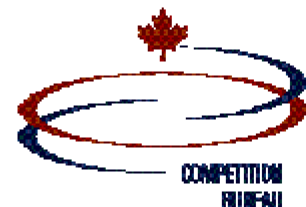
Government of Canada Gouvernement du Canada

Discussion Paper

Options for Amending the *Competition Act*:
Fostering a Competitive Marketplace

June 2003

Canada



Contents

Introduction . . . 3

Consultation process . . . 4

Strengthening the civil provisions . . . 5
1. Administrative monetary penalties . . . 6
2. Restitution . . . 9
3. Civil cause of action . . . 11

Reforming the criminal conspiracy provision . . . 13
1. Criminal conspiracy provisions . . . 15
2. Civil strategic alliances provisions . . . 17
3. Clearance certificate . . . 18

Reforming the pricing provisions . . . 19
1. Price discrimination and promotional allowances . . . 20
2. Predatory pricing behaviour . . . 21

Inquiries into the state of competition . . . 22
1. Market references . . . 22

APPENDIX 1. Administrative monetary penalties . . . 23

APPENDIX 2. Remedies under Part VII.1 . . . 24

APPENDIX 3. Accessory orders . . . 27

APPENDIX 4. Civil cause of action . . . 29

APPENDIX 5. Criminal conspiracy provisions . . . 31

APPENDIX 6. Civil strategic alliances provisions . . . 34

APPENDIX 7. Clearance certificate . . . 37

APPENDIX 8. Reforming the pricing provisions . . . 38

APPENDIX 9. Market references . . . 39

Introduction

Anticompetitive conduct has serious consequences for Canadian businesses and consumers. Each year, the Competition Bureau handles thousands of complaints about such conduct, which ranges from deceptive marketing practices to criminal cartel activity. An average cartel can drain millions of dollars from the economy. For a victim of telemarketing fraud deprived of a life's savings, the cost can be immense.

Through its law enforcement and policy efforts, the Competition Bureau works to ensure that all Canadians enjoy the benefits of a competitive economy. The *Competition Act* is at the heart of this work.

As economic framework legislation, the *Competition Act* enables Canadian businesses to capture new opportunities with innovative products and services. Consumers benefit from competitive prices, product choice and quality service.

In order to achieve these goals, effective competition policy in a global environment must rest on strong foundations that:

- encourage timely and voluntary compliance with the Act;
- enhance predictability and clarity for the business community;
- promote coherent and flexible approaches to enforcement; and
- ensure compatibility with the competition laws of other jurisdictions.

The Government of Canada is committed to modernizing the *Competition Act* in the face of a rapidly changing global economy and public consultations play a vital role in this process. In preparation for the next round of competition law amendments, the Government is seeking public comments on the proposals contained in this discussion paper. The proposed amendments would do the following:

- strengthen the civil provisions of the Act with administrative monetary penalties, restitution and a civil cause of action;
- reform the conspiracy provisions;
- reform the pricing provisions; and
- allow for inquiries into the functioning of markets in Canada.

For each proposal, the paper includes draft provisions for comments. These draft provisions, a sound basis for informed discussion, reflect analytical work done by the Competition Bureau in the last year based on the House of Commons Standing Committee on Industry, Science and Technology's April 2002 report *A Plan to Modernize Canada's Competition Regime.*

These provisions do not necessarily represent the position of the Government of Canada, and should not be taken as such.

Consultation process

The Government of Canada has launched consultations to obtain public comment on the proposals contained in this discussion paper.

Please submit your comments by mail, fax or e-mail before September 30, 2003, to the Public Policy Forum, which is coordinating the consultations on behalf of the Competition Bureau:

Competition Act Consultations
Public Policy Forum
1405–130 Albert Street
Ottawa ON K1P 5G4

Fax: (613) 238-7990
E-mail: **competition@ppforum.ca**

All submissions will be made available to the public, except when confidentiality is requested.

Consultation meetings with stakeholders will be organized in the coming months to discuss in greater detail the proposed amendments as well as the issues raised in the written submissions. At the end of the consultation process, the Government will be able to select options for reform that have public support. These options could be considered as part of the next round of amendments to the *Competition Act*.

Strengthening the civil provisions

Three proposals are suggested to strengthen the civil provisions of the *Competition Act*:

- administrative monetary penalties for civil reviewable matters;
- restitution to consumers in certain cases of deceptive marketing practices; and
- a civil cause of action.

Effective competition law enforcement requires mechanisms for encouraging voluntary compliance and a flexible range of remedies to address non-compliance.

In recent years, the Competition Bureau has made considerable effort to ensure that businesses in Canada understand their obligations under the *Competition Act*. The Bureau's policy on compliance, found in the *Conformity Continuum*,[1] sets out the approaches the Bureau uses to maintain and promote competition and to help businesses meet the Act's requirements.

Businesses are responsible for complying with the Act, and the Bureau provides guidance on what measures they can take to do so. For example, the Bureau publishes enforcement guidelines and interpretation bulletins, and supports implementation of in-house compliance programs by businesses. Additional tools were introduced in 2002 to increase clarity and predictability for businesses and enhance confidence in the marketplace. These tools include written opinions, which are binding on the Commissioner of Competition, and references to the Competition Tribunal about applying and interpreting the *Competition Act*.

Although these efforts are a step in the right direction, voluntary compliance can only be fully attained when the Act includes appropriate incentives to encourage businesses to refrain from anticompetitive practices.

In its April 2002 report, the House of Commons Standing Committee on Industry, Science and Technology recommended that the Act have an "optimum mix of incentives to promote compliance with the Act." Such a mix would provide the Competition Tribunal with the necessary flexibility to choose the most appropriate remedies based on the facts of each case.

Around the world, competition laws and authorities are equipped with a wide array of remedies to promote compliance and deter future violations. The introduction of additional remedies and recourse for the civil provisions of the *Competition Act* would provide a more complete and effective system of enforcement that would encourage timely and meaningful compliance with the Act and promote international convergence.

---

[1] The *Conformity Continuum* is available on the Competition Bureau Web site, at **http://strategis.ic.gc.ca/SSG/ct01768e.html**.

1. Administrative monetary penalties

Administrative monetary penalties (AMPs) were added to the *Competition Act* in 1999 as part of the civil regime that was set up at that time to allow the Competition Tribunal to address non-criminal misleading advertising and deceptive marketing practices. In 2002, AMPs were added under subsection 79(3.1) to address cases of abuse of dominant position by an airline.

AMPs are widely recognized as effective incentives to encourage compliance with a regulatory scheme, and are part of much foreign competition legislation to deter restrictive trade practices.

In its April 2002 report, the House of Commons Standing Committee on Industry, Science and Technology recommended that the Competition Tribunal be allowed to impose AMPs at its discretion for refusal to deal (section 75), consignment selling (section 76), tied selling, market restriction and exclusive dealing (section 77), abuse of dominant position (section 79) and delivered pricing (section 81). Absent voluntary compliance, when someone contravenes these provisions, the remedies currently available are limited to obtaining an order from the Competition Tribunal to stop the activity, obtaining an order to restore competition or obtaining both. Given that there are currently only these few options available to remedy serious harm to competition, there is little incentive for businesses to comply with the Act.

The Government agrees in principle with the recommendation to make AMPs available as a remedy when someone contravenes the sections listed above.

The Government is also considering making the AMPs under the reviewable deceptive marketing practices provisions and the provisions dealing with an abuse of dominant position by an airline the same as the new AMPs described above. This would ensure coherence and consistency across the Act for all civil reviewable matters (except mergers).

1.1 Administrative monetary penalties for civil reviewable matters under Part VIII (except mergers)

The Competition Tribunal could be given the power to impose AMPs at its discretion, based on the facts of each case. A list of criteria could be provided to guide the Tribunal when making its assessment, with the express requirement that any AMP be imposed to promote compliance with the Act, not to punish the business or individual who contravened the Act. See the draft provision in Appendix 1.

Questions

1. Do you agree the Competition Tribunal should have the ability to impose AMPs when firms contravene the sections listed above? Why or why not?

2. Should AMPs be imposed at the discretion of the Competition Tribunal? Why or why not? Should there be a statutory maximum such as currently exists in subsection 79(3.1) (a maximum of $15 million)? If not, what alternative would you suggest?

3. If AMPs are available for reviewable matters under Part VIII of the Act, should the general regime replace the current one that applies specifically to airlines (section 79)?

4. Do you agree that the proposed criteria for assessing AMPs as outlined in the draft priovision in subsection 107.1(2) are appropriate? Should other criteria be added to guide the Tribunal's assessment? If so, which criteria do you suggest?

5. Should the general regime for AMPs also apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?

6. Do you have additional comments?

1.2 Administrative monetary penalties for civil reviewable matters under Part VII.1

Those who engage in misleading advertising and deceptive marketing practices often reap the benefits of their conduct, generating increased revenues and market share. Current AMP limits may represent only a small fraction of the gains businesses make by these practices, thereby providing little incentive for them to be careful to comply with the Act. Therefore, a more flexible AMPs scheme would be preferable.

It is proposed that the existing penalty structure under section 74.1 be revisited to ensure coherence and consistency with the general regime for AMPs being proposed for reviewable matters under Part VIII.

The Competition Tribunal, the Federal Court of Canada or the Superior Court of a province could be given the power to impose AMPs at its discretion, based on the facts of each case, to ensure an order that will achieve deterrence. See the draft provision in Appendix 2.

Questions

7. In case of deceptive marketing practices, should the courts have the power to impose AMPs at their discretion? Why or why not?

8. Subsection 74.1(5) currently sets out a list of criteria for courts to consider when assessing AMPs. Should other criteria be added to guide the courts' assessments? If so, which criteria do you suggest?

9. Do you have additional comments?

2. Restitution

Part VII.1 of the *Competition Act* prohibits businesses and individuals from making representations that are false and misleading. This part was enacted in 1999 as a result of the decriminalization of the majority of deceptive marketing practices. Increasingly, many of the complaints the Bureau receives are from consumers who have wasted their money buying products that simply do not work, based on advertisers' false or misleading representations. In these cases, the courts should be empowered to order restitution.

These false or misleading representations ignore national boundaries, and contribute to increasing occurrence of deceptive practices by Canadian-based businesses, which has serious consequences for businesses and consumers. Advertisers who make claims about a product must therefore be encouraged to take care not to mislead consumers.

In keeping with the spirit of the House of Commons Standing Committee on Industry, Science and Technology's recommendation that the *Competition Act* include the optimal mix of incentives to promote compliance, restitution is proposed as a key remedy to deal with this kind of consumer loss.

2.1 Restitution orders

The courts could be given the power to order respondents (businesses and individuals who contravene the Act) in certain circumstances and on application by the Commissioner of Competition, to provide restitution to consumers. The courts could order respondents to set up a restitution fund and distribute monies directly to entitled purchasers, or appoint a fund administrator to execute that task. See the draft provision in Appendix 2.

Questions

10. Do you agree the courts should have the ability to order restitution to consumers in certain circumstances and on application by the Commissioner of Competition? Why or why not?

11. Should the draft provision address the appointment of a fund administrator to administer and distribute the fund created as a result of a restitution order? Why or why not?

12. Do you have additional comments?

2.2 Disposition of remaining funds

It is possible that not all entitled consumers would claim their loss against the restitution fund, because, for example, they were not aware that they were entitled to a payment, or they may have felt that the amount of money they were entitled to did not justify the time it would take to make the claim. When funds remain in a restitution fund, it may not be appropriate to return the balance to the respondent, especially if such a return would undermine the deterrent effect of the overall remedy (which may include AMPs).

The courts could have the discretion to determine how any balance of the restitution fund should be used. One possibility is that any balance could be given to non-profit organizations that work to benefit consumers in similar situations.

Questions

13. Should the provision state that the courts may make an order about the use of any balance in the restitution fund?

14. Should the provision direct or suggest that any balance in the restitution fund be given to non-profit organizations in Canada for projects that would benefit consumers in similar situations?

15. Do you have additional comments?

2.3 Accessory orders

In extraordinary circumstances, when the Commissioner has strong *prima facie* evidence that the respondent is engaging in or has engaged in reviewable conduct, and that the court is satisfied that the respondent is or is likely to deplete or has depleted property, the court could be given the power to make a freezing order against the respondent or any third party. This type of order would stop the respondent or any third party from depleting funds to ensure that money is available for restitution. See the draft provisions in Appendix 3.

Questions

16. Should the courts be empowered to make a freezing order to ensure that the purpose of the restitution remedy is not defeated? Why or why not?

17. Do you have additional comments?

3. Civil cause of action

The House of Commons Standing Committee on Industry, Science and Technology recommended that the Competition Tribunal be given the power to award damages in private access cases. In its response to the Committee, the Government indicated that the ability of the Tribunal to award damages in private access cases should be delayed, given that a review of recent amendments on private access will be taking place in 2004. The Government also indicated that the ability of the Tribunal to award damages in these cases should be considered once experience is gained with AMPs.

One section of the *Competition Act* that could be amended now is section 36, which allows an injured business or individual who has suffered damages as a result of the criminal conduct of another business or individual, such as a conspiracy contrary to Part VI of the *Competition Act*, or a breach of a Tribunal order, to take action in civil court. The possibility of recovering losses or damages resulting from non-criminal conduct is not, however, currently available under the Act. Adding a method of recourse to section 36, however, could provide a means for injured parties to recover their losses in civil court, with all the safeguards of civil courts in place to guard against strategic litigation and unmeritorious claims. It should be noted that this proposed amendment to section 36 does not confer on the Competition Tribunal the power to award damages.

To build on the Committee's recommendation for additional incentives in the Act to achieve greater compliance, it is proposed that those harmed by any conduct contrary to Part VII.1, and for certain conduct under Part VIII, have recourse to damages under section 36 once the Competition Tribunal or a court has issued an order. See the draft provision in Appendix 4.

Questions

18. Should section 36 be amended to allow businesses and individuals who have suffered damages to recover their losses in civil court once an order by the Tribunal or a court has been made? Why or why not?

19. What should be the starting point for the assessment of the loss or damage suffered as a result of the reviewable practice: the day of the start of the practice or of an investigation by the Commissioner, or the date of an application to the Tribunal or a court?

20. Under the proposed provision, consent agreements under sections 74.12 and 105 of the Act are exempt from recourse under section 36. Do you agree with this? Why or why not?

21. Is it necessary to explicitly refer in the draft provision to an order made for restitution under paragraph 74.1(1)(d)? Why or why not?

22. Should section 36 apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?

23. Do you have additional comments?

Reforming the criminal conspiracy provision

The proposals in this area include the following main components:

- a criminal provision that would explicitly define clearly egregious anticompetitive agreements;
- a civil provision for review of agreements among competitors or potential competitors that may substantially lessen competition; and
- a clearance process to provide certainty and predictability to businesses.

Section 45 of the *Competition Act* makes it a criminal offence for anyone to conspire, combine, agree or arrange with someone else to unduly lessen competition. The intent of this section is to counter egregious anticompetitive behaviour such as price fixing and market sharing among competitors. Given the serious impact of this anticompetitive behaviour on the economy and, in particular on consumers, it is dealt with in criminal courts and carries sanctions such as fines and imprisonment.

However, because of the complexity of the evidence required in these criminal prosecutions, particularly economic evidence, it is widely recognized that the current provision fails to adequately deter such egregious behaviour. As the House of Commons Standing Committee on Industry, Science and Technology commented in its report:

"Competition law experts believe, almost unanimously, that section 45, as currently written, is hard to enforce in a contested trial setting, even when applied to a "naked hard-core cartel". They also believe the two-step "market structure-behaviour" tests provide too much room for litigating irrelevant economic matters in the case of "naked hard-core cartel"."[2]

In the current economic environment, in which businesses can sometimes benefit from forming procompetitive alliances to gain access to new markets, concerns have been expressed that the existing conspiracy provisions may discourage some competitors from pursuing these alliances for fear of criminal prosecution.

Additionally, by having a "market structure-behaviour" test (that is, that the behaviour must "unduly" lessen competition), the *Competition Act* treats conspiracies differently from how all other major foreign antitrust legislation does. Reform could lead to increased compatibility with other jurisdictions and facilitate international investment and cooperation.

---

[2]House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, (Ottawa: 2002), p. 59.

Reforming the conspiracy provisions has been the subject of informed debate for more than a decade. More recently, in 2000, it was considered as part of consultations on proposed amendments to the *Competition Act*. The consultations revealed that there was general agreement on the need to modernize the existing conspiracy provisions. However, participants felt that more discussion was required due to the complexity of the issues and the fact that section 45 is one of the cornerstones of the *Competition Act*.[3] Following this conclusion, the Bureau commissioned three independent studies to provide further expertise on this subject.[4]

Building on this work and on hearings, the House of Commons Standing Committee on Industry, Science and Technology recommended that the conspiracy provisions be amended to provide clarity and certainty to businesses by clearly defining, in a criminal provision, egregious criminal behaviour and setting out which arrangements among competitors should be reviewed under a civil provision. The Committee recommended that a voluntary clearance system be used to screen out procompetitive strategic alliances.

---

[3] Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations* (Ottawa: Public Policy Forum, 2000), p. 31.

[4] These reports are available on the Competition Bureau Web site, at **http://strategis.ic.gc.ca/SSG/ct02277e.html**.

1. Criminal conspiracy provisions

The criminal conspiracy provisions could target price fixing, market or customer allocation, and output restriction between competitors or potential competitors. They could contain a defence that would provide safeguards against overinclusion, but that would not require complex economic evidence. It could also replace the current $10 million fine with a fine set at the courts' discretion to increase deterrence. See the draft provisions in Appendix 5.

Questions

24. Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that the *Competition Act* include a criminal provision to deal with egregious anticompetitive cartel activity and a companion civil provision to deal with other types of agreements among competitors?

25. Do you agree that the phrase "persons who compete or could reasonably be expected to compete" will ensure the provision only captures horizontal agreements among competitors? Will this language require the Competition Bureau to do a complex competition analysis for each criminal case? If so, how else could horizontal agreements be captured by the provision? Please explain.

26. The draft provision would apply to agreements among competitors or potential competitors that have the "purpose" or "effect" of fixing prices, allocating customers or markets, or restricting production or supply of a product. Do you agree with the inclusion of a purpose and an effect test? Why or why not?

27. Does the provision as drafted capture the types of agreements that are the most egregious? Should boycotts be mentioned specifically, or are they captured by the provision as drafted?

28. Does the draft provision deal appropriately with the issues of circumstantial evidence and intent? If not, what do you propose?

29. Does the defence in section 45(5) of the draft provision deal appropriately with the potential overreach of a *per se* provision? Does it provide appropriate safeguards from exposure to civil cause of action under section 36?

30. Do you agree that the burden of proof - on a balance of probabilities - should lie with the accused with respect to the proposed defence in section 45(5), taking into account the fact that they relate to information on potentially complex economic matters that are primarily within the knowledge and control of the accused? If you do not agree, what other options would you

suggest?

31. Should the defences in the current section 45 be repealed? Why or why not?

32. Do you think that block exemptions, such as exemptions by industry, sector or activity, as outlined in draft subsection 45.2(2), should be part of any new criminal conspiracy provision? Why or why not?

33. Given the amounts of recent fines obtained from conspiracy prosecutions, would allowing the courts to set the fines at their discretion be a more appropriate way to respond to criminal conspiracies than the current $10 million fine? Or, should the fine be set based on a fixed percentage of affected commerce? Why or why not?

34. The new draft criminal provision applies to existing and proposed agreements. How should existing agreements be handled under the new provision? Should there be transitional provisions to deal with existing agreements? If so, what do you suggest? Please explain.

35. Do you have additional comments?

2. Civil strategic alliances provisions

A new civil strategic alliances provision could target all other agreements among competitors that could prevent or substantially lessen competition. When assessing whether the agreement prevented or lessened competition, the Tribunal could consider a list of factors similar to those currently considered during a merger review. The Tribunal could issue an order prohibiting the parties to the agreement from entering into or continuing the agreement and could also order AMPs. This new provision would not apply to the types of agreements that are notifiable under Part IX of the Act (notifiable transactions). Furthermore, no duplicate proceedings under the criminal conspiracy, abuse of dominant position or merger provisions could be pursued. See the draft provisions in Appendix 6.

Questions

36. Do you think that a new civil provision is required or can the current abuse of dominant position and merger provisions adequately address all other types of agreements not covered by the proposed criminal provision? Why or why not?

37. Do you think that the addition of a "no duplicate proceedings" clause could adequately address a potential overlap between the abuse of dominant position provision, the merger provision and the civil strategic alliances provision? Should notifiable transactions under Part IX be excluded from the civil strategic alliances provision? Why or why not?

38. Should a list of factors similar to that included in the Act for merger review be included for civil strategic alliances? Why or why not?

39. Should efficiencies be considered as a factor in the civil strategic alliances provision? Should efficiencies be considered as a factor in a merger review? Why or why not?

40. Do you think that the proposed civil strategic alliances provision could replace the joint venture and the specialization agreement provisions? Is this a desired outcome? Why or why not?

41. Do you have additional comments?

3. Clearance certificate

Under the proposed clearance provision, the Commissioner of Competition could provide an assurance to parties, in the form of a certificate, that the matter would not be referred to the Attorney General for prosecution, or that there is insufficient grounds to apply to the Tribunal for an order. The clearance certificate would remain valid as long as the facts upon which it is based remain the same or substantially the same. The Governor in Council could make regulations about the procedure to be followed to apply for a clearance certificate. See the draft provision in Appendix 7.

Questions

42. Should the clearance certificate apply to both proposed and existing agreements? Why or why not?

43. Should the Competition Bureau require certain types of information from parties applying for a clearance certificate similar to the information requested prior to issuing an advance ruling certificate in a merger review? Why or why not? Should this required information be defined through regulations?

44. Subject to confidentiality requirements, should the Bureau contact third parties before issuing a clearance certificate?

45. Do you think that existing section 124.1 (written opinions binding on the Commissioner) should be used instead of a clearance certificate for both existing and proposed agreements? Why or why not?

46. Do you have additional comments?

Reforming the pricing provisions

The proposal in this area has two parts:

- to repeal the criminal pricing provisions; and
- to deal with behaviour under the civil provisions using a competition test.

Paragraphs 50(1)(a), 50(1)(b) and 50(1)(c) of the *Competition Act* set out criminal offences for price discrimination, geographic price discrimination and predatory pricing, respectively. These provisions were drafted more than 60 years ago to protect small independent retailers from discriminatory or predatory pricing behaviour of large firms.

Section 51 sets out a criminal provision dealing with discriminatory promotional allowances. This section states that businesses may not offer promotional allowances for advertising or display purposes to one purchaser without offering them on proportionate terms to competing purchasers. This section was added to the Act in 1960 because it was felt that the existing price discrimination provision did not adequately cover this practice.

The House of Commons Standing Committee on Industry, Science and Technology recommended that the pricing provisions be repealed and that discriminatory or predatory pricing behaviours be made reviewable matters under the existing abuse of dominant position provision (section 79). The Committee recognized that anticompetitive pricing behaviours may not be appropriately dealt with under criminal provisions because they are best suited to a civil provision with a competition test. The Committee's proposal would remove the chill effect that results from addressing these practices under a criminal regime.

Some commentators were of the view that the competition test requirements in section 79 are more difficult to meet than those that currently apply to the criminal predatory pricing provision. The Committee therefore suggested repealing paragraph 79(1)(a) to retain only a "substantial lessening or prevention of competition" test. The Government agreed to seek public input on these recommendations.

1. Price discrimination and promotional allowances

The criminal provisions dealing with price discrimination and promotional allowances could be repealed. In addition, these practices could be included under the abuse of dominant position provision. As a result, the Competition Tribunal could order AMPs. The House of Commons Standing Committee on Industry, Science and Technology also recommended that price discrimination could govern all types of products, including articles and services, and all types of transactions, not just sales.

Questions

47. Do you agree that the criminal provision dealing with price discrimination should be repealed? Why or why not?

48. Should price discrimination govern all types of products, including articles and services? Why or why not?

49. Is the existing abuse of dominant position provision sufficient to respond to anticompetitive price discrimination and promotional allowances? Why or why not? If not, please provide alternatives.

50. Do you agree that the abuse of dominant position provision would provide sufficient deterrence against price discrimination if AMPs were available and with the lower burden of proof of a civil setting?

51. Do you have additional comments?

2. Predatory pricing behaviour

The geographic price discrimination and predatory pricing provisions could be repealed. Furthermore, predatory pricing behaviour could be included as an anticompetitive act under the abuse of dominant position provision. As a result, the Tribunal could order AMPs. See the draft provision in Appendix 8.

Questions

52. Should the criminal provisions dealing with geographic price discrimination and predatory pricing be repealed?

53. Is the existing abuse of dominant position provision sufficient to respond to anticompetitive predatory pricing? Why or why not? If not, please provide alternatives.

54. Do you agree that the abuse of dominant position provision would provide sufficient deterrence against predatory pricing if AMPs were available and with the lower burden of proof in the civil setting?

55. Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that paragraph 79(1)(a), which requires establishing that "one or more persons substantially or completely control" a market, should be repealed? Why or why not?

56. Do you have additional comments?

Inquiries into the state of competition

The proposal would allow inquiries into the state of competition and the functioning of markets in any sector of the Canadian economy.

When the House of Commons Standing Committee on Industry, Science and Technology reviewed Bill C-23 (S.C. 2002, ch. 16) in the fall of 2001, a member of Parliament 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 and the functioning of markets in any sector or subsector of the Canadian economy. At that time, the Commissioner said that this proposal should have the benefit of full discussion before any such amendment to the *Competition Act* was considered.

Currently, the Act does not allow research inquiries into an industry. An inquiry is launched only to investigate a business or individual that has contravened the Act or is about to do so.

The proposed inquiries, if done by an independent and impartial body with economic expertise, could provide thorough and valuable insights into various industry sectors, which would not be available otherwise.

1. Market references

The Commissioner could be allowed to ask an independent and impartial body such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy. The findings of the inquiry would then be provided in a report that the Minister of Industry would table in Parliament. See the draft provision in Appendix 9.

Questions

57. Should the Act be amended to allow the Commissioner to ask an independent and impartial body such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy? Why or why not? Are there other bodies that could conduct such inquiries?

58. If inquiries into the state of competition were allowed, should the proposed provisions include specific criteria to determine under which circumstances the Commissioner of Competition would be allowed to ask for an inquiry? If so, which criteria should be considered? Please explain.

59. Do you have additional comments?

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 1. Administrative monetary penalties

Administrative monetary penalty

107.1. (1) Where the Tribunal makes an order under section 75, 76, 77, 79, 79.11 or 81 against any person, it may also order the person to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount in the discretion of the Tribunal.

Aggravating or mitigating factors

(2) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty:

(*a*) the frequency and duration of the acts on the basis of which the order is made;

(*b*) the vulnerability of the class of persons adversely affected by those acts;

(*c*) injury to competition in the relevant market;

(*d*) the history of compliance with this Act by the person;

(*e*) the volume of gross sales affected by the conduct in respect of which the order is made;

(*f*) any economic benefit or loss generated by the conduct; and

(*g*) any other relevant factor.

Purpose of order

(3) The purpose of an order under this section is to promote actions that are in conformity with this Part, not to punish.

Unpaid monetary penalty

(4) The amount of an administrative monetary penalty imposed on a person under this section is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 2. Remedies under Part VII.1

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(*a*) not to engage in the conduct or substantially similar reviewable conduct;

(*b*) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(*c*) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount in the discretion of the court; and

(*d*) where the court determines that the person is engaging in or has engaged in reviewable conduct under paragraph 74.01(1)(*a*), to provide restitution to persons to whom the products are or have been sold in an amount not exceeding the amount paid by those persons for those products, in the manner and on the terms and conditions that the court considers appropriate and, in particular, the court may

(i) specify the manner and times of bringing notice of the order to the attention of persons likely to have been affected by the conduct, and specify the content of the notice, and whether it should be part of or together with any notice published or otherwise disseminated under paragraph (*b*),

(ii) order that the person set aside a fund for the purpose of providing the restitution, to be administered by that person or, where appropriate, by an administrator who is not controlled by that person and who is appointed by the court,

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

(iii) specify the manner and time within which claims for restitution may be made and the manner of their determination,

(iv) order the manner of distributing the amounts to which claimants for restitution are entitled,

(v) order the manner of payment of the costs of distributing the restitution, including the fees to be paid to the person administering the restitution, and

(vi) order that any balance remaining in the fund after all claims, costs and fees have been determined and distributed in accordance with the terms of the order, be paid or applied in any manner the court considers appropriate and, where possible, order that the balance be paid to a non-profit organization in Canada in respect of projects that will benefit persons in circumstances similar to persons who would have been entitled to restitution under the order.

Duration of order

(2) An order made under paragraph (1)(*a*) applies for a period of ten years unless the court specifies a shorter period.

Saving

(3) No order may be made against a person under paragraph (1)(*b*), (*c*) or (*d*) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(*b*), (*c*) or (*d*) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(*c*):

(*a*) the reach of the conduct within the relevant geographic market;

(*b*) the frequency and duration of the conduct;

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

(*c*) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(*d*) the materiality of any representation;

(*e*) the likelihood of self-correction in the relevant geographic market;

(*f*) injury to competition in the relevant geographic market;

(*g*) the history of compliance with this Act by the person who engaged in the reviewable conduct;

(*h*) the volume of gross sales affected by the conduct in respect of which the order is made;

(*i*) any economic benefit or loss generated by the conduct;

(*j*) whether an order for restitution is being made under paragraph (1)(*d*); and

(*k*) any other relevant factor.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 3. Accessory orders

Interim injunction

74.11X (1) Where, on the application of the Commissioner accompanied by an undertaking to apply for an order under paragraph 74.1 (1)(*d*), a court finds a strong *prima facie* case that a person is engaging in or has engaged in reviewable conduct under paragraph 74.01(1)(*a*), the court may, if the court is satisfied that the person has property in the jurisdiction of the court and that the person is or is likely to deplete or has depleted the property, make an order prohibiting that person or any other person from disposing of or otherwise dealing with the property or any interest in the property specified in the order otherwise than in the manner specified in the order and subject to any terms and conditions specified in the order.

Duration of order

(2) Subject to subsection (5), an order issued under subsection (1) has effect, or may be extended on application by the Commissioner, for such period as the court considers necessary and sufficient to meet the circumstances of the case.

Notice of application by Commissioner

(3) Subject to subsection (4), at least forty-eight hours notice of an application referred to in subsection (1) or (2) shall be given by or on behalf of the Commissioner to the person in respect of whom the order or extension is sought.

Ex parte application

(4) The court may proceed *ex parte* with an application for an order under subsection (1) where it is satisfied that

(*a*) subsection (3) cannot reasonably be complied with;

(*b*) the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest; or

(*c*) to give notice would defeat the purpose of the order.

Duration of *ex parte* order

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

(5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (2), the court extends the order for such additional period as it considers necessary and sufficient.

Duty of Commissioner

(6) Where an order under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued.

Definition of "property"

(7) In this section, "property" means real and personal property of every description including

(*a*) money;

(*b*) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation; and

(*c*) deeds and instruments giving a right to recover or receive property.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 4. Civil cause of action

Recovery of damages

36. (1) Any person who has suffered loss or damage as a result of

(*a*) conduct that is contrary to any provision of Part VI,

(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act, or

(*c*) conduct in respect of which an order was made by the Tribunal or another court under section 74.1, 75, 76, 77, 79, 79.11 or 81, otherwise than by way of consent agreements,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Set off of amount received under a restitution order

(1.1) In determining the amount equal to the loss or damage suffered by any person as a result of reviewable conduct under paragraph 74.01(1)(*a*), the court shall take into account whether an order for restitution was made under paragraph 74.1(1)(*d*).

Evidence of prior proceedings

(2) In any action under subsection (1) against a person,

(*a*) the record of proceedings in any court in which that person was convicted of an offence under Part VI,

(*b*) the record of proceedings in any court in which that person was convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act, or

(*c*) the record of proceedings in the Tribunal or other court that made an order referred to in paragraph (1)(*c*),

is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act or that an order of the Tribunal or other court was made against the person, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Limitation

(4) No action may be brought under subsection (1),

(*a*) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later;

(*b*) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(*c*) in the case of an action based on conduct in respect of which an order has been made by the Tribunal or another court under section 74.1, 75, 76, 77, 79, 79.11 or 81, after two years from

(i) the day on which the order was made, or

(ii) the day on which any appeals from the order were finally disposed of,

whichever is the later.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 5. Criminal conspiracy provisions

Conspiracy

45. (1) Every person who agrees or arranges with one or more persons, where those persons compete or could reasonably be expected to compete with each other, for the purpose of or where the agreement or arrangement has or is likely to have the effect of,

(*a*) fixing, establishing, controlling or maintaining the price at which those persons supply or offer to supply a product,

(*b*) allocating customers or markets or portions of markets for the supply of a product, or

(*c*) preventing, eliminating, limiting or lessening the production or supply of a product

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine in the discretion of the court or to both.

Evidence of conspiracy

(2) In a prosecution under subsection (1), the court may infer the existence of an agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent

(3) In establishing that an agreement or arrangement is for a purpose described in any of paragraphs (1)(*a*) to (*c*), it is necessary to prove that the parties thereto intended to and did agree or arrange as described in that paragraph or subsection, but it is not necessary to prove that the parties intended that the agreement or arrangement have an effect referred to in any of paragraphs (1)(*a*) to (*c*).

Proof of intent

(4) In establishing that an agreement or arrangement has or is likely to have an effect described in any of paragraphs (1)(*a*) to (*c*), it is necessary to prove that the parties thereto intended to and did agree or arrange as described in that paragraph, and that the parties knew or ought reasonably to have known that the agreement or arrangement would likely have that effect.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

Defence

(5) In a prosecution under subsection (1), where the accused establishes, on a balance of probabilities, that

(*a*) the agreement or arrangement is ancillary to a principal agreement,

(*b*) the agreement or arrangement is necessary for implementing the principal agreement, and

(*c*) less restrictive alternatives to the agreement or arrangement are not available for implementing the principal agreement,

the court shall not convict the accused unless the court finds that the principal agreement, when considered without the agreement or arrangement in respect of which the prosecution is commenced, is for a purpose, has an effect or is likely to have an effect referred to in any of paragraphs (1)(*a*) to (*c*).

Definition of "principal agreement"

(6) For greater certainty, in this section, "principal agreement" means

(*a*) an agreement or arrangement that includes the agreement or arrangement in respect of which the prosecution is commenced; or

(*b*) an agreement or arrangement that is separate from, but between the same persons as, the agreement or arrangement in respect of which the prosecution is commenced.

Defence

(7) Subject to subsection (8), in a prosecution under subsection (1) the court shall not convict the accused if the agreement or arrangement relates only to the export of products from Canada.

Exception

(8) Subsection (7) does not apply if the agreement or arrangement

(*a*) results in or is likely to result in a reduction or limitation of the real value of exports of a product;

(*b*) restricts or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

(*c*) prevents or lessens or is likely to prevent or lessen competition substantially in the supply of services facilitating the export of products from Canada.

Defences

(9) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(*a*) in the practice of a trade or profession relating to the service; or

(*b*) in the collection and dissemination of information relating to the service.

Non-application

(10) Subsection (1) does not apply in respect of an agreement or arrangement

(*a*) between federal financial institutions that is described in subsection 49(1); or

(*b*) that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.

Where application made under section 79, 79.11 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79, 79.11 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection.

Exception for block exemptions

45.2 (1) Subsection 45(1) does not apply in respect of an agreement or arrangement that is within a class of agreements or arrangements exempted from the application of subsection 45(1) by an order made under subsection (2).

Order in council

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Justice, made on the advice of the Commissioner, exempt any class of agreements or arrangements from the application of subsection 45(1) .

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 6. Civil strategic alliances provisions

Civil strategic alliances

79.11. (1) Where, on application by the Commissioner, the Tribunal finds that an agreement or arrangement between two or more persons prevents or lessens or is likely to prevent or lessen competition substantially in a market, the Tribunal may make an order prohibiting all or any of the parties to the agreement or arrangement from doing anything or continuing to do anything under the agreement or arrangement.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that an agreement or arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in a market solely on the basis of evidence of concentration or market share.

Factors to be considered regarding prevention or lessening of competition

(3) In determining, for the purpose of this section, whether or not an agreement or arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(*a*) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(*b*) whether the business, or a part of the business, of a party to the agreement or arrangement has failed or is likely to fail;

(*c*) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(*d*) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the agreement or arrangement on such barriers;

(*e*) the extent to which effective competition remains or would remain in a market that is or would be affected by the agreement or arrangement;

(*f*) any likelihood that the agreement or arrangement will or would result in the removal of a vigorous and effective competitor;

(*g*) the nature and extent of change and innovation in a relevant market;

(*h*) whether the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or product choices, and that would not likely be attained in the absence of the agreement or arrangement; and

(*i*) any other factor that is relevant to competition in a market that is or would be affected by the agreement or arrangement.

Non-application

(4) Subsection (1) does not apply in respect of an agreement or arrangement

(*a*) between federal financial institutions that is described in subsection 49(1);

(*b*) that is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or

(*c*) in respect of which notice must be given under Part IX.

Where proceedings commenced under section 45, 79 or 92

(5) No application may be made under this section against a person

(*a*) against whom proceedings have been commenced under section 45, or

(*b*) against whom an order is sought under section 79 or 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45, 79 or 92, as the case may be.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

Additional or alternative order

79.12. (1) Where, on an application under subsection 79.11(1), the Tribunal finds that grounds exist for making an order under section 79.11 but that an order under that section is not likely to restore competition in the market, the Tribunal may, in addition to or instead of making an order under that section, make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the agreement or arrangement in that market.

Limitation

(2) In making an order under subsection (1), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 7. Clearance certificate

Certificate in relation to section 45

124.3.(1) Where, on the application of a party to an agreement or arrangement or proposed agreement or arrangement, the Commissioner determines not to refer the matter to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against section 45, the Commissioner may issue a certificate to that effect.

Certificate in relation to civil strategic alliance

(2) Where, on the application of a party to an agreement or arrangement or proposed agreement or arrangement, the Commissioner is satisfied that sufficient grounds do not or would not exist to apply to the Tribunal under section 79.11, the Commissioner may issue a certificate to that effect.

Duty of Commissioner

(3) The Commissioner shall consider any application for a certificate under this section as expeditiously as possible.

Validity of certificate

(4) A certificate issued under subsection (1) or (2) is valid only on the basis of the same or substantially the same facts as the facts on the basis of which the certificate was issued

Regulations

(5) The Governor in Council may make regulations respecting the procedure to be followed in respect of an application made under subsection (1) or (2), including the information to be contained in the application.

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 8. Reforming the pricing provisions

Subsection 78(1) of the Act is amended by adding the following after paragraph (*i*):

(*i*.1) selling products at a price below avoidable cost for the purpose of disciplining or eliminating a competitor or impeding or preventing a competitor's entry into, or expansion in, a market;

Please note that the draft provisions do not necessarily represent the position of the Government of Canada and should not be taken as such.

APPENDIX 9. Market references

124.4. (1) The Commissioner may ask the [*Canadian International Trade Tribunal*] to inquire, in accordance with terms of reference approved by the Minister of Industry, into the state of competition and the functioning of markets in any sector or subsector of the Canadian economy.

(2) The [*Canadian International Trade Tribunal*] shall conduct the inquiry, submit a report to the Commissioner and the Minister of Industry and cause notice of its submission to be published in the *Canada Gazette.*

(3) The Minister of Industry shall cause of copy of the report to be tabled before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is submitted.