to competition enforcement

through the use of an international competition regime, together with harmonized national competition laws.

In the author's view, the key to future developments will be to continue developing global cooperation efforts between competition enforcement authorities. Cooperation is currently being developed in two main ways: through bilateral agreements between competition authorities and through the ICN. Overall, it must be said that there is a complex patchwork of different types of cooperation and cooperation agreements, which currently are not conducive to efficient investigation or prosecution of international cartels. These forms of cooperation, although useful, must be improved. The ICN is currently the best vehicle for developing this international cooperation. Through its focus on dissemination of competition experiences and best practices, the ICN serves as the cornerstone of international cooperation between nearly one hundred competition enforcement authorities.

As long as international cartels remain a top priority for competition authorities around the world, the need for cooperation will remain. Efforts to detect, investigate and prosecute international cartels will need to continue developing. Through the ICN and bilateral agreements, it is hoped that competition agencies will be able to continue to promote international cooperation in cartel investigations and cases, as well as articulate best practices for developing more aggressive investigation tools. In this way, the international community can become more efficient and effective in prosecuting international cartels.

#### Notes

\* Of the Ontario Bar. The author works for the Competition Bureau. The views expressed are solely the views of the author and not those of his employer. The author would like to thank Shannon Lewis for her assistance in editing this paper.

<sup>1</sup> OECD Council, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (1998).

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International cartels are agreements to fix prices or to share geographic markets (i.e. countries) amongst the members of the cartels (that is, multinational corporations operating in the same product market).

<sup>2</sup> Article 81 of the *EC Treaty* (was Article 85 in the Treaty of Rome) prohibits agreements and concerted practices which prevent, restrict or distort competition, insofar as they may affect trade between Member States, unless justified by improvements in production or distribution in accordance with Article 81(3).

<sup>3</sup> Income tax violations would be one example of this type of regulation.

<sup>4</sup> Carlos Di Ponio, "Competition, Cooperation, and Conflict: An Assessment of the Extraterritorial Application and Enforcement of Competition Laws in Canada and the United States" 13 Mich. St. J. Int'l L 283 at 284.

<sup>5</sup> See *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.) [*Libman*] for a detailed discussion of the jurisdictional test. However, there are substantial differences in this case to an international cartel scenario. Most importantly, this was a case where part of the illegal activity took place within Canadian territory and the victims in this case were located abroad. It would be interesting to see how the Canadian courts would deal with the reverse scenario, that is, where the conduct of foreign corporations (which are outside of Canadian borders) affects Canadian victims.

<sup>6</sup> Section 703.2 of the *Criminal Code* sets out that a corporation may be served by delivery of a summons to the "manager, secretary or other executive of the corporation or a branch thereof" See also D. Martin Low, "Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments" (paper presented at the International Bar Association Communications and Competition Law Conference, Rome, Italy, May 17-18, 2004) for a more detailed discussion of this matter.

<sup>7</sup> The rule that *ex juris* service cannot be used to establish personal jurisdiction in criminal matters was confirmed in *Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff'g (1974) 52 D.L.R. (3d) 246 (B.C.S.C.).

<sup>8</sup> The last successful contested prosecution of a cartel in Canada was a domestic conspiracy case under s. 45 of the Act: *R v. Tindale*, [1997] O.J. No. 4449. For detailed reasoning, see *R. v. Clarke Transport Canada Inc.*, [1995] O.J. No. 3395, [1995] 64 C.P.R. (3d) 289 (Ont. Gen Div.).

<sup>9</sup> Gabrielle Marceau, *Anti-Dumping and Anti-Trust Issues in Free-trade Areas* (Oxford: Clarendon Press, 1994) at 66.

<sup>10</sup> Damjan Kukovec, "International Antitrust – What Law in Action" (2004-2005) 15 Int'l & Comp. L. Rev. 1 at 3.

<sup>11</sup> CLP Report on Positive Comity, DAFFE/CLP(99)19 [*OECD Report on Comity*].

<sup>12</sup> *Ibid.* at 2 (paraphrasing Part I.B.5 of the OECD Recommendations on Co-operation).

<sup>13</sup> *Ibid.* at 3.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 20.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* at 22.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* at 23.

<sup>20</sup> *Ibid.* Criminal provisions against cartels are generally a cornerstone of competition legislation, however certain exceptions do exist. For example, s. 45(5) of the *Competition Act* which deals with exports of products from Canada. The EU and other jurisdictions have similar provisions.

<sup>21</sup> *Ibid.* at 23.

<sup>22</sup> Many cooperation agreements between countries specifically deal with the issue of information sharing between competition authorities when the actions of regulators in one country affect the interests of another country, *ibid.* See also John J. Parisi, "Enforcement Cooperation amongst Antitrust Authorities" (2000) 12 Int'l Q. 691 for a more detailed discussion on the issue of information sharing.

<sup>23</sup> *OECD Report on Comity, ibid.* at 23.

<sup>24</sup> Anu Piilola, "Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation" (2003) 39 Stan. J. Int'l L. 207.

<sup>25</sup> See Ernst-Urlich Petersmann, "International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO" (1996) 72 Chi Kent. L. Rev. 545 at 565-74 for a discussion on positive aspects and see Daniel J. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry" (1997) 6 Minn. J. Global Trade 1 at 4-5 for a negative view.

<sup>26</sup> Presented in the Doha Round Ministerial Declaration ¶ 25. See World Trade Organization, Doha Ministerial Declaration ¶¶ 23-25. WTO Doc WT/MIN(01)/DEC/1(2001).

<sup>27</sup> Diane P. Wood, "Antitrust at the Global Level" (2004-2005) 72 Antitrust L.J. 309.

<sup>28</sup> John O. McGinnis, "The Political Economy of International Antitrust Harmonization" in Michael S. Greve & Richard A. Epstein eds., *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington, D.C.: AEI Press, 2004) at 126.

<sup>29</sup> Andrew T. Guzman, "The Case for International Antitrust" [2004] 22 Berk. J Int'l Law 355 at 367. See also Andrew T. Guzman, "Public Choice and International Regulatory Competition" (2002) 90 Geo.L.J. 971 at 977.

<sup>30</sup> *Supra* note 28 at 10.

<sup>31</sup> *Public Choice, supra* note 29 at 978.

<sup>32</sup> *Supra* note 27 at 324.

<sup>33</sup> *F. Hoffman-La Roche v. Empagran S.A.*, 124 S.Ct. 2364 [*Empagran*].

<sup>34</sup> The European Community (EC) and each nation within

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the European Competition Network (ECN) can enforce the EC competition rules. The decentralized system, led by the EC in a role of *primus inter pares* (first among equals), requires more cooperation between nations. Cornelius Cananbley and Michael Rosenthal, "Co-operation Between Authorities In and Outside the EU: What does it mean for Multinational Corporations: Part 1" (2005) 26(2) E.C.L.R. 106 at 107.

<sup>35</sup> International Competition Network, Cartel Working Group, Subgroup 1 – General Framework, *Co-operation between Competition Agencies in Cartel Investigations* (Report to the ICN Annual Conference, Cape Town, May 2006, found at [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org).) at 17.

<sup>36</sup> The US is party to eight agreements and the EU to three. Canada currently has comprehensive state-to-state cooperation agreements with the US, the EU, Mexico and Japan. There are also inter-agency arrangements in place with competition authorities in Australia, New Zealand, Chile, the United Kingdom and, most recently, Korea (announced May 4, 2006). See [www.competitionbureau.gc.ca/internet/index.cfm?itemID=141](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=141).

<sup>37</sup> OECD, *Hard Core Cartels, Recent Progress and Challenges Ahead* (Third Report on the Implementation of the 1998 Recommendations found at [www.oecd.org](http://www.oecd.org)) at 37.

<sup>38</sup> MLATs are typically focussed on the enforcement of criminal provisions. While MLATs are not competition specific agreements, they play an important role in international cartel cases since they provide enforcement agencies with formal cooperation, including exchange of confidential information and obtaining of evidence.

<sup>39</sup> *Supra* note 37 at 17.

<sup>40</sup> *Ibid.* at 19.

<sup>41</sup> Daniel Steiner, "The International Convergence of Competition Laws" (1997) 24 Man. L.J. 577, 591 at 594.

<sup>42</sup> See *Memorandum on the Establishment and Operation of the ICN*, [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org).

<sup>43</sup> *Supra* note 34 at 186.

<sup>44</sup> *Supra* note 35.

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### THE CONTINUING SAGA OF THE *STOLT-NIELSEN* CASE

By: Graham Reynolds, Q.C.<sup>1</sup>  
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Since our last update of this case in the Fall 2005 issue of the *Record* there have been interesting developments in the continuing battle between the Antitrust Division and Stolt-Nielsen. The Division's appeal from the

injunction rendered in U.S. District Court was heard late in 2005 and the Court released its decision on March 23rd of last year. A two judge panel of the United States Court of Appeals for the Third Circuit reversed and remanded the District Court's decision which had blocked the U.S. Department of Justice's Antitrust Division from indicting Stolt-Nielsen, its officers, directors and employees relative to alleged anti-trust violations in the parcel tanker industry.<sup>2</sup>

In its appeal, the Division alleged that the District Court had erred in entertaining jurisdiction to prevent the Executive Branch from filing its indictment and, on the merits of the case, had erred in holding that Stolt-Nielsen (and an executive's) actions did not violate the terms of the amnesty agreement. The Third Circuit's decision dealt only with the first issue, focussing on jurisdictional separation between the judiciary and the executive. The reasons, steeped in U.S. constitutional law, note that there are only limited exceptions to the plenary authority of the Executive Branch to determine whether to prosecute a case, and that judicial intervention was limited to instances where the mere threat of prosecution might inhibit the exercise of First Amendment rights.

A large portion of the reasons focused on the procedural aspects of review of the contents of an immunity agreement, and specifically as to whether there could be an enquiry as to potential breach of immunity terms prior to indictment.

In an earlier Seventh Circuit Decision, *United States v. Meyer*<sup>3</sup>, the Court had opened the door to a possible pre-indictment procedure whereby the government would seek relief from its obligations under an immunity agreement. The Third Circuit did not specifically overrule this approach but favoured a post-indictment procedure for the evaluation of the merits of an alleged breach of an immunity agreement. The reasons noted

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that a defendant had a right to assert its rights after indictment and that the adversary system provides a “federal forum in which to assert their defences”. Thus, because the defendants were guaranteed access to a federal court, it was “... not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors”

In the Third Circuit’s view, precedent indicated that there was no basis to contend that an indictment should be precluded prior to substantive proceedings before the federal courts and the decision at first instance was therefore reversed.

Since the decision of the Third Circuit, Stolt-Nielsen unsuccessfully sought *en banc* review in the Third Circuit and followed that process with applications to stay the Third Circuit’s decision in the Supreme Court. The company had sought an emergency petition which would have blocked the government from filing charges against the company. In fact, on September 6, 2006, the Antitrust Division filed an indictment against Stolt-Nielsen, two of its executives, and two of its subsidiaries, charging them with participating in a conspiracy to fix prices, allocate customers and rig bids on shipping contracts.<sup>4</sup> This followed the company’s unsuccessful application for *certiorari* to the U.S. Supreme Court. The merits will now presumably be argued in due course before the U.S. District Court.

Significantly, the reasons of the Third Circuit did not consider the substantive issue of whether Stolt-Nielsen had, as alleged by the Antitrust Division, breached its immunity agreement. The Court specifically noted:

... if the appellees assert the agreement as a defense after they are indicted, the District Court must consider the Agreement anew and determine the date on which Stolt-Nielsen

discovered its anticompetitive conduct, the Company’s and Wingfield’s subsequent actions, and whether, in light of those actions, Stolt-Nielsen complied with its obligation under the Agreement to take “prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity”

The later quotation stems directly from the wording of the Antitrust Division’s amnesty policy which states that an applicant must take “prompt and effective action to terminate its part in the activity upon its discovery of the illegal activity being reported”.<sup>5</sup>

It should be remembered that in the District Court’s view, the Antitrust Division had entered into a binding contract with the applicant that no prosecution would occur for activity prior to the date of the amnesty letter and that the standard integration clause in the document precluded the Division’s ability to rely upon any other date for assertion of respective rights and obligations. From a policy perspective, it is of course entirely reasonable to demand that applicants act with all candour in their dealings with antitrust agencies generally and that leniency programs cannot function effectively in the absence of such candour. Thus, the run-up to the case is flush with policy undertones. However, it remains to be seen whether, in the cold light of day, strict contractual analysis of the facts may well preclude the Division from asserting that Stolt-Nielsen engaged in any misrepresentation in its dealings with the Division prior to the date of the amnesty letter. On this view, there may be much less to the case than meets the eye.

It is interesting to note that the Antitrust Division’s policy relative to cessation of participation is more particularized, and arguably more stringent, than that

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applied by other competition agencies. For example, in its *Immunity Program under the Competition Act*, the Competition Bureau maintains that a party must "... take effective steps to terminate its participation in the illegal activity". The Bureau does not go on to specify that an applicant cease its participation in the activity immediately upon discovery, the Bureau's position being more reflective of the actual circumstances that may confront immunity applicants. For example, the nature of ongoing contact among co-conspirators may make an abrupt withdrawal from cartel activity difficult (and may actually frustrate law enforcement objectives by "tipping" other participants of possible enforcement action); moreover, in some circumstances, co-operative efforts with the agency may involve acting as an agent of the state in continuing the contacts as an evidence-gathering mechanism for the government.<sup>7</sup>

In the E.U., the proscription against continued participation focuses upon the time of the application, with the revised (2006) leniency notice stating that an applicant must "... end its involvement in the alleged cartel immediately following its application".<sup>8</sup> Under the Office of Fair Trading's leniency notice, applicants must (similarly) "...refrain from further participation in the cartel activity".<sup>9</sup> The Japanese FTC requires that the applicant "...has not engaged in any illegal activity after the date on which the JFTC commences an investigation".<sup>10</sup> The Korea Fair Trade Commission reviews whether an applicant is currently conducting the "improper behaviour being investigated" or has ceased to do so.<sup>11</sup> A corporate leniency applicant to the Australian Consumer and Competition Commission must "cease its involvement in the suspected cartel".<sup>12</sup>

All of these policies focus on the current state of activity of the applicant at the time of the application instead of an examination of internal corporate events that predated the process. Internal corporate

machinations that may have delayed the eventual leniency application are, absent issues of obstruction or coercion, irrelevant to the leniency grant.

No enforcement agency would tolerate direct deception by an applicant in asserting that it has ceased participating in a cartel while at the same time continuing its unlawful contact with other participants. Regulators are entitled to rely on the state of facts presented to them by applicants; however, regulators are also bound by the agreements into which they enter as the *quid pro quo* between regulator and amnesty applicant in the circumstances. The majority of regulators limit themselves to addressing only representations as to the Applicant's current state of activities in concluding the immunity bargain. There is no reason to suspect that a lack of inquiry into the alacrity of corporate response to discovery of wrongdoing has in some way produced any less valuable immunity applicants or diminished the effectiveness of cartel enforcement programs worldwide.

As for remedies for applicants faced with revocation, as indicated in our prior commentary<sup>13</sup>, procedural resort to a post-indictment hearing would very likely be the preferred course of action in Canada. Injunctive relief against the Attorney General is practically impossible and a corporation and/or executives in the situation of the *Stolt-Nielsen* defendants would very likely avail themselves of an abuse of process stay application prior to any domestic proceedings.

As earlier expressed, there has not been a great deal of success in blocking prosecutions in Canada on this basis, absent clear and compelling evidence of prosecutorial malfeasance.

More generally, the issue of revocation of immunity leniency has received more attention arising from the *Stolt-Nielsen* case. In Europe, the European Commission's decision to revoke the immunity of

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Deltafina in the Italian raw tobacco cartel inquiry raised eyebrows because of the Commission's expansive interpretation of the co-operation requirements of point 11(a) of the 2002 Leniency Notice, which required undertakings (having been granted conditional immunity) to "...cooperate, fully, on a continuous basis".<sup>14</sup> Deltafina had, in subsequent meetings with competitors, disclosed the fact of its immunity application. In the Commission's view, this failure to maintain confidentiality compromised further investigative measures. While the Commission recognized that there was a certain inherent difficulty in maintaining complete confidentiality of an application, it does not "licence the immunity applicant to voluntarily disclose its immunity application at meetings with competitors".<sup>15</sup> Ultimately, though, Deltafina received a 50% reduction in its fine level arising from its positive role in unearthing the violation.

The Bureau has itself acknowledged the greater focus now placed on the possibility of agency revocation of immunity arising from *Stolt-Nielsen*.<sup>16</sup> Revocation is portrayed as an "exceedingly rare event" which balances the immunity bargain against the cooperation obligations of applicants to tell the truth and not knowingly mislead investigators, to refrain from destroying, altering, or withholding evidence, and the like. To date, the Bureau reports that corporate immunity has never been revoked, although the Attorney General had, in two cases, revoked individual immunity only after "repeated and unsuccessful attempts by the Bureau to gain the co-operation of the parties in question".<sup>17</sup>

In the end, the ultimate precedential effect of the *Stolt-Nielsen* case may be limited to its unusual facts. At least one prominent commentator, however, has suggested that the implications of the case have already led to much greater circumspection by the Antitrust Division in ascertaining facts and circumstances

underlying the leniency application, and particularly those related to corporate acts following discovery of potentially illegal conduct.<sup>18</sup>

## Notes

<sup>1</sup> Mr. Reynolds is a partner in the Competition and Antitrust Law Group at Osler, Hoskin & Harcourt LLP's Toronto offices.

<sup>2</sup> Judge Samuel Alito was a member of the panel hearing the appeal but did not take part in the judgment, owing to his successful nomination as a Justice of the U.S. Supreme Court.

<sup>3</sup> 157 F. 3d. 1067 (Seventh Cir. 1998).

<sup>4</sup> *United States of America v. Stolt-Nielsen S.A.*, United States District Court for the Eastern District of Pennsylvania, Criminal No. 06-466, Filed September 6, 2006, available at [http://www.usdoj.gov/atr/cases/f218200\\_218212.htm](http://www.usdoj.gov/atr/cases/f218200_218212.htm).

<sup>5</sup> *Department of Justice Corporate Leniency Policy*, available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

<sup>6</sup> *Immunity Program under the Competition Act*, Competition Bureau Canada, available at <http://www.competitionbureau.gc.ca/PDFs/immunitye.pdf>.

<sup>7</sup> A comprehensive discussion of the state agency doctrine in Canada may be found in the Supreme Court's decision in *R. v. Broyles* [1991] 3 S.C.R. 595.

<sup>8</sup> *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, 2006, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>, at para 12(b).

<sup>9</sup> Section 5.1, "Leniency and No Action", OFT's draft final guidance note on the handling of applications, November 2006.

<sup>10</sup> Amendments to Japanese Anti Monopoly Act, effective January 2006.

<sup>11</sup> Korean Fair Trade Commission "Notification on Implementation of Leniency Program for Corrective Measures against Confessors", March 2005, at Article 6 (Cease of improper concerted act) and *Enforcement Decree*, Article 35, pgh (1), subparagraphs 1-5.

<sup>12</sup> ACCC leniency policy for cartel conduct, June 2003, Part A (2)(c), available at <http://www.accc.gov.au/content/index.phtml/itemId/459479>.

<sup>13</sup> "Revoking Immunity: Could the *Stolt-Nielsen* Scenario Occur in Canada?" (2005) 22:2 Can. Comp. Rec. 85.

<sup>14</sup> *Commission Notice on Fines and Reduction of Fines in Cartel Cases* (2002), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:c:2002:045:0003:0005:en:PDF> at paragraph 11(a); note that the 2002 notice did not contain the explicit requirements of confidentiality as presently found in para. 12(b) of the 2006 Notice (*supra* note 8).

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<sup>15</sup> Commission Decision, 20 October 2005, case COMP C.38.281 B.2 – Raw Tobacco Italy at 9.3.1.

<sup>16</sup> See remarks of Denyse MacKenzie, Senior Deputy Commissioner, Criminal Matters Branch, Competition Bureau Canada “The Bureau’s Immunity Program: Fine Tuning or Overhaul?” (Paper prepared for the Canadian Bar Association Annual Conference, September 28-29, 2006, Gatineau, Quebec) at 12-14.

<sup>17</sup> Remarks of Denyse MacKenzie, *ibid.*

<sup>18</sup> See Donald Klawiter & Clayton Everett. “The Legacy of *Stolt-Nielsen*: A New Approach to the Corporate Leniency Program?” *The Antitrust Source* 6:2 (December 2006) online: [www.antitrustsource.com](http://www.antitrustsource.com).

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### AUSTRALIAN NEWSLETTER

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#### The Legislative Backlog is Moving

This Newsletter has in the past reported on proposed changes to the *Trade Practices Act 1974* (“TPA”), flowing from the Dawson Committee and a legislative backlog that had built up.

#### *Trade Practices Legislation (Amendment) Bill 2006*

The Dawson amendments finally became law on January 1, 2007. They had been delayed for a substantial time as the Senate, including a Government Senator, opposed the legislation package because of a concern that the changes to the merger review process may lead to further concentration in the Australian economy. Of significant concern to some Senators was that the Australian Competition and Consumer Commission (“ACCC”) was to be by-passed in relation to merger authorization (public benefit assessment) and that parties could apply directly to the Australian Competition Tribunal (“ACT”) for authorization.

The Government made some changes to the package and, in particular, enhanced the role of the ACCC in the new merger authorization process. One independent Senator accepted the Government’s changes and the Bill was passed. The Government Senator who voted against the Bill initially did not change his vote.

The amendments are extensive and in brief cover the following:

#### 1. Changes to the merger review process.

- A new formal merger clearance process on competition grounds. Applications to be to the ACCC with an appeal to the ACT.
- Applications for authorization of mergers on public benefit grounds to be made directly to the ACT. Currently, authorization matters go first to the ACCC and then on appeal to the ACT.
- There are time limits set in relation to both new processes. In relation to formal merger clearances it is 40 days, with some room for an extension. If the ACCC does not make a decision in the 40 days, the merger is deemed not cleared.
- The long-established ACCC informal review process will remain, but the ACCC has signalled it will seek to stop parties from forum shopping or gaming the new processes.
- Private rights in relation to mergers have been further curtailed.
- Both the new processes are transparent.
- Both the new processes are voluntary. There is still no mandatory merger pre-notification in Australia.

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- There are substantial fees set for the new processes.
  - The ACCC will be a full party to any merger authorization applications to the ACT. This is somewhat of a change to its current role where it is an amicus.
  - The new processes will generally enhance the role of the ACT.
2. A fast track notification process for exemption of small business collective bargaining/boycott arrangements.
- There is a \$3 million cap threshold as to which small businesses can be involved in collective bargaining arrangements. This threshold relates to the annual dealings of each of the members of the group that is the target of the collective bargaining arrangement.
  - Regulations will prescribe different amounts for different industries, and the Government has flagged a number of possible industries, including petrol resellers and car dealers, smash repairers and some agricultural enterprises, that will have a higher threshold.
  - Collective boycotts are included in the new regime.
  - Third parties can apply on behalf of the collective bargaining groups. This allows trade associations to represent their members; but the Bill specifically excludes unions from applying on behalf of union members.
  - Notifying parties must advise the target at the time of the filing of the notification.
  - The conduct that can be notified relates to collective action that otherwise would be in breach of the TPA and includes section 45A conduct (price fixing) and primary boycotts.
  - The test for the ACCC to use in assessing the matter is that the ACCC must be satisfied that the likely benefit from the collective bargaining conduct will outweigh the likely detriment to the public from the conduct.
  - The ACCC has five days to reject an application on the basis that it is not a valid notice on technical grounds.
  - The ACCC has 28 days (this will be reduced to 14 days after 12 months from the date the legislation takes effect) to object to a notification, in substance, and if it does the notification does not take effect unless the ACCC changes its view in its final decision or is overturned by the ACT.
  - If the ACCC does not object, the notification stands and no third party can appeal.
  - Parties can only have one attempt at notification, if it is rejected they cannot notify again.
  - If parties apply for authorization for collective bargaining and that application is rejected, the parties cannot then notify the same collective bargaining arrangement.
  - If the ACCC objects to a notification, the current TPA process relating to the objection to notifications applies with an eventual appeal to the ACT. Initially, the ACCC issues a draft notice of objection. Then, after consultation, a final decision is issued. That final decision can be appealed to the ACT by the applicants.

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- The ACCC can object to a notice at anytime even after the 28 days, but exemption will be in effect and will then continue until such time as the objection becomes final, which may be after an ACT decision.
  - A collective bargaining/boycott notice expires after three years.
  - There is to be a fee of \$1000 per notification, with some concessional fees in limited circumstances.
3. New provisions relating to dual listed companies and exempting them from the cartel provisions.
  4. An expansion of the joint venture provisions providing exemptions from the *per se* cartel offence provisions.
  5. Expanded search powers for the ACCC subject to the ACCC obtaining a warrant and various legislative safeguards. Currently, the ACCC does not have to obtain a warrant for its limited enter and seizure powers.
  6. Substantially increased penalties for competition offences, including factoring issues such as economic gain from the unlawful conduct.
  7. Company officials to be disqualified from office following TPA offences.
  8. Companies cannot pay penalties imposed on company officials by the Court.
  9. Third line forcing by related companies no longer to be a *per se* offence, now subject to a competition test.

### *ACCC Guidance Publications*

The ACCC has issued guidelines in relation to the new merger processes and collective bargaining to assist businesses.

### *Trade Practices Legislation Amendment Bill (No. 1) 2007*

The above Bill flows from the Government's response to a Senate Report into the TPA and small business and from discussions that took place prior to the Dawson Bill being passed, with the support of small business groups. It is expected that the Bill will be tabled early in 2007, bearing in mind that a Federal election is due later in 2007.

This Bill will contain amendments to the misuse of market power and small business unconscionability provisions. It will also provide for the appointment of a second Deputy Chairman to the ACCC. The Government has announced that the current Commissioner with responsibilities for small business, John Martin, will be appointed as the new Deputy Chairman.

### *Trade Practices Legislation (Criminal Cartels) Bill 2007*

This Bill flows from the 2003 Dawson Committee report but was separated from the rest of the Dawson amendments due to the complexity of the issues.

Currently, cartel offences and all competition offences are civil penalty provisions. The new cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly

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obtaining a gain from the customers who fall victim to the cartel.

Dishonest intent will be proved if a jury is satisfied that the cartel arrangement was dishonest according to the standards of ordinary people, and the defendant knew it was dishonest according to those standards. Indicators of dishonesty include deception (such as lies or misleading statements), making or relying upon representations or promises that are known to be false or which will not be carried out, concealing facts that there is a duty to disclose, and engaging in conduct that the defendant knows they have no right to engage in.

To ensure effective enforcement, the Australian Government also considers it appropriate that there be parallel civil and criminal prohibitions on cartel behaviour. This will enable a proportionate response to any attempt by cartels to stifle competition. The most serious cartel conduct would be pursued under the criminal provisions, and other cartel conduct would be litigated civilly.

To ensure consistency with international best practice, the legislated definition of cartel conduct in Australia under both the civil and criminal regimes will accord with the OECD's definition of serious cartel conduct, that is, agreements, practices or arrangements that fix prices, rig bids, restrict output or establish quotas and share or divide markets by allocating customers, suppliers, territories or lines of commerce. In 1998, the OECD recommended members ensure their competition laws halt and deter these cartel activities.

### *Other Legislative Changes*

Petroleum industry. Parliament has repealed long-standing legislation which limited the number of sites that oil companies could own and which set the framework for dealings between oil companies and their franchisees. As part of this package, a new

mandatory Code of Conduct involving oil distributors and franchisees has been introduced into the TPA. This law and the Code came into effect on March 1, 2007.

Media industry. Australian law has prohibited holders of metropolitan TV licences from owning a newspaper in the same market. These laws were called the "cross media" laws. They were repealed last year. The TPA will now govern media acquisitions along with the Media and Communications regulator who will enforce new diversity rules.

Co-operation between competition regulators. The TPA is to be amended this year to facilitate the exchange of information between international regulators.

Component pricing. The TPA is to be amended to prohibit advertising where the total price is not specified. This is to counter conduct by some businesses that do not include in advertised prices additional costs such as taxes and levies, for example fuel levies by the airlines.

Access regime in relation to monopoly networks. The TPA was amended last year to update the third party access regime in order to speed up the process and generally ensure that it meets modern needs in the Australian and global market place.

### **Policy Developments – Consumer Protection**

Australia has had many reviews of its competition laws culminating in its National Competition Policy. A national (Commonwealth/States/Territories) approach in broad "marketing practices" type consumer protection laws has existed since the early 1980's, but that national approach is drifting. In addition, there is much industry licensing and other so-called consumer protection laws at the State and Territory level.

The Commonwealth Government has asked the Productivity Commission to review Australia's

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consumer protection framework. This review follows on Productivity Commission reviews of Product Safety laws in Australia and Regulatory imposts on business. This latest Productivity Commission review has major implications for both the statutory content and institutional framework in Australia. Issues of conformity with New Zealand and Pacific neighbours will also be an issue.

The separate institutional arrangements that have operated in the financial services sector since 1996 will also be reviewed. The ACCC does not have jurisdiction in relation to consumer protection in the financial services sector. This has caused some problems where products are bundled and the ACCC has jurisdiction for one part of the bundle and the financial services regulator has jurisdiction over another part.

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### U.S. ANTITRUST LAW DEVELOPMENTS

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#### U.S. DEVELOPMENTS IN 2007 TO DATE

##### Supreme Court Antitrust Actions

The first half of 2007 was marked by the unusual phenomenon of multiple antitrust cases either decided or pending at the Supreme Court. These cases involved a wide range of issues, including: unilateral conduct matters related to monopsony power and the treatment of predatory bidding as well as the use of minimum resale prices; and coordinated effects, including the standards for establishing plausible evidence of conspiracy and the balance between securities and antitrust regulation governing joint activity. In addition, the Supreme Court considered matters related to intellectual property and the relationship between IP

and antitrust. The following provides a brief summary of the key Supreme Court decisions and the upcoming ones.

*Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*<sup>1</sup> involved allegations that a large lumber company with numerous mills in an area had engaged in predatory bidding that affected the costs of a rival, the Plaintiff. The Plaintiff alleged that the resulting increase in costs affected its ability to operate profitably and hence was predatory. The Court, in evaluating the predatory bidding claims, concluded that the relevant standard to apply to issues of predatory bidding should essentially be the comparable standards applied to predatory pricing. That is, that the Plaintiff must demonstrate both the predatory conduct and the ability of the Defendant to recoup: "the alleged predatory bidding led to below-cost pricing of the predator's outputs", and it must be demonstrated that the Defendant "has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."<sup>2</sup> The Court indicated that there should be an analogous economic reasoning of harm from monopsony power and the possible downside risks for litigation costs of a too lenient standard that would not require recoupment given the possible additional litigation of matters that were actually procompetitive. This was a matter in which the Department of Justice (DOJ) and the Federal Trade Commission (FTC) filed amicus briefs.<sup>3</sup>

*Bell Atlantic Corporation v. Twombly*<sup>4</sup>, which was very recently decided, involved a class action alleging conspiracy among the former Bell operating companies not to compete in each other's territories and, as a result, to raise prices for various telecommunications services. At issue in this case was the sufficiency of evidence with regard to conspiracy and, particularly, whether parallel conduct was sufficient to show conspiracy. The Court found that more than parallel

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conduct must be evidenced and that the claims must be plausible, citing high costs associated with litigation and discovery if cases proceed on insufficient bases. The 7-2 decision included reference to the underlying economic thinking of conspiracy which requires that there be a plausible economic basis for an inference of conspiracy. This was also a case in which amicus briefs were filed by the federal agencies.

There are two matters that have been argued but not yet decided that involve additional unilateral as well as coordinated effects issues: *Leegin Creative Lumber Products, Inc. v. PSKS, Inc.* represents an opportunity for the Supreme Court to address the per se standard with regard to minimum price fixing and will be a closely watched decision. The DOJ has filed an amicus brief supporting a rule of reason standard, although FTC Commissioner Harbour has filed an open letter to the Court. At issue are practices for suggested retail prices for various leather products. The second matter, *Credit Suisse First Boston Ltd. v. Billing*, raises interesting issues in the context of a class action brought with regard to IPOs in which it is claimed that collaboration among underwriters for offerings amounted to conspiracy. The case involves the evaluation of both conspiracy issues in an environment in which joint action is frequent, and of whether certain actions are immunized by the SEC, including whether there are pro-competitive justifications and a need for balancing between antitrust and coordination.<sup>5</sup>

### **Antitrust Modernization Commission Report and IP Report**

The first half of 2007 was also marked by the issuance of two long-awaited reports which reflected the culmination of detailed hearings and inquiry. The Antitrust Modernization Commission (AMC) issued its final Report to Congress in April 2007 after extensive hearings on a wide variety of matters. The Report provided a number of recommendations with

regard to process and to some extent with regard to suggested legislative activity. With regard to merger enforcement, the AMC recommended additional retrospectives with regard to decisions to enjoin or not challenge merger transactions, a variety of process improvements with regard to merger review, including promotion of efficiency where there is review by multiple agencies and streamlining of the HSR process, and also recommended that the FTC be prohibited from using administrative litigation in HSR merger cases. With regard to legislative activity, the AMC Report recommended repeal of the *Robinson Patman Act* and addressed exemptions and immunities. With regard to exemptions and immunities, the Report argues against the adoption of additional statutory exemptions unless a compelling case can be made that the benefits outweigh the potentially substantial costs associated with the regulation. The Report does identify a number of statutory exemptions and notes that many were adopted prior to modern antitrust analysis. In addition to cautioning strongly against the adoption of any new exemptions, the Report also encourages additional deregulation.

The second report was the U.S. Department of Justice Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights, Promoting Competition and Innovation, April 2007.<sup>6</sup> The Report summarizes an extended set of hearings held by the agencies in 2002, which included a large number of panels across the country on a wide variety of topics related to antitrust enforcement in the context of intellectual property, the IP Guidelines (1995), and issues such as exclusive dealing, tying, and other arrangements. Of particular interest is the analysis of the extension of royalties past the life of the patent (at page 122 of the Report) and the assessment that there can be innovation-inducing aspects. The Report covers a broad range of topics related to market power and standard-setting, as well as the analytical framework

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for assessing the competitive implications of licensing practices.<sup>7</sup>

### Brief Synopsis of Merger Activity and Review

Early 2007 was marked by an up-tick in merger activity and filings following on increases at the end of 2006. Both the FTC and DOJ have reviewed a number of merger matters since the beginning of 2007, with relatively few challenges. A detailed summary of the transactions under review that were decided in 2007 or in earlier years is provided in the recent report issued by the FTC Bureau of Competition, "Report on Antitrust Enforcement Activities Fiscal Year 2003 – March 31, 2007" at the ABA Antitrust Section Spring Meeting 2007.<sup>8</sup> This report provides an extensive summary of all consent orders and merger decisions in an array of industries, including court or administrative law judge opinions over the period. The summaries are useful for highlighting the competitive analyses and for a quick review of the nature of merger and non-merger activity. For example, a large proportion of the non-merger enforcement activity has focused on the health care sector. The report highlights the fact that there have been relatively few challenges that have resulted in litigation, although a number of consent decrees are detailed.

There continue to be some litigation issues unique to certain aspects of U.S. law. For example, in one of the recent challenges by the FTC of a natural gas pipeline transaction, Equitable Resources and Peoples Natural Gas Company (Administrative Complaint of March 2007), a Pennsylvania Court ruled that the FTC's challenge of the proposed combination was immune due to oversight of the Pennsylvania Public Utility Commission.

### Notes

<sup>1</sup> 127 S. Ct. 1069 (2007) [*Weyerhaeuser*].

<sup>2</sup> *Weyerhaeuser*, Slip Opinion at 12 (available at <http://www.supremecourtus.gov/opinions/06pdf/05-381.pdf>).

<sup>3</sup> For additional analysis of this topic, see Gregory J. Werden, "Monopsony and the Sherman Act: Consumer Welfare in a New Light" (March 23, 2007, available at SSRN: <http://ssrn.com/abstract=975992>).

<sup>4</sup> [2007] WL 1461066.

<sup>5</sup> See Solicitor General Brief, "Brief for the United States As Amicus Curiae" particularly Section III with regard to reconciliation of standards (available at <http://www.usdoj.gov/atr/cases/f219600.219666.htm>). See also Transcripts (available at [http://www.supremecourtus.gov/oral\\_arguments/argument-transcripts/05\\_1157.pdf](http://www.supremecourtus.gov/oral_arguments/argument-transcripts/05_1157.pdf)).

<sup>6</sup> [http://www.usdoj.gov/atr/public\\_hearings/ip\\_222655.pdf](http://www.usdoj.gov/atr/public_hearings/ip_222655.pdf).

<sup>7</sup> See also Thomas Barnett, AAG, Antitrust Division, Department of Justice "Recent Developments in Antitrust and Intellectual Property Law" (Presentation to the American Conference Institute's Third Annual In-House Counsel Forum on Pharmaceutical Antitrust, New York, May 16, 2007) including discussion of recent business reviews as well as matters before the Supreme Court. A related decision is *KSR International Co. v. Teleflex, Inc.* (April 30, 2007) concerning obviousness of patents.

<sup>8</sup> [www.ftc.gov/reports/aba/abaspring2007.pdf](http://www.ftc.gov/reports/aba/abaspring2007.pdf).