

Market Studies

A Review by the Competition Bureau

October 6, 2005

Background

When the House of Commons Standing Committee on Industry, Science, and Technology (the Committee) reviewed Bill C-23 (S.C. 2002, ch.16), *An Act to amend the Competition Act and the Competition Tribunal Act*, in the Fall of 2001, a Member of Parliament, the Honourable Dan McTeague, proposed a motion to allow the Commissioner of Competition, with the approval of the Minister of Industry, to ask the Canadian International Trade Tribunal (CITT) to inquire into the state of competition in any sector of the Canadian economy. At that time, the then Commissioner said that this proposal should have the benefit of consultations before such an amendment should be considered.

Currently, the *Competition Act* does not allow for market studies, with the use of formal powers to compel the production of information, into an industry. An inquiry is launched only to investigate a business, or individual, that has likely contravened the Act or is about to do so.

In 2002, the Committee released a report entitled *A Plan to Modernize Canada's Competition Regime* which recommended a wholesale reform of competition policy in Canada. In October 2002, the Government tabled its response to the recommendations contained in the Industry Report. The Government committed to consult widely with stakeholders on a number of proposals to be developed in a discussion paper.

National consultations were launched on June 23, 2003, with the issuance of a discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Market Place*. The June 2003 Discussion Paper incorporated the original proposal from the Honourable Dan McTeague for consultation.

The Public Policy Forum (PPF), a not-for-profit organization, conducted national consultations following the release of the Discussion Paper. More than a hundred individuals, businesses and associations provided written comments on the proposals included in the Discussion Paper. A wide range of stakeholders commented on the proposal for market studies.

Those who supported the market studies proposal indicated in general terms that they felt the power could be useful. They felt that the government should be better informed on industry and the markets. International respondents explained that their competition authorities are vested with similar powers and that they have proven to be valuable assets.

Those opposed to the proposal suggested that the Commissioner of Competition already has the necessary tools to enforce the *Competition Act* and that the Commissioner could carry out studies by hiring consultants or experts. They raised concerns about the considerable time and potential significant costs for both the government and businesses. They were concerned about procedural safeguards and whether such a power could be used as an inappropriate means of diverting political pressure on the Competition Bureau.

Some also stated that there already exists in Canada various means to conduct such studies, such as the *Inquiries Act*, the *CITT Act* and parliamentary committees. Many participants were of the view that the CITT was not the appropriate body to conduct such studies¹.

During the Committee hearings on Bill C-19, *An Act to amend the Competition Act and to make consequential amendments to other Acts*, the Commissioner of Competition indicated that the Bureau was continuing its analysis of such powers to conduct market studies, given the comments received during the consultations. As well, the Commissioner indicated that the Bureau would need to look at Charter implications. As part of the analysis of this issue, the Bureau also planned to carry out an international bench marking exercise to look at the ability of other jurisdictions to conduct market studies. Finally, it was indicated that the Bureau would share the results of the review with this Committee.

What the Bureau has found is that if such market studies are conducted for a legitimate purpose to assess the state of competition in various sectors of the economy, i.e. that they are not a disguised enforcement inquiry, and provided that such a power contains protections against self-incrimination, it could be possible to integrate such a power into the *Competition Act*.

The Bureau also found that several antitrust authorities have such powers, as described briefly below, and as detailed in Appendix 1 to this document².

¹ Public Policy Forum, National Consultation on the Competition Act - Final Report, April 8, 2004.

²The information is based on publicly available documents.

United States

The Federal Trade Commission (FTC) can conduct "research and policy" reports. Inquiries can be initiated by Congress or the FTC on its own initiative. There are no formal criteria limiting what kind of research and policy inquiries the FTC can undertake. The process followed depends on the nature of the inquiry but they are relatively informal and non-adversarial. The FTC rarely uses its subpoena powers.

Section 46(f) of the *Federal Trade Commission Act* allows the FTC to publish portions of information obtained pursuant to market studies. The FTC may not make public any trade secret or other commercial or financial information which is privileged and confidential. However, the FTC may disclose such information to a law enforcement agency upon certification that the information will be maintained in confidence and will be used only for official law enforcement purposes. The FTC does not conduct criminal antitrust matters.

European Union

The European Commission (EC) has the power to conduct general inquiries into any sector of the economy if "the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market". The power, while used to a limited extent in the past, has been used more frequently during 2005. In June 2005 two "sector inquiries" were launched, one into competition in the energy sector - specifically gas and electricity markets - and another into the financial services sector. The EC does not conduct criminal antitrust matters.

United Kingdom

The *Enterprise Act 2002*, which came into effect during the Summer of 2003, expanded the powers of the Office of Fair Trading (OFT) to make "market investigation references" to the Competition Commission for general inquiries. Previously limited to possible monopolies acting against public interest, the OFT can now make references if there are "reasonable grounds for suspecting that any feature, or combination of features, of a market ... prevents, restricts or distorts competition." The legislation specifically concerning market investigation references is extensive and both the OFT and the Competition Commission have published related Guidelines.

There are also "market studies", which are done exclusively by the OFT. Market studies are used where concerns exist that a given market is not working

well for consumers, but where competition or consumer regulation enforcement action does not appear to be an appropriate response at the moment. A market study can lead to enforcement action, a reference to the Competition Commission, recommendations for changes to laws or regulations or consumer education and awareness campaigns. The OFT forecasts that it will have spent approximately 34.7 million CAD dollars in market studies between 2002 and 2006. For the period 2005-06³, the OFT proposes to allocate at least 13% of its budget to market studies i.e. around 15.5 million CAD dollars.

Australia

Australia can conduct general inquiries through section 28(1)(c) of the *Trade Practices Act* (the TPA) which allows the Australian Competition and Consumer Commission (ACCC) "to conduct research in relation to matters affecting the interests of consumers." An inquiry can be initiated by the ACCC's Commissioner or its Minister. The ACCC has no power to compel information for such an inquiry but information is usually provided voluntarily as the relevant parties recognize it is in their interests to avoid a potentially more formal government inquiry. Part IIA of the TPA contains provisions to allow the ACCC, with Ministerial authorization, to research, monitor and investigate specific persons and industries. These provisions allow for the compelling of information and documents. In terms of costs, as an example, the ACCC spent in the range of 1.5 million CAD dollars over the last three years to monitor medical indemnity insurance premiums⁴.

³Office of Fair Trading, Annual Plan 2005-06, p. 27

⁴Australian Competition and Consumer Commission, ACCC Annual Report 2002-03, p. 108 and ACCC Annual Report 2003-04, p. 117.

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>Australia</p> <p>Australian Competition and Consumer Commission (ACCC)</p>	<p><i>Trade Practices Act, 1974 (TPA)</i></p>	<p>General Inquiries: ACCC takes the view that it has "a general power of inquiry" under s. 28(1)(c) of the Trade Practices Act, 1974 (TPA):</p> <p style="padding-left: 40px;">Sect 28 Functions of Commission in relation to dissemination of information, law reform and research</p> <p style="padding-left: 40px;">(1) In addition to any other functions conferred on the Commission, the Commission has the following functions:</p> <p style="padding-left: 80px;">(c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws.</p> <p>An inquiry under s.28(1)(c) can be initiated by the responsible Minister or the ACCC.</p> <p>Scope of Investigative Powers Under s. 28(1)(c) of the TPA, the ACCC has no power to compel information. It uses information that is already available or information that is provided voluntarily.</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>Australia (cont'd)</p>	<p>TPA</p>	<p>Process The ACCC has indicated that it prefers the flexible and informal nature of inquiry that s.28(1)(c) allows. However, the typical steps of a general inquiry include:</p> <ul style="list-style-type: none"> • notify the persons/companies that are the targets of the inquiry and advise them in writing; • seek information from targets of inquiry; • issue a paper or a report to get written submissions; • meet with subjects of inquiry and other interested parties; • hold oral hearings/public forums across the country (administrative process instead of judicial process or arbitration); • interested parties have the opportunity to provide comments on a draft report; • final report is issued <p>Other Section 28(1)(b) also lists Commission's functions as including: "(b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which the Parliament has power to make laws." This is a more formal power for the Minister to refer matters to the Commission. However, our ACCC contact on this issue knew of no examples where this provision had been used. Similarly, s.28(1)(ca) lists as one of the Commission's functions: "(ca) to conduct research and undertake studies on matters that are referred to the Commission by the (National Competition) Council and that relate to the Commission's other functions." Again, our ACCC contact knew of no examples where this provision had been used.</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>European Union (EU)</p> <p>European Commission (EC)</p>	<p><i>Treaty establishing the European Economic Community (EEC Treaty)</i></p> <p><i>Council Regulation No. 1/2003</i></p>	<p>Sector Inquiries</p> <p>The ability to conduct general inquiries, or "sector inquiries," is derived from Article 17 of Council Regulation (EC) No 1/2002:</p> <p style="text-align: center;">Article 17</p> <p>Investigations into sectors of the economy and into types of agreements:</p> <p>1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.</p> <p>The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.</p> <p>The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.</p> <p>2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.</p>
<p>European</p>		<p>This is the same provision used for regular enforcement</p>

Appendix 1

COUNTRY & COMPETITION AGENCY	LEGISLATION <u>Summary</u>	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS <u>Research of Policy Inquiries</u>
Union (cont'd)		<p>inquiries. In enforcement cases, the Commission has a very clear idea of specific anti-competitive behaviour. The Commission uses sector inquiries when they don't have specific information about anti-competitive conduct but are concerned that the market is not operating as it should. Still, consistent with the enabling legislation, a sector inquiry has to be linked to Articles 81 (agreements which restrict competition) or 82 (abuse of dominant position). While remedies not directly related to Articles 81 or 82 are possible (e.g. proposals for new regulations), a sector inquiry can only be initiated if it can be related to Articles 81 or 82. If a sector inquiry leads to information indicating anti-competitive conduct under either Articles 81 or 82, then appropriate enforcement action would be taken by the EC.</p> <p>Scope of Investigative Powers Article 18 allows the Commission to compel companies to provide information; Article 19 provides that the Commission may interview people, who consent to being interviewed, for the purpose of collecting information; Article 20 allows the Commission to conduct searches; Article 23 and 24 allow the Commission to impose fines on companies for providing incomplete, incorrect or misleading information.</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United Kingdom (UK)</p> <p>Office of Fair Trading Competition Commission</p>	<p><i>Enterprise Act 2002</i></p>	<p>The UK has two types of market or general inquiries:</p> <p>(1) "market studies" which are done exclusively by the Office of Fair Trading (OFT); and</p> <p>(2) "market investigation references" which involve the OFT referring a matter to the Competition Commission for a detailed public investigation.</p> <p>Market Studies</p> <p>Market studies are used "... where there are concerns that a particular market is not working well for consumers but where competition or consumer regulation enforcement action does not appear, immediately, to be the appropriate response."</p> <p>Possible results of these market studies include:</p> <ul style="list-style-type: none"> • enforcement action • a reference of the market study to the Competition Commission • recommendations for changes in laws or regulations • recommendations to regulators, self-regulatory bodies and others to consider changes to their rules • campaigns to promote consumer education and awareness. <p>Statutory authority for gathering information is derived from a relatively general provision of the Enterprise Act 2002:</p> <p style="padding-left: 20px;">5 Acquisition of information etc</p> <p style="padding-left: 40px;">(1) The OFT has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.</p> <p style="padding-left: 40px;">(2) That function is to be carried out with a view to (among other things) ensuring that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively.(3) In carrying out that function the OFT may carry out, commission or support (financially or otherwise) research.</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United Kingdom (cont'd)</p>		<p>The OFT will normally publish market study reports under s.(4)(4) of the Enterprise Act 2002:</p> <p style="padding-left: 40px;">4. Annual and other reports</p> <p style="padding-left: 40px;">....</p> <p style="padding-left: 40px;">(4) the OFT may -</p> <p style="padding-left: 80px;">(a) prepare other reports in respect of matters relating to any of its functions; and</p> <p style="padding-left: 80px;">(b) arrange for any such report to be published</p> <p>Under certain circumstances, the OFT can use formal powers to obtain information for market studies but UK representatives, have indicated that they do not. Typically, the OFT will write asking for information and it is volunteered by the parties in the context of helping to allay any concerns that the OFT might have.</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United Kingdom (cont'd)</p>		<p>Market Investigation Reference</p> <p>The Office of Fair Trading may make a market investigation reference to the Competition Commission if there are:</p> <ul style="list-style-type: none"> • "... reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom." • "Features" can include structural considerations, specific kinds of conduct or a combination of structure and conduct. <p>The legislation specifically concerning market investigation references is extensive and both the OFT and the Competition Commission have published related Guidelines. Among other considerations, the legislation provides that:</p> <ul style="list-style-type: none"> • Before making a market investigation reference, the OFT must first consult, so far as practicable, with anyone who is likely to be substantially affected by the reference. • Upon receipt of a market investigation reference, the Competition Commission is required to determine whether any feature, or combination of features, prevents, restricts or distorts competition. • If the Commission concludes that there is an adverse effect on competition, it must decide what action should be taken by it (or whether it should recommend the taking of action by others): <ul style="list-style-type: none"> for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers. • There is a detrimental effect on consumers if the feature or features result in higher prices, lower quality, less choice or less innovation.

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United Kingdom (cont'd)</p>		<ul style="list-style-type: none"> • Statutory remedies available to the Commission under the Enterprise Act are wide ranging (whereas under the previous regime the Commission could only make recommendations to the Secretary of State). The Commission, for example, can make orders: requiring parties to terminate an agreement; prohibiting the withholding of goods or services to a person; prohibiting price discrimination; regulating the price charged for a good or service; prohibiting the acquisition of assets; or requiring that accounting information (e.g. the costs of supply) be published <p>In its Guidelines, the OFT notes that, in addition to the statutory criteria outlined above, it will also consider whether a market investigation reference to the Competition Commission is the most appropriate way of proceeding. It will only make references to the Competition Commission when, in its view, each of the following criteria have been met:</p> <ul style="list-style-type: none"> • it would not be more appropriate to deal with the competition issues identified by applying Competition Act 1998 or using other powers available to the OFT or, where appropriate, to sectoral regulators • it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference • the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it • there is a reasonable chance that appropriate remedies will be available. <p>Scope of Investigative Powers Both the OFT and the Competition Commission have three investigatory powers that can be used in market studies:</p> <ul style="list-style-type: none"> • to require the attendance of parties to give evidence • to require the production of specified documents, and • to require the supply of specified information.

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United States</p> <p>Federal Trade Commission (FTC)</p>	<p><i>Federal Trade Commission Act</i> 15 U.S.C. 2 § 46</p>	<p>Research and Policy Reports</p> <p>Considered an important part of the FTC's work, "research and policy" reports can be started in three ways:</p> <ul style="list-style-type: none"> • Congress uses its legislative authority to ask the FTC to do a specific report. • Members of Congress or a Congressional Committee asks, without using its legislative authority, the FTC to do a study. • The FTC initiates a study on its own. <p>For the last two types of inquiries, the FTC authority to conduct such inquiries and publish related reports is derived from FTC Act Subsections 6(a) and 6(f), 15 U.S.C. Sec. 46(f):</p> <p style="padding-left: 40px;">(a) Investigation of persons, partnerships, or corporations</p> <p style="padding-left: 40px;">To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a (f)(3) of this title, Federal credit unions described in section 57a (f)(4) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.</p> <p style="padding-left: 40px;">The authority to publish the reports is derived from FTC Act Sec. 6(f), 15 U.S.C. Sec. 46(f):</p> <p style="padding-left: 40px;">(f) Publication of information; reports</p>

Appendix 1

Summary - Research or Policy Inquiries

COUNTRY & COMPETITION AGENCY	LEGISLATION	POWER OF INQUIRIES INTO THE STATE OF COMPETITION & THE FUNCTIONING OF MARKETS
<p>United States (cont'd)</p>		<p>To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use: provided, that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.</p> <p>There are no formal criteria limiting what kind of research and policy inquiries the FTC can undertake.</p> <p>Scope of Investigative Powers The FTC has the ability to compel oral or documentary evidence but rarely uses it for research and policy inquiries.</p>