

Antitrust/Competition & Marketing Bulletin

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Fasken Martineau DuMoulin LLP

Antitrust/Competition & Marketing 2007 Year in Review

MERGERS

Merger Review

Akzo Nobel N.V. / Imperial Chemical Industries PLC

On December 14, 2007, a consent agreement between the Commissioner of Competition and Akzo Nobel N.V. was filed with the Competition Tribunal, which provides for the divestiture of certain paint brands and other assets following Akzo's acquisition of Imperial Chemical Industries PLC. Netherlands-based Akzo owns and sells a number of paint brands in Canada, including Sico, Para, Bétonel and Crown Diamond. ICI, based in the U.K., owns brands in Canada such as CIL, Glidden, Colour Your World and Ralph Lauren.

The substantial lessening and/or prevention of competition sought to be remedied was in respect of the wholesale supply of decorative coatings in Quebec. Under the consent agreement, Akzo agreed to divest the Para business (including a production facility in Ontario), and the Crown Diamond brand and related assets. Of note, Akzo also agreed to a behavioural remedy wherein it will, for a period of five years, cease all programs that reward retailers in the province of Quebec for the following: (1)

carrying only Akzo brands; or (2) the number of Akzo brands purchased.

CHUM Ltd. / Bell Globemedia Inc.

In the matter of the proposed merger of the television broadcasting operations of CTVglobemedia Inc. (then Bell Globemedia Inc.) and CHUM Ltd., the Competition Bureau concluded that the merger was unlikely to result in a substantial lessening or prevention of competition, and that, as such, no action by the Commissioner was warranted. In coming to that conclusion, the Bureau noted in its Technical Backgrounder in respect of that decision that, in its view, while CTV, given its strong position in top-rated television programming, held a certain degree of market power in the sale of advertising pre-merger, market power would not be enhanced by acquiring the CHUM assets. This conclusion was supported, in the opinion of the Bureau, by the fact that there was only a marginal degree of overlap between top-rated and lower-rated programming that characterized the respective CTV and CHUM broadcast schedules, and that with respect to advertising services where top-rated exposure was not critical, remaining competition would be sufficient to ensure that there was no reasonable prospect that CTV could effect a material price increase.

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Johannesburg

New York

Abitibi-Consolidated Inc. / Bowater Incorporated

The Competition Bureau released a technical backgrounder on October 30, 2007, in respect of its review of the merger between Abitibi-Consolidated Inc. and Bowater Incorporated. Abitibi is a global forest products company headquartered in Montreal, Quebec, with ownership interests in paper mills, sawmills and other facilities in Canada and abroad. Bowater is also a forest products company, which is headquartered in Greenville, South Carolina; it owns and operates paper mills primarily in Canada and the United States.

The Bureau's investigation of the parties' proposed transaction was concentrated on six product markets where overlap existed: (i) softwood lumber; (ii) market pulp;¹ (iii) wood chips; (iv) roundwood/logs; (v) uncoated groundwood (UGW) papers; and (vi) newsprint. For each market, the Bureau concluded that the parties' proposed transaction would not likely result in substantial prevention or lessening of competition (SPLC) for the following reasons:

- (i) Softwood lumber: Less than 10% post-merger share in a North American market.
- (ii) Market pulp: Less than 10% post-merger share in a North American market.
- (iii) Wood chips: The parties were found to compete in both the upstream and downstream segments of the wood chips market (wood chips being a by-product of sawmills used to produce pulp); despite sales to third parties, both parties were net purchasers of wood chips. Examining the Saguenay-Lac-St-Jean area of Quebec and the Thunder Bay area of Ontario, the Bureau concluded that the parties' proposed transaction

would not likely result in an SPLC, having regard to, among other things, the existence of long-term formal contracts for wood chip sales and interdependence among certain sellers and purchasers, which would significantly constrain the ability of the merged entity to exercise market power.

- (iv) Roundwood/logs: An SPLC was found to be unlikely having regard to, among other reasons, the significant regulatory oversight in Ontario and Quebec for this product.
- (v) UGW papers: Although the merged entity would have high market shares for certain grades of UGW paper, customers expressed confidence that the merged entity would not be able to exercise market power given effective remaining competition, and in particular, customers' minimal switching costs to change suppliers and ability to substitute a different UGW paper grade.
- (vi) Newsprint: Finding the geographic market for newsprint to be Eastern Canada, the Bureau assessed the post-merger market share for newsprint to be in excess of 35%; therefore, there was a prima facie concern about potential market power. Despite finding significant barriers to entry and limited foreign competition, on the whole, the Bureau concluded that there was insufficient evidence to support an application for remedies to the Tribunal in respect of newsprint. More specifically, while there were conditions that supported non-cooperative coordination among suppliers in Eastern Canada (e.g. small number of firms with high levels of concentration, inelastic demand, high entry barriers, a homogeneous product, and a high degree of transparency in the industry), coordination would in fact be difficult to effect given, among other things, declining demand for newsprint and recent examples of competitors winning business on clear price competition.

¹ Market pulp is pulp in excess of the parties' paper mill requirements sold on the open market.

Moreover, there would be effective remaining competition post-transaction. In particular, the Bureau observed that competitors had an ability and willingness to decrease exports in favour of sales in Eastern Canada in the event of a material increase in price, and that customers enjoyed low switching costs.

Notwithstanding the decision not to challenge the parties' transaction, the Commissioner retained the right to bring proceedings before the Tribunal in respect of the transaction within three years of it being substantially completed.

Labatt/Lakeport

In our August 2007 Bulletin², we reported on the important decision of the Competition Tribunal in respect of this merger in which the Tribunal refused to grant the Commissioner of Competition's application for an injunction in respect of the Labatt acquisition of Lakeport on the basis that the Commissioner had not demonstrated that the Tribunal's ability to eliminate the substantial prevention or lessening of competition post-merger would be substantially impaired.

The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal (FCA) and, earlier this year, the FCA dismissed the Commissioner's appeal, agreeing with the Tribunal that the Commissioner must establish that, absent an order, the Tribunal's remedial powers post-merger would be substantially impaired. The FCA noted that the Commissioner had not discharged this burden.

Merger Remedies

Template Consent Agreement for Mergers

On May 1, 2007, the Bureau published an *Outline Consent Agreement* (OCA) to complement the *Information Bulletin on Merger Remedies in Canada* released in September 2006. The OCA is intended to provide further guidance on the objectives and general principles applied by the Bureau when seeking remedies to resolve competition concerns arising from a proposed transaction. For the Bureau, the OCA will serve as a starting point for the negotiation of consent agreements, with the terms of the actual negotiated agreement being tailored to the specific facts of a given case.

As expected, certain terms of the OCA give to the Commissioner powers that may be too onerous in certain circumstances or for certain parties. For example, the OCA provides that the Commissioner is responsible for appointing (rather than simply approving) a Hold Separate Manager, Hold Separate Monitor and Divestiture Trustee. Moreover, the OCA contains provisions which dictate certain terms of the sale agreement for the divested assets, which may otherwise be the subject of reasonable negotiation.

In any event, the OCA is a welcome addition to the Bureau's continued transparency in the area of merger remedies, as is the Bureau's stated intention to maintain the OCA as a living document to be amended as the Bureau's policies and practices evolve. The OCA is available on the Bureau's website at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02310e.html>.

² Our bulletin is online at: http://www.fasken.com/files/Publication/0a149965-000e-4f38-b216-ccf42344bad6/Presentation/PublicationAttachment/0a497241-9cfb-43bc-8c34-cf45a9752660/Bulletin_Antitrust_Competition_and_Marketing_August2007.pdf.

Merger Studies

Report on Dynamic Efficiencies

In August 2007, the Competition Bureau made public a report it had commissioned on potential approaches to the assessment of dynamic efficiencies in merger review. The report, entitled “Innovation and Dynamic Efficiencies in Merger Reviews”, was prepared by CRA International.

Competition based on innovation is, according to the report, the heart of many modern industries. Accordingly, an understanding of dynamic competition is key. However, the report notes that this raises several issues. First, there is no settled economic model that relates the extent of market concentration to the extent of innovation. Second, innovation is highly uncertain, making it much more difficult to measure and quantify than price and output. Third, the measurement problems make it difficult to quantify a merger’s likely effect on the rate or outcome of innovation. Finally, innovative activity is a form of up-front investment, so prices, on average, must be expected to exceed short-run marginal costs to justify the investment.

The report proposes a framework that allows for the effect of merger transactions on innovation to be incorporated into merger review where the current approach found in the *Merger Enforcement Guidelines* is inadequate to fully capture dynamic competition. The framework is aimed at addressing future goods markets, while making use of information available in the present.

In making the report public, the Bureau noted that it remains an independent third party document and, implicitly, not Bureau policy. The report can be found at: [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/cra-final-report-on-efficiencies-2007-04-09-e.pdf/\\$FILE/cra-final-report-on-efficiencies-2007-04-09-e.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/cra-final-report-on-efficiencies-2007-04-09-e.pdf/$FILE/cra-final-report-on-efficiencies-2007-04-09-e.pdf).

Legislative/Regulatory Developments

New Merger Review Provisions of the *Canada Transportation Act*

On June 22, 2007, the *Canada Transportation Act* (CTA) was amended to provide for pre-merger notification (for transactions notifiable under the *Competition Act*) and a public interest review in relation to mergers that involve transportation undertakings.

Under the new regime, after receiving notice of a proposed merger, the Minister of Transport (MOT) determines whether the proposed transaction gives rise to a public interest issue. If the MOT determines that a public interest issue does not arise, no further review is conducted under the CTA and the normal *Competition Act* merger review process proceeds. However, where the MOT determines that a public interest issue does arise, a lengthy public interest review process is invoked that incorporates a review by the Commissioner of Competition. The Competition Tribunal may not issue an order under the substantive merger provisions of the *Competition Act* in respect of a transaction that is approved under the CTA.

Investment Canada Act Guidelines for State-owned Enterprises and Potential Legislation re National Security and Foreign Investment

In our October 2007 Bulletin³, we reported that the Honourable Jim Prentice, Minister of Industry, had announced in a speech to the Vancouver Board of

³ Our Bulletin is online at: http://www.fasken.com/files/Publication/f4620098-496e-4710-8b71-5729d41b5adb/Presentation/PublicationAttachment/8781334f-1ac3-46bf-a539-590b56e7555b/Whither_foreign_investment_in_Canada.pdf.

Trade that he intended to deal with the issue of national security in the context of foreign investment in Canada and that he would also be specifically addressing the issue of investment in Canada by state-owned enterprises (SOEs) (defined as an enterprise that is owned or controlled directly or indirectly by a foreign government).

On December 7, 2007, new Guidelines were issued under the *Investment Canada Act* directed at clarifying how the Act will be applied to investments in Canada by SOEs.

Under the Guidelines, the review of an investment by an SOE will, in addition to the traditional factors considered under the Act when determining an investment's "net benefit" to Canada, focus on: (i) whether the SOE adheres to Canadian standards of corporate governance (including commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders) and to Canadian laws and practices; (ii) how, and the extent to which, the non-Canadian is owned or controlled by the foreign state; (iii) the post-acquisition ability of the Canadian business to operate on a commercial basis regarding export and processing location decisions; (iv) the participation of Canadians in its operations in Canada and abroad; (v) the support of on-going innovation, research and development in Canada; and (vi) the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

Before approving the investment, the Minister may require specific formal undertakings to Canada that address some or all of the foregoing factors.⁴

CRIMINAL MATTERS: ENFORCEMENT POLICY

New Information Bulletin on Immunity

Following public consultations, on October 10, 2007, the Competition Bureau formally revised its Immunity Program. Originally launched in September of 2000, the Immunity Program offers immunity from prosecution to parties who have contravened the criminal provisions of the *Competition Act* (e.g., conspiracy) in return for their cooperation.

Significant changes to the Immunity Program include the following.

Procedural Change – Elimination of Provisional Guarantee of Immunity

- The original Immunity Program established a two-step process for immunity applications. The first step involved the applicant disclosing to the Competition Bureau information relating to the illegal conduct on a hypothetical basis in order to obtain a provisional guarantee of immunity (PGI) from the Attorney General (now the Director of Public Prosecutions (DPP)) on the recommendation of the Competition Bureau. Once the PGI was granted, the applicant would then proceed to provide full disclosure of information relating to the offence and cooperate with the Bureau's investigation and Attorney General's (now DPP's) prosecution of other parties to the illegal conduct. If the Bureau was satisfied with the applicant's disclosure and cooperation, it would recommend that the Attorney General (now DPP) enter into a formal immunity agreement with the applicant.

⁴ For more information, see our December 2007 Bulletin, online at: <http://www.fasken.com/files/Publication/253684cb-340b-485e-ac61->

[e22b72d0e1f1/Presentation/PublicationAttachment/78fe7049-f3f2-4a03-848b-fda126135631/Bulletin_Antitrust_Competition_%26_Marketing_December2007.pdf](http://www.fasken.com/files/Publication/253684cb-340b-485e-ac61-)

- The revised Immunity Program effectively eliminates the PGI step in the immunity application process. Under the revised Immunity Program, if the applicant secures a “marker” as the first in line for immunity and can satisfy the Immunity Program’s eligibility, disclosure and cooperation criteria, the Bureau will recommend that the DPP grant the applicant immunity. In such circumstances, the DPP will execute an immunity agreement with the applicant setting out, among other things, the terms of the applicant’s ongoing obligations. This welcomed procedural change brings the Immunity Program closer in line with similar programs offered by antitrust regulators in other jurisdictions, most notably, the Antitrust Division of the U.S. Department of Justice.

Revised Eligibility Criteria

- The revised Immunity Program no longer disqualifies applicants because they were either: (a) the instigator or ringleader of the illegal conduct; or (b) the sole beneficiary of the illegal conduct (except for single-party offences such as price maintenance).
- Rather, the revised Immunity Program now disqualifies applicants who coerce others into participating in the illegal conduct, which better aligns the Immunity Program with similar programs of major antitrust regulators in other jurisdictions.

Removal of Restitution Requirement

- The restitution requirement in the original Immunity Program has been removed.

Clarification re Confidentiality

The revised Immunity Program reaffirms the Bureau’s practice of keeping the identity of immunity applicants confidential, although it

clarifies that the identity of an applicant may be disclosed where it is necessary to obtain or preserve a judicial authorization order (e.g., a section 11 order or search warrant) – or where it is necessary to secure the assistance of another Canadian law enforcement agency.

Bureau Seeks Comments on Predatory Pricing Enforcement Guidelines

In October 2007, the Bureau released for comment a draft of its revised *Predatory Pricing Enforcement Guidelines*. The existing version of the guidelines was published in 1992. The revised draft outlines the Bureau’s enforcement approach as regards predatory pricing in light of recent case-law and economic thinking. The consultation process ended in January 2008.

According to the draft guidelines, “the Bureau considers predatory pricing to be a firm deliberately setting prices to incur losses for a sufficiently long period of time to eliminate a competitor, or otherwise inhibit competition in the expectation that the firm will subsequently be able to recoup its losses by charging prices above competitive levels or achieving another anti-competitive objective.” Predatory pricing can be examined under section 50(1)(c) of the *Competition Act* (a criminal provision) or sections 78 and 79 of the Act, the civil abuse of dominance provisions.

Key features of the draft guidelines include:

- clarification that predatory pricing complaints will initially be examined under the civil abuse of dominance provisions, with preliminary inquiries under the criminal provision generally being reserved for egregious cases;
- adoption of “average avoidable cost” in the analysis of whether prices are “unreasonably low”;

- addition of “price matching” as a reasonable business justification for pricing below average avoidable cost; and
- an expanded discussion of the “recoupment” concept.

**PODCAST:
An Insight into Antitrust/Competition
Class Actions in Canada**

This podcast, the first in a series produced by the Fasken Martineau Antitrust/Competition & Marketing Law Group, is available at: http://www.fasken.com/competition_class_actions_podcast_march2008.

REVIEWABLE PRACTICES

Abuse of Dominance: Canada Pipe Update

The proceedings commenced by the Commissioner of Competition in 2002 against Canada Pipe Ltd. under the abuse of dominance and exclusive dealing provisions of the *Competition Act* concluded with the registration of a consent agreement in December 2007. This brings to a close proceedings brought over five years ago seeking remedies under sections 77 and 79 of the Act in respect of a loyalty rebate program implemented by Canada Pipe known as the stocking distribution program (SDP). Under the SDP, purchasers of Canada Pipe’s cast iron drain, waste and vent (DWV) pipe, fittings and MJ couplings products receive point of sale discounts and annual and quarterly rebates if they purchase all three cast iron DWV products exclusively from Canada Pipe.

The Competition Tribunal released a decision dismissing the Commissioner’s application in February 2005. In respect of section 79 of the Act (abuse of dominance), the Tribunal found that

Canada Pipe had market power in the relevant markets in Canada for cast iron DWV products, but that the Commissioner had failed to establish that the SDP qualified as an anti-competitive act, or that the SDP had resulted or would likely result in a substantial lessening or prevention of competition in the relevant markets. The Tribunal also found that Canada Pipe was a major supplier for the purposes of section 77 of the Act (exclusive dealing), but that the Commissioner had not established that the SDP is likely to impede entry or expansion or have any other exclusionary effect in a market, with the result that competition is or is likely to be lessened substantially.

The Commissioner appealed the Tribunal’s decision to the Federal Court of Appeal. The Court granted the Commissioner’s appeal in a decision released in June 2006 on the grounds that the Tribunal had not applied the correct legal tests for an anti-competitive act and a substantial lessening of competition, and remanded the matter to the Tribunal for re-hearing. The Court found that in the case of a substantial lessening of competition, the Tribunal had erred by focusing solely on the absolute requirement of whether or not the SDP had prevented entry or expansion, rather than the relative test mandated by the *Competition Act* of whether the relevant markets would be substantially more competitive *but for* the impugned practice of anti-competitive acts. With regards to the test for an anti-competitive act, the Court similarly found that the Tribunal had erred by focusing on whether the SDP had prevented competition. The Court held that the test for an anti-competitive act is whether the purpose of the conduct in question has an intended negative effect on competitors, not competition, that is predatory, disciplinary or exclusionary. The Court also found that the Tribunal had employed an incorrect test for assessing whether Canada Pipe had established a valid business justification for the SDP.

Canada Pipe sought and was denied leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada and the matter was set to be re-heard by the Tribunal this February. However, on December 19, 2007, the Commissioner and Canada Pipe filed with the Tribunal a consent agreement to resolve the Commissioner's concerns in respect of the SDP. Under the consent agreement, Canada Pipe is required to implement a modified loyalty rebate program that is not conditioned on exclusivity and that offers point of purchase discounts and rebates that are at least as good as those available under the SDP. The consent agreement envisions that Canada Pipe will continue to market its cast iron DWV products under the SDP.

Refusal to Deal/Exclusive Dealing Cases

The Competition Tribunal considered and dismissed during the year a number of requests for leave to bring applications before the Tribunal under sections 75 and 77 of the *Competition Act*, in most part on the grounds that the applicant had failed to establish that it was directly and substantially affected by the refusal to supply.

For example, in *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, the Tribunal denied a request by Sears for leave to file an application under section 75 of the Act in respect of the decision of Dior and Givenchy to cease to supply Sears with their cosmetic products on the grounds that Sears had failed to establish that the refusal to supply had a substantial effect on its business. In reaching this decision, the Tribunal held that the effect of the refusal to supply must be assessed with reference to Sears' entire business, not simply its cosmetic products sales. The Tribunal found that Sears' revenues from Dior and Givenchy products of \$16 million per year represented an insignificant portion of Sears' total annual revenues of \$6 billion. The

Tribunal also held that Sears had not quantified the impact of the refusal on sales of other products which, in any event, represented an insignificant portion of Sears' total sales, and that Sears' suggestion that the refusal to supply would affect its position with other suppliers was speculative.

London Drugs, which had also filed an application for leave to bring an application under section 75 in respect of Givenchy's decision to terminate the supply of its products to London Drugs, withdrew its application shortly after the release of the Sears' decision.

In *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.* the Tribunal dismissed Sono Pro's application for leave to file an application under section 75 of the Act, again on the grounds that the applicant had failed to demonstrate that its business was directly and substantially affected by the respondent's refusal to supply Dolby products to the applicant. The affidavit evidence filed by the applicant stated that Dolby products represented 10% of its sales, but that the refusal to supply would affect 25% of its sales. The Tribunal held that the applicant had failed to provide "sufficient credible evidence" that it was directly and substantially affected in its business by the refusal to deal. The Tribunal noted, in particular, that the applicant had failed to indicate how its sales of other products would be affected by the refusal to supply Dolby products or how it had calculated a 25% loss of sales.

Finally, B-Filer commenced appeal proceedings in 2007 in respect of the Tribunal's decision dismissing its application under section 75 of the Act concerning the Bank of Nova Scotia's termination of its banking relationship with B-Filer. In its decision released December 20, 2006, the Tribunal held that B-Filer had not established that: (1) it was substantially affected in its business due to an inability to obtain adequate supplies of a service; (2) it was unable

to obtain adequate supply because of insufficient competition among suppliers; and (3) the refusal was having an adverse effect on competition in a market. Prior to the scheduling of a hearing of the appeal, the Bank of Nova Scotia filed a motion seeking an order requiring B-Filer to furnish security for costs awarded against B-Filer in the Tribunal proceeding. The Federal Court of Appeal granted the motion and issued an order on December 19, 2007 requiring B-Filer to provide security for costs within 30 days of the Order, failing which the appeal would be dismissed without further notice. As security was not provided within the 30-day period, the appeal was dismissed with costs by the Court on February 13, 2008.

MARKETING AND ADVERTISING

In 2007, the Bureau continued to be active in the enforcement of marketing and advertising laws for which it is responsible. Highlights include the following:

- in November 2007, the Bureau entered into a consent agreement with Premier Fitness Clubs, resolving the Bureau's concerns about certain advertising practices. The Bureau had commenced an inquiry into alleged misleading advertising, claiming that Premier had failed to adequately disclose certain additional fees in advertising membership offers (a consumer had to sign up for a one-year contract and/or pay a "fitness assessment" in order to receive the "free" 30-90 day trial offer that was being advertised). The terms of the 10-year consent agreement provide that Premier will pay a \$200,000 administrative monetary penalty, publish a corrective notice, and implement a new compliance program to cover its marketing practices. In the consent agreement, Premier also agreed to comply with the deceptive marketing practices provisions of the

Competition Act; in that regard, the consent agreement sets out a detailed list of "Do's and Don'ts" relating to the use of disclaimers in advertising; and

- also in November 2007, following discussions between the Bureau and Lululemon Athletica, the Bureau announced that Lululemon had agreed to stop making claims alleging therapeutic benefits in connection with its VitaSea clothing line. The Bureau had claimed that statements made were unsubstantiated. According to the Bureau's press release, the claims that led to the Bureau's action included claims that the fabric would release minerals and vitamins into the skin upon contact with moisture, which would have a number of benefits, such as keeping skin firm and smooth, and reducing stress. In its press release, the Bureau reminds industry of the need for scientific testing of fibres or fabrics to substantiate performance claims.

Other marketing and advertising developments/initiatives this past year include the following:

- the Bureau's public consultations on the Draft "Environmental Claims: A Guide for Industry and Advertisers", developed by the Canadian Standards Association in partnership with the Bureau;
- the Bureau's public consultations on its Discussion Paper, "Amending the Textile Labelling and Advertising Regulations"; and
- as part of its Targeted Enforcement Approach to Markets (TEAM) strategy, the Bureau announced that it is looking to address concerns relating to rebate offers and gift cards, which they are undertaking through a combination of means, including enforcement and education. Information gathered by the Bureau identified

issues relating to disclosure, timeliness and non-payment.

BUREAU'S SECTOR-SPECIFIC ENFORCEMENT POLICY

Pharmaceuticals: Generic Drug Sector Study

In October 2007, the Canadian Competition Bureau (the "Bureau") released its report entitled "Canadian Generic Drug Sector Study". Prompted by studies finding prescription generics to be relatively more expensive in Canada than in other countries, the Bureau conducted a study of the Canadian Generic Drug Sector and attempted to identify areas where changes in the market structure could result in greater benefits to the public through competition.

One of the key findings of the study was that generic drug manufacturing has become more competitive over the last 15 years. The Bureau highlighted that it appears that strong competition exists in the supply of many generic drugs in Canada such that within a short period of time following the expiration of patent protection there are typically many interchangeable generic products. As noted by the Bureau, one of the more significant incentives through which generic manufacturers have traditionally competed to have their products stocked by pharmacies is by offering them rebates off invoice prices. These rebates have tended not, however, to result in lower prices to consumers or private or public drug plans. Alternative approaches that focus on overall competition, according to the Bureau, may therefore result in important cost savings. However, it is necessary to consider in greater detail any barriers to such approaches. Some of the possible options being considered by the Bureau include providing manufacturers with incentives to compete to be listed on planned formularies, using competitive tendering processes to determine the products that can be dispensed by

pharmacies, monitoring the net price paid by pharmacies for generic drugs to ensure the price paid reflects competitive prices, and increasing the role of private plans in obtaining lower prices for their customers.

Telecommunications

The Competition Bureau released for comment on September 26, 2006 a *Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (the TABs) setting out the approach the Bureau intends to take in respect of complaints regarding abuse of dominance in the telecommunications industry, including in particular complaints regarding denial of access to essential facilities and predatory and targeted pricing. The comment period closed in early 2007. Comments were filed by incumbent local exchange carriers (ILECs), cable companies and other new entrant telecommunications service providers, a consortium of Internet service providers, consumer groups and the Canadian and American Bar Associations. While commentators generally supported the Bureau's goal of increasing the transparency of its analysis, many identified concerns with the TABs, including the need to provide greater clarity on the interface and jurisdictional division between the Bureau and the Canadian Radio-television and Telecommunications Commission (CRTC), more telecom-specific analysis, and consistency with the Bureau's general enforcement guidelines. New entrants and cable companies also expressed the view that the Bureau's procedures and remedial powers could not provide effective relief against abuses of dominance in the telecommunications industry, while ILECs argued that telecommunication-specific guidelines are unnecessary. It is not clear if or when the Bureau will release a final version of the TABs.

The Bureau was also active in a number of telecommunications proceedings throughout the

year, including the procedures for commenting on the Government's proposed order varying Telecom Decision CRTC 2006-15 (*Local Forbearance*) and the CRTC proceeding concerning the regulatory framework for wholesale services. In Telecom Decision 2006-15, the Commission determined that it would retain certain powers, including powers under the undue preference provision of the *Telecommunications Act* (section 27(2)) and its power to impose conditions of service (section 24) in some circumstances notwithstanding forbearance from regulation of ILEC local exchange service rates. In Proposed Order Varying Telecom Decision CRTC 2006-15, the Government proposed changes to the threshold test for granting forbearance for ILEC local exchange services, but did not propose changes to the CRTC's determinations regarding the scope of forbearance once the threshold test was satisfied. In its comments on Proposed Order Varying Telecom Decision CRTC 2006-15, the Bureau argued that Decision 2006-15 should be varied so as to expand the scope of the powers that the CRTC would no longer exercise following forbearance, and clarify that complaints regarding anti-competitive conduct would be assessed by the Bureau, not the CRTC, once ILEC local exchange services have been forborne from regulation. The Government declined to address these issues in its final Order Varying Telecom Decision CRTC 2006-15.

The Bureau also participated in the CRTC's wholesale service proceeding, focusing in particular on the test for essential service. The Bureau proposed a test for essential service that is consistent with competition law principles and its analysis in the TABs. The Bureau also argued that wholesale service regulation should be limited to services that qualify as essential. A decision by the CRTC in this proceeding is expected shortly.

Health Care, Law, Accounting and Real Estate: Self-Regulated Professions Study

On December 11, 2007, the Bureau's much-anticipated study on regulated professions was released. The initiation of the study is largely a reaction to a report by the Organization for Economic Co-operation and Development that identified the lessening of regulation of professional services as one of five key ways to improve the future prosperity of Canada. More specifically, the Bureau is concerned about professional rules that may contribute to higher prices, limit choice or restrict access to information consumers need to make decisions. The study is available on the Bureau's website at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>.

The focus of the study is on five groups of professionals: accountants, lawyers, optometrists, pharmacists and real estate agents; although, the Bureau emphasizes that the principles and findings of the study can be applied to any self-regulated profession.

Generally, the findings relate to rules that restrict the following:

- entering the profession;
- inter-jurisdictional mobility (e.g. rules that create uneven licensing requirements);
- provision of overlapping services and/or scope of practice (e.g. rules that limit who can offer certain professional services);
- advertising (e.g. comparative advertising);
- pricing and compensation (e.g. fee guides); and
- business structures (e.g. multidisciplinary practices).

The Bureau acknowledges the legitimate role regulation plays in protecting consumers and meeting public policy goals; however, it hopes that self-regulated professions will re-examine their rules and regulations in light of the study. Going forward, the Bureau is considering whether to expand its inquiry to other self-regulated professions and, in two years, intends to assess what steps have been taken by the professions, which were the subject of the study, to implement the Bureau's recommendations.

BUREAU INITIATIVES OF GENERAL APPLICATION

Revised Information Bulletin on Confidentiality

On October 10, 2007, the Competition Bureau issued its new *Information Bulletin: Communication and Treatment of Information under the Competition Act*, updating a previous information bulletin on the subject which was published in 1995.

According to the revised bulletin, in accordance with section 29 of the *Competition Act*, the Bureau's discretion to communicate confidential information is limited to: (a) communication to a Canadian law enforcement agency; (b) communication for the purposes of administering or enforcing the *Competition Act*; (c) communication where the information has otherwise been made public; and (d) communication authorized by the person who provided the information.

The Bureau is of the view that communicating confidential information "for the purposes of administering or enforcing the *Competition Act*" includes the following:

- eliciting information from market participants;
- obtaining an opinion or analysis by an industry, legal, economic or other expert;

- obtaining enforcement assistance from, or coordinating enforcement actions with, foreign law enforcement authorities;
- making an application to the courts for the use of formal investigative powers; and
- initiating proceedings pursuant to the *Competition Act* before the courts or the Competition Tribunal.

Competition Policy Review Panel

In July 2007, the Competition Policy Review Panel was appointed by the federal Ministers of Industry and Finance to conduct a review of Canada's competition and foreign investment laws. The Panel's report is expected in June 2008.

The Panel has a mandate to review key elements of Canada's competition and investment policies to ensure that they are working effectively and that Canada is positioned for continued economic competitiveness. In particular, the Panel has been mandated to look at a consultation paper entitled "Sharpening Canada's Competitive Edge", online at: [http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/sharpening_e.pdf/\\$FILE/sharpening_e.pdf](http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/sharpening_e.pdf/$FILE/sharpening_e.pdf).

Areas of focus for the Panel include Canada's policies regarding foreign direct investment to ensure that they maximize Canada's competitiveness. The Panel will examine whether the *Investment Canada Act* review process is beneficial to Canada. The Panel will also review the restrictions that are currently in place on foreign and domestic ownership of firms in specific industry sectors; namely, telecommunications, cultural industries, broadcasting, transportation services, uranium production and financial services.

In relation to competition policy, the Panel will review how the *Competition Act* and Canadian

competition policies affect the nation's competitiveness. It will also look to international best practices and examine whether changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy. A key area of inquiry will be Canada's merger review process and the question of whether Canada's approach to mergers strikes the right balance between consumers' interest in competition and the creation of an environment from which Canadian firms can grow to become global competitors.

SELECTED INTERNATIONAL DEVELOPMENTS: EUROPE AND THE U.K.

Office of Fair Trading Announces First Criminal Cartel Charges in Marine Hose Cartel

In May 2007, the UK's Office of Fair Trading (OFT), the European Commission (the Commission) and the US Department of Justice (DOJ) launched investigations into a possible worldwide conspiracy to rig bids, fix prices and allocate markets in the supply of marine hoses, typically used in the oil and defence industries to transport oil between tankers and storage facilities. Eight executives from the UK, France, Italy and Japan were arrested in the U.S. while attending the annual Offshore Technology Conference in Houston.

In December 2007, three UK nationals pleaded guilty in the U.S. to participating in the cartel and received record prison sentences of 30 months, 24 months and 20 months, respectively. The OFT later confirmed that the three had returned to the UK and had been charged with criminal cartel offences under the *Enterprise Act 2002*; the first time that such charges have been brought. The individuals were allowed to return to the UK to face these charges as part of a plea bargain agreement with the DOJ.

If the trio are found guilty of the UK criminal cartel provisions, they could face up to five years imprisonment and/or an unlimited fine. To date, no individual has been penalized under the UK's criminal cartel regime, although it is understood a number of cases are being investigated.

The Commission is carrying out a separate civil investigation into the cartel. If it finds that competition laws have been breached, the companies involved could face fines of up to 10% of worldwide group turnover.

Microsoft... the saga continues

On September 17, 2007, Microsoft lost its long running dispute with the European Commission over the Windows operating system. On appeal to the European Court of First Instance (CFI), the €497 million fine (US\$613 million) imposed by the Commission was upheld, as were the requirements regarding server interoperability information and bundling of Microsoft's Media Player. In addition, Microsoft was ordered to pay 80 per cent of the Commission's legal costs. Microsoft announced that it would not appeal the decision further.

In 2003, the Commission decided that Microsoft had infringed Article 82 of the EC Treaty by abusing its dominant market position. Microsoft has a 95% share of the desktop operating system market, and in excess of 70% of the market for work group server operating systems. The Commission found that Microsoft had leveraged its PC operating systems onto the market for work group server operating systems. Citing ongoing abuse by Microsoft, the Commission ordered the company to both offer a version of Windows without Windows Media Player and disclose on reasonable and non-discriminatory terms the server interoperability information, in order to allow competing networking software to interact fully with Windows desktops and servers. In March 2004, the Commission ordered Microsoft to pay a €497 million fine, which was paid in July

2004, but Microsoft did not release the server interoperability information.

In December 2005, the Commission announced that it would fine Microsoft €2 million a day until it disclosed the server interoperability information. In July 2006, the Commission fined Microsoft an additional €80.5 million, being €1.5 million a day for failure to disclose from December 16, 2005 to June 20, 2006. The Commission further threatened to increase the fine to €3 million per day if Microsoft failed to comply by July 31, 2006.

Microsoft eventually agreed to alter the terms of its licence agreements for server interoperability information so that they are compatible with the open source business model, which is employed by the majority of Microsoft's competitors in the work group server operating system market. Furthermore, Microsoft will charge a nominal one-off payment of €10,000 for its "No Patent Agreement" and reduce its royalties from 5.95% to 0.4% of revenue for its "Patent Agreement." This follows heavy criticism by the Commission and other experts that there was virtually no innovation in the "No Patent Agreement" and that Microsoft's royalty rates were unreasonable. Microsoft will also provide warranties in respect of the completeness and accuracy of the server interoperability information, thereby providing protection to licensees who develop software on the basis of this information.

On February 27, 2008, the Commission announced that it fined Microsoft an additional €899 million (US\$1.35 billion) for non-compliance with obligations under the Commission's March 2004 Decision occurring prior to October 22, 2007.

Opera joins the cry against Microsoft

In a recent twist, the developer of Opera, a rival internet client software, has complained to the Commission about Microsoft's Internet Explorer, which, like the Media Player, is bundled with

Microsoft's Windows operating system. Opera, along with Adobe, IBM, Nokia and others is alleging that Microsoft is using identical tactics to stifle competition and innovation in the internet client software market as it did with its Media Player. The Commission has confirmed that it is considering the complaint.

Apple's iTunes

Microsoft's personal computer rival, Apple, is also feeling the heat from the Commission. The Commission received a complaint from "Which?" (a UK consumer protection organization) regarding Apple's online music store, iTunes. The problems arose from the fact that EEA consumers can only buy music from iTunes stores in their country of residence. iTunes checks the consumer's residence through their credit card details. Currently, prices for iTunes downloads in the UK are nearly 10% more expensive than downloads in the EEA.

The Commission announced that it had not identified any agreements between Apple and the major record companies that infringed Article 81 (cartels) of the EC Treaty. Furthermore, the Commission recognised that the structure of the iTunes store was chosen by Apple, based on country-specific aspects of copyright laws. It also acknowledged that some record companies, publishers and collecting societies still apply licensing practices which can make it difficult for iTunes to operate a single store for the whole of the EEA.

Apple announced that within the next six months, its UK consumers would pay the same for music downloads from iTunes as customers from the other member states. The Commission has confirmed that it is satisfied with Apple's announcement and consequently, does not intend to take further action in this case.

European Commission Pharmaceutical Enquiry

Using its powers under Article 17 of Council Regulation 1/2003, the Commission will investigate whether certain commercial practices, particularly the use of patents, vexatious litigation and litigation settlement agreements, are used to block innovation and/or generic competition contrary to Article 81 of the EC Treaty prohibiting anti-competitive agreements.

The Commission will also examine whether market participants have used such practices to create artificial barriers to entry and whether such practices may also constitute abuses of dominant positions, in breach of Article 82 of the EC Treaty. The Commission notes that the number of novel medicines reaching the market has decreased over time; from 1995-1999, an average of 40 novel molecular entities were launched per year, compared to just 28 in the period from 2000-2004. Similarly, the Commission is also concerned that the entry of generic medicines into the market may be delayed as a result of anti-competitive conduct.

Private enforcement

In 2001, faced with a rising number of cases of anti-competitive conduct and limited resources to deal with them, the UK Government took a number of measures aimed at, amongst other things, encouraging private parties to take action against those alleged to be responsible for alleged anti-competitive behaviour. These measures included the publication of a white paper and thereafter the enactment of legislation creating new private competition recourses.

By 2007, judging that the results of the UK Governmental initiatives had not been as anticipated, the OFT undertook informal public consultation to identify ways of further enhancing availability of private recourse(s) to consumers and businesses who

had suffered damage as a result of anti-competitive behaviour. This consultation exercise resulted in the publication of the OFT's recommendations to Government in November 2007, the intention of which was to stimulate private initiatives in the pursuit of anticompetitive conduct.

In addition, separately the European Commission has consulted on the subject of private enforcement and is expected to publish the results of this consultation shortly.

The OFT's recommendations will not themselves lead to direct action by Government – the recommendations are that the Government should consult further in respect of the issues raised.

In its paper, the OFT noted that, in the main, procedures already exist to bring private enforcement actions in the UK. However, it also noted the following: (i) absence of a substantial increase in the number of private actions following the implementation of the *Enterprise Act*; (ii) the barriers to success of such actions; and (iii) that the OFT only had finite resources to investigate and bring actions itself.

In the OFT's view, the above factors pointed to the need for the existing system to be modified. However, a recurrent theme of the paper was the need to avoid a move towards what was seen as the excesses of the U.S. class action system. The OFT made a number of recommendations, including the following.

First, the OFT suggested that the Government consult on modifying or introducing new procedures in the UK to extend representative (class) actions to be brought on behalf of consumers as well as small and medium sized businesses whether or not there has been public enforcement action.

Second, the OFT recommended that restrictions which limit the funding of actions could be modified

to allow greater flexibility for funding arrangements in order that claimants can more easily find lawyers willing to represent them.

Third, recommendations were made to encourage, in appropriate cases, the courts to consider limiting the risks that claimants be ordered to pay the other party's costs.

Notwithstanding these recommendations in relation to procedural changes and group actions, private enforcement is a reality in the UK and may be more attractive there than in other European countries. Cases continue to be brought by companies aggrieved by competition abuses.

Akzo Judgment

An important decision of the European Court of First Instance (CFI) in November 2007 held that documents prepared by or for in-house lawyers are not protected by legal privilege under EU law (the situation may be different under individual Member States' laws) as those prepared by or for external independent counsel are. The case followed a Commission dawn raid at one of the party's premises and a dispute over the status of certain documentation seized. It had been hoped by the in-house community that this decision would overturn previous case law on this point; unfortunately it has maintained the *status quo*.

Gun jumping

In December 2007, the European Commission conducted unannounced inspections of two companies in the UK. The Commission along with their UK Competition Commission counterparts suspected that the companies may have violated Article 7(1) of the Commission Merger Regulation by implementing the merger before receiving antitrust clearance from the Commission. This is the first instance of a dawn raid of parties to a merger

and is the preliminary step in the Commission's investigations into this transaction.

OFT revises "*de minimis*" guidelines

In November 2007, the OFT issued new guidelines raising the "*de minimis*" threshold under which, in general, it would consider a market of insufficient importance such that a referral to the Competition Commission is not necessary. The previous threshold of £400,000 was generally considered to be so low as to not be particularly useful and, after consultation, the threshold has been increased to £10 million.

However, a number of points should be borne in mind, namely, the following.

- 1) The *de minimus* threshold is a market threshold – not a threshold for either or both of the merging entities. The £10 million threshold in such a context is still relatively low.
- 2) The *de minimis* threshold is entirely discretionary and the OFT reserves the right to refer mergers notwithstanding that the transaction falls within the threshold; for example, where the market is highly concentrated and prospect of entry is low and/or where there is evidence of collusion in the market.
- 3) There is no duty to refer mergers to the OFT in the UK. The governing thresholds apply to the circumstances in which the OFT is required to refer the transaction to the Competition Commission for further investigation. Clearly, parties to a proposed transaction should have regard to the relevant thresholds notwithstanding that there is no obligation to refer the transaction in order to avoid investigation after the transaction is made public and/or completed.

EU proposes new guidance on merger remedies

In April 2007, the European Commission published a consultation document and proposed a new Notice to deal with merger remedies.

The current remedies notice came into effect in 2001 and therefore pre-dates the revised merger regulation from 2004 and relevant case law, as well as a major report on the subject commissioned in 2004.

The proposed revised Notice would take into account the practice already adopted by the Commission and formalizes the use of arbitration clauses as a way of enforcing behavioural remedies as an alternative to more onerous structural remedies.

The proposed new Notice remains in draft form.

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