

Antitrust/Competition & Marketing Bulletin

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Antitrust/Competition & Marketing Group 2009 Year in Review

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CANADA

2009 – A Year of Change

Significant amendments to the *Competition Act* and the *Investment Canada Act*, contained in *Bill C-10*¹, were introduced in Parliament on February 6, 2009, and enacted on March 12, 2009. The amendments are discussed in various of our 2008 and 2009 bulletins² and to

some extent in this bulletin. Key amendments to the *Competition Act* include the following: (i) establishment of a dual-track criminal/civil regime for agreements with competitors; (ii) repeal of criminal price discrimination, predatory pricing, price maintenance (replaced with a new civil price maintenance provision),

Vancouver

Calgary

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Montréal

Québec City

London

Paris

Johannesburg

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¹ Bill C-10, Budget Implementation Act, 2009, 2d Sess., 4th Parl., 2009 (assented to 12 March 2009, S.C. 2009, c. 2). The amendments largely followed recommendations made by the Competition Policy Review Panel in its June 2008 report “Compete to Win”. The Panel was appointed by the federal government in July 2007 and its mandate was to review Canada’s competition and foreign investment policies and make recommendations for making Canada more competitive in a global marketplace.

² See “Substantial Changes to the *Competition Act* and *Investment Canada Act* Enacted – Businesses Must React”,

http://www.fasken.com/acm_march2009/; “Dramatic Changes to Canada’s Competition and Foreign Investment Review Laws Proposed in Bill C-10”, http://www.fasken.com/acm_bulletin_february2009/; “Re-election of Conservative Government Brings Proposed Changes to Canadian Competition and Foreign Investment Laws Closer to Reality”, http://www.fasken.com/november_2008_acm_bulletin/; “Prime Minister’s First Response to the Report of the Competition Policy Review Panel”, http://www.fasken.com/competition_policy_response_sept2008/; and, “Competition Policy Review Panel Proposes National Competitiveness Agenda”, http://www.fasken.com/competition_policy_review/.

and discriminatory promotional allowances provisions; (iii) increased criminal fines for a number of offences, including, among others, conspiracy, bid-rigging, and false or misleading representations; (iv) introduction of significant administrative monetary penalties for abuse of dominance; (v) a new U.S.-style merger notification and review regime and increased size-of-transaction notification thresholds; and (vi) a decrease in the amount of time the Commissioner of Competition has to challenge a transaction after closing (down from 3 years to 1 year). Key amendments to the *Investment Canada Act* include an increase and change to the WTO investor threshold applicable in the determination of whether an investment must be submitted for ministerial review to assess “net benefit to Canada” and the introduction of a regime to review investments on the basis of national security concerns.

In August 2009, Ms. Melanie Aitken was appointed Commissioner of Competition. Ms. Aitken held the position of Interim Commissioner of Competition following the departure of Ms. Sheridan Scott (the incumbent Commissioner) in January 2009.

Mergers

Fundamental changes to the pre-merger notification regime in the *Competition Act*

Prior to the *Bill C-10* amendments, pre-merger notification under the *Competition Act* was required only where a C \$400 million size-of-parties and a C \$50 million size-of-transaction threshold were exceeded. Effective March 12, 2009, the size-of-transaction threshold was increased to C \$70 million. Moreover, the threshold will henceforth be adjusted annually based on changes in national GDP. (Indeed, the threshold for 2010 is likely to be less than C \$70 million.)

Also, the previous 14 and 42-day waiting periods for short-form and long-form notifications have been

replaced with a single process for merger notification and review, whereby an initial 30-day waiting period applies but can be extended by the Commissioner of Competition issuing a supplementary information request (SIR), in which case completion is prohibited until 30 days after compliance with the SIR. The information required in connection with the merger notification requirement is to be outlined in amendments to the *Notifiable Transactions Regulations*.

The *Bill C-10* amendments also established a mechanism for the imposition of administrative monetary penalties of up to C \$10,000 per day for each day that a party, without good and sufficient cause, has completed a transaction prior to expiration of the applicable waiting periods, contrary to the *Competition Act*. This is in addition to the pre-existing ability of the Commissioner to impose a fine of up to C \$50,000 for failing to comply with the merger notification regime without good and sufficient cause.

Change to the limitation period for proceedings under the *Competition Act* in respect of completed mergers

As mentioned above, the *Bill C-10* amendments reduced the time the Commissioner has to challenge a merger before the Competition Tribunal to one year after the merger’s substantial completion, down from three years.

Draft Notifiable Transactions Regulations

On April 4, 2009, draft regulations amending the *Notifiable Transactions Regulations* were published for comment. The amendments are intended in large part to support the amendments to the *Competition Act* pre-merger notification provisions and also to accomplish long overdue housekeeping such as correcting outdated references. The most significant changes in the draft regulations are the new requirements that copies of legal documents that are

to be used to implement a notifiable merger transaction and studies, surveys, analyses and reports prepared or received by a senior officer of the notifying party or its relevant affiliates for the purpose of assessing the proposed transaction be supplied with the notification. The latter requirement is virtually identical to that in item 4c of the U.S. *Hart-Scott-Rodino* Notification and Report Form.

The new regulations are expected to be promulgated in the near term.

Merger Review Process Guidelines

The guidelines describe the Bureau's general approach to administering the two-stage merger review process established by the *Bill C-10* amendments. Specifically, they describe the process the Bureau will follow during the initial 30-day waiting period and after a decision to issue a SIR has been taken. Among other things, in relation to SIRs, the guidelines provide for a pre-issuance dialogue with the parties, limiting the number of custodians to be searched and limiting the time period to which record and data requests are to relate.

The guidelines also introduce the "timing agreement" device, which the Bureau may use where its review has not been completed within the initial 30-day waiting period and the Commissioner has elected not to issue a SIR.

New Efficiencies Bulletin

In March 2009, the Bureau issued its *Bulletin on Efficiencies in Merger Review*, which is described as a "supplement" to the Bureau's *Merger Enforcement Guidelines*.

By way of background, the *Competition Act* contains an efficiencies exception that provides that a merger that prevents or lessens competition substantially or has already done so, may nonetheless not be the subject of a Competition Tribunal order under the

substantive merger provisions of the *Competition Act* if the merger has brought about or is likely to bring about efficiencies that are greater than and will offset the merger's anti-competitive effects, and those efficiencies would likely not be realized if the proposed Competition Tribunal order were made.

The bulletin includes a description of the information that the Bureau states would be useful in its analysis of efficiency claims in general and clarifies its approach to, among other things, assessing dynamic efficiencies and gains in efficiency that are likely to be generated outside of Canada. Importantly, the bulletin states that a thorough assessment of efficiency claims is only necessary in relation to those mergers that raise significant competition concerns.

Merger Litigation and Consent Agreements

In contrast to 2008, which saw important merger litigation including in relation to the *Labatt-Lakeport* merger and the *American Iron & Metal Company Inc.-SNF Inc.* merger, there was no new merger jurisprudence in 2009. (The Bureau, after failing to secure an injunction in relation to the *Labatt-Lakeport* merger and enduring the controversy attached to its application for a section 11 (production) order in relation to that same merger, decided in early 2009 not to challenge the merger based on "insufficient evidence to establish that the transaction is likely to substantially lessen or prevent competition".)

However, in 2009 the Bureau secured consent agreements in relation to (i) the acquisition by Clean Harbors, Inc. of Eveready, Inc.; (ii) the merger of Pfizer and Wyeth; (iii) the merger of Merck and Schering-Plough; (iv) the proposed acquisition by Agrium Inc. of CF Industries; and (v) Suncor's merger with Petro-Canada. Also, in the BASF acquisition of Ciba Holding AG, the Bureau concluded that commitments made to the FTC and the European Union Competition Directorate

adequately addressed the Bureau's concerns respecting anticompetitive effects in the supply of certain pigments and no separate consent agreement for Canada was required. A similar approach was adopted in relation to the Dow Chemical acquisition of Rohm and Haas. Our experience suggests this (practical) approach is one that may be employed with increasing frequency in appropriate circumstances.

Criminal Matters

Cases

2009 saw a number of notable convictions by guilty pleas in domestic and international cartel cases.

Ten individuals and six companies have, to date, pleaded guilty, with fines totaling over C \$2.7 million, in an alleged domestic cartel fixing retail gasoline prices in Quebec. Of the ten individuals who have pleaded guilty, six have been sentenced to terms of imprisonment, totaling 54 months.

Four air cargo carriers - Société Air France (Air France), Koninklijke Luchtvaart Maatschappij N.V. (KLM), Martinair Holland N.V. (Martinair) and Qantas Airways Limited (Qantas) – have, to date, pleaded guilty to fixing air cargo surcharges for shipments on certain routes from Canada. Air France, KLM and Martinair were fined a combined total of C \$10 million; Qantas was fined C \$155,000.

De-Criminalizing Certain Criminal Provisions

Bill C-10 repealed the criminal provisions of the *Competition Act* relating to price discrimination, predatory pricing and discriminatory promotional allowances, thereby subjecting such practices to review by the Competition Tribunal only under the civil abuse of dominance provisions of the Act.

Bill C-10 also repealed the criminal price maintenance provision, replacing it with a new civil resale price maintenance provision that will permit remedial orders to be issued by the Competition Tribunal on application of the Commissioner of Competition, or a private person with leave, where the resale price maintenance is likely to have an adverse effect on competition.

Increasing Criminal Fines

Bill C-10 has dramatically increased potential fines and (curiously, in view of the relative rarity of lengthy prison sentences for conspiracy under the *Competition Act*) maximum terms of imprisonment for cartels, bid-rigging, obstruction of Competition Bureau investigations, criminal false or misleading representations, deceptive telemarketing, deceptive notice of winning a prize, and failure to comply with prohibition or production orders.

Dual-Track for Agreements among Competitors

Bill C-10 establishes a dual-track approach to agreements between competitors, which will come into force on March 12, 2010. Cartel-type agreements that fix prices, allocate markets and/or fix output will be prosecuted under a criminal per se provision, while other agreements between competitors (e.g. legitimate joint ventures or strategic alliances) that are likely to substantially prevent or lessen competition will be subject to review by the Competition Tribunal under a civil provision. *Bill C-10* will also:

- establish an ancillary restraint defence to the *per se* cartel provision; and
- incorporate by reference the common law regulated conduct defence to the *per se* cartel provision.

Policy Developments

2009 was a busy year for the Bureau in terms of new bulletins and guidelines issued. New publications included the following:

- a revised *Draft Information Bulletin on Sentencing and Leniency in Cartel Cases*, which sets out the factors the Competition Bureau considers in making a recommendation to the Director of Public Prosecutions for lenient treatment of individuals or business organizations accused of criminal cartel offences under the *Competition Act* (March 25, 2009);
- *Immunity Program under the Competition Act*, which describes, amongst other things, the roles and responsibilities of the Commissioner and the Director of Public Prosecutions and the requirements an applicant must meet to obtain immunity (August 2009);
- *Competitor Collaboration Guidelines*, which provides guidance on the Commissioner's approach to the new dual-track regime for dealing with competitor agreements (December 23, 2009).

Private Actions for Damages

The pursuit of civil actions for private damages pursuant to the provisions of the *Competition Act* continued to expand in 2009. Canadian courts have followed apace with the development of the jurisprudence relevant to these actions. 2009 saw significant decisions in matters relating both to civil remedies for the pursuit of alleged cartel behaviour and in the area of misleading advertising.

Price Fixing Class Action Certification

Two recent decisions (both of which are currently subject to appeal) have certified actions in respect of alleged cartel behaviour and have, at least for the

time being, substantially lowered the threshold for the acceptance by Canadian courts of these types of matters for class action treatment.

In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*³, the British Columbia Court of Appeal overturned a lower court decision and certified a class proceeding in relation to allegations of cartel behaviour among manufacturers of dynamic random access memory. Prior thereto, the Ontario Superior Court certified a similar class proceeding involving allegations of cartel behaviour among certain manufacturers of hydrogen peroxide in *Irving Paper Limited et al v. Atofina Chemicals et al.*⁴. These decisions represent a sharp reversal of a trend in Canadian jurisprudence where such cases were consistently denied class action status (a principal example of which was the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.*⁵. Until these two decisions, cases of this nature were only certified in the context of a consent application in furtherance of the approval of a case settlement.

In granting class action status to both of these cases, the courts had to overcome the historic difficulty faced by plaintiffs in this area of addressing the thorny issue of the "pass through" of the alleged overcharge from the manufacturer to the direct purchaser down through the potential complex chain of distribution to the various indirect purchasers and the ultimate consumer. Harm or actual damage is a constituent element of liability in respect of the civil liability provisions of the *Competition Act*. As such, the difficulty of assessing class-wide harm given the pass through issue had previously proven to be an obstacle to the certification of these types of actions. In fact, this particular aspect of these cases most often engages a battle of experts presenting economic evidence on the class-wide harm issue.

³ (2009) B.C.C.A. 503.

⁴ Unreported.

⁵ (2003), 63 O.R. (3d) 22.

The expert evidence frequently relates both to attempts to demonstrate the existence of class-wide harm and to the proposed methodology for the assessment of such harm. Canadian courts had previously determined that such cases were not suitable for class action treatment on the basis that the expert evidence was unable to demonstrate class-wide harm and unable to provide an effective methodology for demonstrating damage to direct and/or indirect purchasers.

In the *Pro-Sys* and *Irving Paper* decisions, the courts have chosen to avoid the entire expert evidence battle. In fact, both courts based their decisions upon the plaintiffs only having to demonstrate that the proposed methodology for class-wide determination of harm was merely “plausible” or that such a methodology “may” exist. Both courts were highly reluctant to weigh and consider the evidence at the certification stage. Further, both decisions held that it might be open to the plaintiffs to establish harm on an aggregate basis after demonstrating some “potential” liability based solely on the alleged wrongdoing of the defendants without the need to prove any individual harm or damage.

Misrepresentation Claims

This past year also saw the first judicial award of damages from misleading advertising in breach of the *Competition Act* upheld on appeal. In *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*⁶, the Nova Scotia Court of Appeal affirmed an award of damages for misleading advertising contrary to section 52 of the *Competition Act*. In this action, Maritime Travel complained of certain newspaper advertisements of Go Travel which compared the price of southern holidays between the two companies. It was alleged that Go Travel had knowingly or recklessly made misrepresentations to

the public that were false or misleading in a material respect.

At trial, Go Travel was found liable with respect to a single price comparison advertisement. The trial judge established a number of principles upon which she determined that such comparative advertising actions ought to be considered. They included determining the general impression of the advertisement, whether the advertisement was misleading in a material respect, and that the court ought not to interfere unless the advertising was “clearly unfair”. The court found that one of the advertisements in issue gave the general impression that the defendant’s holiday packages were generally less expensive than the plaintiff’s notwithstanding that the specific information in the advertisement represented the pricing for only a particular trip which was only available for a limited time. Upon finding that the advertisement was misleading, the court then dealt with the difficult issue of damages and their assessment. The court determined that damages could only be awarded for injury actually caused by the improper conduct. It found that the evidence before it established that the effects of the misleading advertisement extended for the entire winter travel season even though the advertisement itself ran for only a few days. The court relied upon a percentage of market share loss approach in assessing damages based on prior years in which there was no misleading advertising.

Marketing & Advertising

Bill C-10 Amendments

Certain provisions of the *Competition Act* relating to marketing and advertising were amended as part of the *Bill C-10* amendments. These are discussed in greater detail in one of our previous bulletins⁷, but in

⁶ (2008), 265 N.S.R. (2d) 369, aff’d 2009 NSCA 42.

⁷ See our February 2009 bulletin “Dramatic Changes to Canada’s Competition and Foreign Investment

general the amendments increase the penalties for certain criminal and civil infractions, provide new remedies for the civil misleading representations provisions and clarify certain civil provisions dealing with deceptive marketing.

Competition Bureau Publications

Last year, the Bureau released several enforcement guidelines relevant to marketing and advertising, including the following:

- Consumer Rebate Promotions;⁸
- “Product of Canada” and “Made in Canada” Claims;⁹ and
- Multi-level Marketing Plans and Schemes of Pyramid Selling.¹⁰

These publications were formerly released in draft form for public consultation.

Enforcement Developments

Noteworthy enforcement developments in 2009 include the following.

- A record \$15 million fine imposed by the Ontario Superior Court against DataCom Marketing Inc. for targeting Canadian and U.S.

businesses in a business directory telemarketing scam.

- A favourable judgement for the Commissioner at the Federal Court of Appeal in *Commissioner of Competition v. Premier Career Management Group Corp.*¹¹, where the court overturned the Competition Tribunal on a key point of law. In overruling the Tribunal, the court ruled that simply because representations are made in private to separate persons individually, does not render such representations as not being “to the public” such that persons making the misleading representations could escape liability on that basis.¹²
- *Maritime Travel Inc. v. Go Travel Direct.Com Inc.* (discussed above): A case of private enforcement, where a competitor was awarded damages pursuant to s. 36 of the *Competition Act* for criminal misleading representations by another competitor. The case is significant as it represents a rare recent case where a claim under s. 36 was fully litigated (and upheld on appeal) and a court was required to set out the analysis for assessing causation and quantifying damages suffered by a competitor in the context of misleading advertising.
- In addition to *Maritime Travel*, last year, in a couple of cases, participants in the wireless industry used the right of action under s. 36 of the *Competition Act* to thwart or attempt to thwart certain advertising campaigns of their competitors on the basis that their competitors claims were criminally false or misleading.

Review Laws Proposed in Bill C-10”, online: http://www.fasken.com/acm_bulletin_february2009/.

⁸ (21 September 2009), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03136.html>.

⁹ (22 December 2009), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03169.html>

¹⁰ (29 April 2009), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03035.html>.

¹¹ 2009 FCA 295.

¹² See Competition Bureau’s announcement, “Federal Court of Appeal Rules that Career Management Firm Misled Vulnerable Job Seekers”, (16 October 2009), online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03144.html>.

These developments perhaps signal an increasing trend in the use of private enforcement against competitors' advertising and the development of jurisprudence in this area should assist businesses in the assessment of the viability of this potential recourse against competitors.

Abuse of Dominance and other Reviewable Practices

Abuse of Dominance Guidelines

In January 2009, the Bureau released for comment draft amended abuse of dominance guidelines.¹³ The Bureau is proposing to amend the current guidelines in a number of key respects including updating the Bureau's approach to market definition, joint dominance, anti-competitive intent and business justification, and discussing in detail the framework used by the Bureau to assess whether exclusive dealing, tying, bundling and denial of access constitute anti-competitive conduct. The revised guidelines have not yet been issued.

Competition Act Amendments

As noted above, the *Competition Act* was amended in 2009 to include a new civil resale price maintenance provision. This provision grants to the Competition Tribunal authority to prohibit resale price maintenance that has had, is having, or is likely to have an adverse effect on competition in a market. Also, as previously mentioned, effective March 12, 2010, a new civil provision respecting competitor collaborations will also come into force.¹⁴ This new provision will authorize the Tribunal to prohibit any

person from doing anything under an agreement involving competitors that lessens or prevents, or is likely to lessen or prevent, competition substantially in a market. These amendments were discussed in previous Fasken Bulletins.¹⁵

Nadeau Poultry Farm Limited v. Groupe Westco Inc.

In June, the Competition Tribunal issued its decision in respect of the private application by Nadeau Farm for relief under the refusal to deal provision of the *Competition Act*. The Tribunal found that Nadeau Farm had established that it was substantially affected in its business due to its inability to obtain adequate supplies of live chicken (the product) anywhere in a market on usual trade terms and that it was willing and able to meet the usual trade terms of suppliers of the product. However, the Tribunal found that Nadeau Farm had failed to satisfy the remaining elements of the refusal to deal provision, namely, that it was unable to obtain adequate supplies of the product because of insufficient competition among suppliers, that the product was in ample supply, and that the refusal to deal was having or was likely to have an adverse effect on competition in a market.

In its reasons, the Tribunal confirmed that "substantially affected" means affected "in an important and significant way" and does not require proof that the applicant is unable to carry on business; that "usual trade terms" are terms, including price, that apply generally in the market at the time of the refusal to deal; and that "ample

¹³ "Updated Enforcement Guidelines on the Abuse of Dominance Provisions", online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html>.

¹⁴ The new civil provision will be s. 90.1.

¹⁵ See our February 2009 bulletin "Dramatic Changes to Canada's Competition and Foreign Investment Review Laws Proposed in Bill C-10", online: http://www.fasken.com/acm_bulletin_february2009/ and March 2009 bulletin "Substantial Changes to the *Competition Act* and *Investment Canada Act* Enacted – Businesses Must React", online: http://www.fasken.com/acm_march2009/.

supply” means more than sufficient or adequate and availability is not an issue. The Tribunal also reiterated its conclusion in B-Filer that “an adverse effect on competition” requires consideration of whether the refusal creates, preserves or enhances the market power of remaining participants in the relevant markets and that “adverse” is a lower standard than “substantial”.

On the facts, the Tribunal found that Nadeau’s inability to obtain adequate supply was due to the supply management regime for live chickens rather than due to insufficient competition, that the product was not in ample supply (again because of supply management), and that the evidence did not establish that an adverse effect on competition was likely.

Nadeau Farm has appealed the decision.

Waste Services Consent Agreement

Also in June, the Commissioner of Competition filed with the Competition Tribunal a consent agreement resolving an inquiry by the Commissioner into certain practices of Waste Services (CA) Inc. (WSI) and Waste Management Corporation (WM). The Commissioner had concluded that WSI and WM, which held a collective share of in excess of 80% of certain commercial solid waste haulage and disposal services markets in parts of British Columbia and had engaged in similar contracting practices, were jointly dominant. The Commissioner also concluded that WSI and WM had engaged in a practice of anti-competitive acts and that these acts had substantially prevented and lessened competition in relevant markets.

The Consent Agreement prohibits WSI and WM from entering into any contracts or enforcing any terms in existing contracts for: an initial term greater than two years; renewal terms of greater than one year; any limitations on termination at the end of term (other than notice); a right of first refusal in favour of WSI or WM; a requirement to disclose

third party offers; and any requirement to pay, upon termination at the end of term, liquidated damages in excess of 1-3 times average monthly charges, depending on the time of termination.

The Consent Agreement is interesting as it indicates that, consistent with commentary in the draft amended abuse of dominance guidelines, the Commissioner may consider that a high combined market share coupled with similar conduct is sufficient to establish joint dominance by two or more entities.

Investment Canada Act

2009 was an event filled year for the *Investment Canada Act*.

On March 12, 2009 amendments to the Act were enacted to, among other things, increase the review threshold for direct acquisitions by WTO investors to C \$600 million in “enterprise value” of the Canadian business being acquired, with the threshold ultimately increasing to C \$1 billion. However, the current review threshold remains in effect until new regulations are passed to establish a method for determining enterprise value. (The WTO investor threshold was C \$312 million in 2009. The threshold is adjusted annually based on Canadian Gross Domestic Product. The threshold is expected to be C \$299 million for 2010.)¹⁶

The amendments also introduced a new power allowing Canada to block any transaction viewed as being potentially injurious to Canada’s national security. What appears to have been the first exercise of this new power occurred in August 2009 when George Forrest International Afrique S.P.R.L. announced that it had received an unsolicited letter

¹⁶ See Industry Canada, online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00070.html.

from Industry Canada advising that it was prohibited from implementing its proposed acquisition of the uranium mining company Forsys Metals Corp. pending further notice from Industry Canada. The transaction was abandoned following the receipt of that letter.

Foreign investors will also be paying closer attention to the undertakings that they submit to Her Majesty in order gain approvals under the Act in light of a Federal Court of Canada application filed by the Minister of Industry in July. In that application, the Minister asked the Court to order appropriate measures to remedy the alleged failure by U.S. Steel to comply with certain undertakings that it had given in 2007 in connection with its acquisition of Stelco Inc. regarding, among others, capital expenditures, research and development, and production. This action, the first of its kind under the Act, quickly expanded to include two interveners - a union representing Stelco employees and a prospective purchaser of the Stelco facility. U.S. Steel has now moved to challenge the constitutional validity of sections 39 and 40 of the Act (which, among other things, provide for Ministerial demands for compliance with the Act and court orders where non-compliance is established).

The U.S. Steel undertakings are not the only undertakings that have attracted attention during 2009. Employees at the Inco and Falconbridge mines want undertakings presumably given by mining giants CVRD and Xstrata in connection with their recent Canadian acquisitions, made public so that the employees can see for themselves if these undertakings are being honoured. The Industry Minister has confirmed that he is satisfied that the undertakings are being complied with. Confidentiality provisions in the Act however prevent him from disclosing exactly what the undertakings are. In response to that situation, two bills were tabled in the House of Commons in December that, if passed, will require that both the CVRD and Xstrata undertakings, as well as the

Ministerial demands made in respect of those undertakings, be made public.¹⁷ Concurrently tabled with those two bills was another bill proposing an amendment to the Act that would, in the future, require that all undertakings be made public.¹⁸ These three bills are private members bills which typically do not become law.

The acquisition of certain Nortel Networks Corp. assets by Sweden's Telefonaktiebolaget LM Ericsson also generated a great deal of public debate as to whether the transaction should be subjected to review under either the general provisions of the Act or under its new national security provisions. With some members of Parliament and one prospective alternative purchaser of the Nortel assets demanding a review, special hearings were held before the House of Commons Standing Committee on Industry, Science and Technology. Ultimately, the Industry Minister confirmed that the proposed transaction fell below the C \$312 million review threshold and chose not to exercise his national security power.

INTERNATIONAL

European Union

New Treaty

Since the entry into force of the "Treaty on the Functioning of the European Union" (the New Treaty) on December 1st, 2009, former Articles 81 (concerted practices) and 82 (abuse of dominance)

¹⁷ Bill C-489, *An Act respecting the acquisition of Inco Limited by CVRD Canada Inc.*, 2nd Sess., 40th Parl., 2009, and Bill C-490, *An Act respecting the acquisition of Falconbridge Limited by Xstrata PLC*, 2nd Sess., 40th Parl., 2009.

¹⁸ Bill C-488, *An Act to amend the Investment Canada Act (disclosure of undertakings and demands)*, 2nd Sess., 40th Parl., 2009.

are now embodied in Articles 101 and 102, respectively, of the New Treaty. States aids are governed by Articles 107 to 109 in the New Treaty.

Revision of rules applicable to vertical restraints

Before the expiry in May 2010 of the *Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*¹⁹, the Commission released on July 28, 2009 a draft revised regulation and set of guidelines on the application of Article 101(3)²⁰ of the New Treaty to vertical restraints. They should be finalized in the coming months following comments received by the Commission.

It is proposed that the current 30% market share threshold set for the exemption be extended to apply to the purchaser and not only the supplier. Where substantial investments by the distributor to start up and/or develop a new market are necessary, restrictions on passive sales by other distributors into

such a territory or to such a customer group would generally fall outside Article 101(1)²¹ of the New Treaty during the first two years that this distributor is selling the contract goods or services in that territory or to that customer group. The Commission also considers that restrictions relating to Internet sales in distribution networks should generally be considered as hardcore restrictions prohibited by EU competition rules.

Burden of proof under Article 81(3)

On October 6, 2009, the European Court of Justice (ECJ) issued a ruling (*GlaxoSmithKline* case) regarding the burden of proof relating to individual exemptions. The Court affirmed that such an examination may require the nature and specific features of the sector concerned to be taken into account if they are decisive for the outcome of the analysis. The request for exemption has to be conducted in light of the appropriate factual arguments and evidence provided by the party requesting the exemption, meaning that the Commission may not reject the exemption without first examining such elements.

France

New Competition Authority

The new Competition Authority started its activity in early 2009. It replaces the former Competition Council and enjoys enlarged powers. It is responsible for both investigating/fining perpetrators of anticompetitive practices and reviewing mergers and acquisitions (a task formerly undertaken by the Ministry of Economics Affairs). With respect to merger control, the Ministry maintains the power to clear or prohibit transactions notwithstanding a

¹⁹ The "Treaty" referred to in the title of this regulation is the Treaty establishing the European Economic Community.

²⁰ Article 101(1) prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices, which may affect trade between EU member states and which have as their objective or effect, the prevention, restriction or distortion of competition. Article 101(3), meanwhile, provides an exception to the general prohibition in Article 101(1) where the relevant agreement, decision or concerted practice (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and (ii) does not impose on the undertakings restrictions which are not indispensable to the attainment of these objectives and does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

²¹ See Article 101(1) *ibid.*

decision of the Competition Authority, but only on specific grounds unrelated to competition law.

Distribution networks - Internet sales

On October 29, 2009, the Paris Court of Appeals referred a case (*Pierre Fabre*) involving Internet sales restrictions to the ECJ for a preliminary ruling. The Court asked the ECJ whether the general and absolute interdiction imposed on selective distributors to sell on the Internet contractual products to end-users actually constitutes a hardcore restriction that cannot be exempted under the Regulation except on a case-by-case basis under Article 101(3). The outcome of this case is likely to have an impact on European competition law as the Commission is reviewing Regulation 2790/1999.

Merger control - Collective dominance

In a decision of July 31, 2009 (appeal against a merger control decision issued by the Ministry of Economics Affairs – *Deloitte* case), the *Conseil d'Etat* applied for the first time the notion of collective dominance as defined by EC case law in the *Airtours* case.

Cartels – Excessive duration of investigation

In a ruling dated November 10, 2009, the Paris Court of Appeals decided for the first time to annul a decision of the Competition Council on the ground that the duration of the investigation carried out by the Council was excessive and compromised the defendants' rights of defence.

United Kingdom

As has also been seen at the EU level, the last year has shown an acknowledgement by UK competition authorities of the economic downturn's effect on competition enforcement.

Cartels

The most significant competition decision of 2009 was the decision in the construction bid rigging cartel. This massive investigation culminated in fines totalling £129.2 million split among 103 companies.

Another cartel decision relating to construction recruitment agencies is notable as it reinforces the view that mere provision and receipt of competitor pricing, at a meeting where such matters are discussed, constitutes a breach of the UK legislation's Chapter 1 prohibition of anti-competitive agreements.

At the end of last year, the Office of Fair Trading (OFT) issued revised leniency guidance for members of cartels who provide evidence of involvement. Leniency has been a successful policy initiative in the detection and enforcement of cartels.

On the other hand, the OFT is consulting upon wider use of Competition Disqualification Orders (which allow the court to disqualify a director from acting as a director for a period of up to 15 years if the company of which he/she is a director breaches competition law and the court considers the director unfit to be concerned in the management of a company) which, along with criminal prosecution, remain regarded as the most effective and feared sanctions for cartel activity.

Merger Control

As a reaction to the economic downturn, in December 2008 the OFT restated its guidance on using the "failing firm" argument as a reason for clearing transactions and it was accepted in a number of decisions in 2009.

Abuse of Dominance

There has been less activity in the area of abuse of dominance, and many feel that the chance of making a finding of infringement is too low for authorities to bring these cases.

South Africa

Criminal sanctions introduced under South African competition laws

A recent amendment to South Africa's competition laws provides for criminal sanctions to be imposed against directors and certain managers involved with practices prohibited under such competition laws. Previously, only companies could be sanctioned (by the imposition of fines by South African Competition authorities) for violating such laws.

The provisions relating to the prosecution of directors and managers are likely to be challenged in the South African Constitutional Court, as these provisions place a higher burden of proof on directors and managers than would ordinarily be the case in criminal proceedings and may, therefore, be deemed to contravene an individual's constitutional right to a fair trial.

An amendment that is likely less-vulnerable to constitutional challenge is the provision for the regulation of so-called "complex monopolies", namely, where at least three quarters of goods and services in a particular market are supplied to or by five or fewer companies and these companies are acting in the same manner, whether or not by agreement. This recent introduction greatly increases the powers of the Competition authorities to promote competition, but it is not clear what the approach

would be in circumstances where this situation arises from a change in market conditions.

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