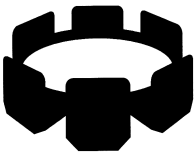
# National Consultation on the Competition Act

# Final Report

## April 8, 2004



Public Policy Forum
Forum des politiques publiques

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## About the Public Policy Forum

The Public Policy Forum (PPF) is a national, independent, non-profit organization aimed at improving the quality of government in Canada through better dialogue between the public, private and voluntary sectors. The Forum's members, drawn from businesses, federal and provincial governments, the voluntary sector and the labour movement, share a common belief that an efficient and effective public service is a key element in ensuring our quality of life and global competitive position.

Established in 1987, the Public Policy Forum has gained a reputation as a trusted, neutral facilitator, capable of bringing together a wide range of stakeholders in productive dialogue. Its research program provides a neutral base to inform collective decision-making. By promoting more information sharing and greater linkages between governments and other sectors, the Public Policy Forum ensures that Canada's future directions become more dynamic, coordinated and responsive to the challenges and opportunities that lie ahead.

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# Executive Summary

In June 2003, the Government of Canada launched extensive consultations to obtain public comments on proposed legislative changes to the *Competition Act.* The Public Policy Forum was mandated to steer this consultation process which allowed interested parties to participate in a constructive dialogue and to discuss solutions to the challenge of modernizing the *Competition Act*.

Intervenors were invited to comment on the following set of proposals for amending the *Competition Act*:

- Strengthening the civil provisions of the *Competition Act* with administrative monetary penalties (AMPs), restitution and civil cause of action;
- Reforming the conspiracy provisions;
- Reforming the pricing provisions; and,
- Allowing for inquiries into the functioning of markets in Canada.

The consultation process included two phases: a submission phase and a roundtable phase. During the submission process, stakeholders and interested parties were invited to submit written comments on the proposed amendments to the *Act*. The written comments were posted on the Public Policy Forum website and a summary of the comments was prepared and made public in October 2003 (Annex I).

In November and December 2003, roundtables were held across Canada, in Vancouver, Calgary, Winnipeg, Toronto, Ottawa, Montreal, and Halifax. Participants included representatives from small, medium and large businesses, consumer and business associations, the federal, provincial and territorial governments, and not-for-profit organizations (Annex II).

This report is based on an analysis of comments received from intervenors in both the submission and roundtable phases, and has been presented to the Commissioner of Competition. The following general observations can be made about the consultations:

- The *Competition Act* is a technical and complex piece of legislation that brings together law and economics. Larger firms were more likely to make a submission or to participate in the roundtable process than small business or consumer representatives. Concerns have been expressed by some that consultations on proposed amendments to the *Competition Act* may not fully capture the views of small and medium enterprises because they often lack the necessary technical and financial resources to participate fully.

- Some intervenors explained that the duty to consider consumer interest is elevated in Canada, since the consumer movement is relatively small and not active in bringing forward competition issues. They observed that instead of simply thinking along the lines of business interests, the Government should attempt to consider the effects of the options on society as a whole.

- Many intervenors felt that the *Competition Act* is successful in deterring anti-competitive behaviour and in encouraging competition, and that the case had not been made in the

Discussion Paper for implementing many of the proposals. They argued that further study was needed and more evidence required before moving forward.

- The effectiveness of competition policy in a global environment was raised. Some intervenors indicated that it was important to increase convergence of competition laws around the world. Others felt that the proposed changes would reduce Canada's competitive advantage in a globalized marketplace and would make Canada a less attractive place to do business.

The following is an assessment of what we heard. In the assessments, the term *majority* refers to the number of submissions received and of roundtable participants without necessarily reflecting the number of individuals or organizations they represent.

***Strengthening the Civil Provisions***

- The views on the proposed amendments to the civil provisions were widely divergent. Some of the intervenors, generally representing small and medium business and consumer groups, urged that the proposals were necessary to deter anti-competitive behaviour. The majority of intervenors believed that the civil provisions being suggested were unnecessary and expressed concern that they would have a potentially negative cumulative effect. Should the Government decide to move forward with these proposals, several participants urged an incremental approach. There was no clear preference on which proposal, if any, would be most appropriate.

***Reforming the Criminal Conspiracy Provision***

- Intervenors generally agreed that provisions to deal with hard core cartels should be effective, but they were divided on the need to reform the existing criminal provision. A large majority of intervenors reported concerns with the draft provisions proposed in the Discussion Paper and indicated that any changes should be approached with more study and careful consideration.

***Reforming the Pricing Provisions***

- The majority of the intervenors supported the proposal to decriminalize these provisions based on diverse, and often diverging reasons. A large majority of the intervenors supported these proposals to reform the pricing provisions and agreed that the current provisions can discourage pro-competitive interactions. Some intervenors supported these proposals to increase the effectiveness of the Bureau's enforcement. Considerable disagreement persists on the need to implement AMPs and to expand the civil cause of action for the practices covered by existing pricing provisions.

### *Market References*

- Some of the intervenors were interested in the proposal because they felt that the government should be better informed on industry and the markets. However, they also shared the concerns of the large majority of the intervenors that were opposed to the proposal for market references. Most intervenors expressed concerns about political triggers for such references and the potential high cost for businesses and industry participants. Overall, most participants felt that other alternatives currently exist to assist the government in gaining knowledge of industries and sectors.

## Introduction

Consultations on specific legislative proposals were promised as part of the federal government's response to the April 2002 Report of the House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime.*

In June 2003, the Government of Canada launched extensive consultations to obtain public comments on proposed legislative changes to the *Competition Act.* The proposed changes are outlined in a Discussion Paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace.* The Public Policy Forum was mandated to steer this consultation process. Through this consultation process, interested parties could participate in a constructive dialogue and discuss solutions to the challenge of modernizing the *Competition Act*.

## Methodology

The public consultation process included a submission phase and a roundtable phase. Through the submission process, stakeholders and interested parties, including representatives from small, medium and large businesses, consumer and business associations, labour, the federal, provincial and territorial governments, and not-for-profit organizations, were invited to submit written comments on the proposed amendments to the *Act* by September 30, 2003. Over 100 intervenors responded to the invitation to comment on the proposed changes to the *Competition Act* by making a submission. The written comments were posted on the Public Policy Forum website and a summary of the comments was prepared and made public on October 31, 2003 (Annex I).

The roundtable phase commenced in November and was completed by December 2003. Roundtables were held across Canada, in Vancouver, Calgary, Winnipeg, Toronto, Ottawa, Montreal, and Halifax. Participants included representatives from small, medium and large businesses, consumer and business associations, the federal, provincial and territorial governments, and not-for-profit organizations (Annex II).

The following report is based on an analysis of comments received from intervenors in both the submission and roundtable phases, and has presented to the Commissioner of Competition.

## General Observations

The following general observations can be made about the consultations:

- The *Competition Act* is a technical and complex piece of legislation that brings together law and economics. Larger firms were more likely to make a submission or to participate in the roundtable process than small business or consumer representatives. Concerns have been expressed by some that consultations on proposed amendments to the *Competition Act* may not fully capture the views of small and medium enterprises because they often lack the necessary technical and financial resources to participate fully.

- Some intervenors explained that the duty to consider consumer interest is elevated in Canada, since the consumer movement is relatively small and not active in bringing forward competition issues. They observed that instead of simply thinking along the lines of business interests, the Government should attempt to consider the effects of the options on society as a whole.

- Many intervenors felt that the *Competition Act* is successful in deterring anti-competitive behaviour and in encouraging competition, and that the case had not been made in the Discussion Paper for implementing many of the proposals. They argued that further study was needed and more evidence required before moving forward.

- The effectiveness of competition policy in a global environment was raised. Some intervenors indicated that it was important to increase convergence of competition laws around the world. Others felt that the proposed changes would reduce Canada's competitive advantage in a globalized marketplace and would make Canada a less attractive place to do business.

## What We Heard

Intervenors were invited to comment on the following set of proposals for amending the *Competition Act*:

- Strengthening the civil provisions of the *Competition Act* with administrative monetary penalties (AMPs), restitution and civil cause of action;
- Reforming the conspiracy provisions;
- Reforming the pricing provisions; and,
- Allowing for inquiries into the functioning of markets in Canada.

Each section in the following report describes the options that were presented to the intervenors, and provides an analysis of comments received from intervenors in both the submission and roundtable phases.

At the end of each section, we provide an assessment of what we heard. In the assessments, the term *majority* refers to the number of submissions received and of roundtable participants without necessarily reflecting the number of individuals or organizations they represent.

## Strengthening the Civil Provisions

The House of Commons Standing Committee on Industry, Science and Technology ("Committee") originally recommended in its April 2002 Report that the *Act* have the necessary incentives to promote compliance with the civil reviewable matters provisions. The Government, in the Discussion Paper, outlines three proposals to strengthen the civil provisions of the *Competition Act*:

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

### Administrative Monetary Penalties (AMPs)

Option

The House of Commons Standing Committee on Industry, Science and Technology recommended giving the Competition Tribunal the power to impose AMPs, at its discretion, as a remedy against persons that were found to have contravened certain civil provisions of the *Act* (e.g. refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and abuse of dominant position). The government agreed with this proposal and also recommended removing the statutory maximum on AMPs currently available against non-criminal misleading advertising and false representations.

The general purpose for this option is to increase the incentives for business to comply with the civil provisions of the Act by increasing the range of remedies available to the Competition

Tribunal. It is aimed at ensuring coherence and consistency across all civil reviewable matters (except mergers), and increasing convergence with the competition laws of other jurisdictions.

Comments

The supporting intervenors agreed with the Discussion Paper that AMPs were a valuable means to enhance the competitive environment in Canada. They offered the following reasons for their support:

- Supporters pointed to the need for a wider range of available remedies, since current remedies provide little incentive for business to comply with the *Act* in a timely manner. Activities covered by the civil provisions can have a serious and negative impact on the economy. Remedies under the Competition Act should, therefore, go beyond a cease and desist order or an order to restore competition.

- They disagreed that the relatively small number of cases brought before the Competition Tribunal and the Competition Bureau's enforcement track record were indicative of a healthy competitive environment in Canada. They suggested that anti-competitive acts were occurring in all sectors of the economy because proper remedies did not exist in the *Act* to address them.

- Some supporters of the AMPs also suggested that the Tribunal should be free to set the amount of the penalties depending on the circumstances of the case. To impose a 'hard limit' by setting a definitive amount in the legislation would become burdensome over time, as it would require a periodic adjustment to the amount as inflation in the economy grew.

- The decriminalization of conspiracy and pricing provisions should be accompanied by adequate incentives to encourage compliance with the *Act*, such as AMPs. In the case of predatory pricing, for example, it was suggested that current existing civil remedies offer few practical benefits.

- Some Canadian respondents indicated that their foreign colleagues were surprised that Canadian legislation did not have any financial penalties for civil matters. Most of Canada's trade partners have monetary remedies, available in one form or another, to enforce non-criminal competition law provisions. Some foreign respondents also pointed out that the implementation of civil monetary penalties has been successful in their respective jurisdictions.

Intervenors who opposed the implementation of AMPs offered the following reasons for their concerns:

- The imposition of AMPs would lead to a fundamental change in the character of the civil provisions. Opponents of the proposal argued that the civil provisions were originally enacted without monetary penalties because it was recognized that the behaviour targeted by AMPs was not inherently anti-competitive, and could even have neutral or beneficial effects on

competition. Reviewable conduct becomes prohibited only after a determination by the Competition Tribunal that they are anti-competitive. Accordingly, it was considered appropriate that penalties be limited to forward-looking remedies (such as cease and desist orders and orders designed to restore competition).

- They argued that AMPs were unwarranted and should not be expanded because of their punitive nature. Opponents claimed that AMPs are equivalent to fines. They saw the proposal that places the amount of AMPs at the discretion of the courts as further evidence that AMPs aim to punish rather than merely promote compliance. They questioned the constitutional validity of this remedy and cautioned against introducing AMPs without also including customary criminal law safeguards. The addition of AMPs would blur the line between civil and criminal conduct.

- Opponents indicated that the case for reform is insufficient, and point to the Competition Bureau as having failed to provide evidence that the current remedies are inadequate in achieving their compliance goals. They argued that AMPs are unwarranted because firms are sufficiently deterred by the current provisions, by high costs associated with long and drawn-out legal proceedings and by the effect an investigation by the Bureau may have on their reputation.

- They felt that AMPs would have a harmful and chilling effect on the Canadian economy because it would place law-abiding companies on the defensive. The proposed amendments would have the undesirable impact of deterring pro-competitive business practices. AMPs would undermine incentives to develop new products. Furthermore, intervenors indicated that the cumulative effects of proposals to strengthen the civil provisions would overexpose firms to financial liability and increase the chilling effect.

Some intervenors provided possible modifications and alternatives to the proposal for AMPs:

- Should the government decide to move forward with the option, some intervenors suggested that the Government adopt an incremental approach to the strengthening of civil provisions.

- Some intervenors favoured a limited AMP with a statutory maximum similar to that in Part VII.1 (that is, $100,000 for a first instance and $200,000 for subsequent orders) or as is used in the European Union, whereby a penalty of up to 10% of the annual turnover of the company for the previous year can be imposed. It was argued that a cap on AMPs based on the percentage of a business' gross income would serve as an excellent incentive for businesses to comply while adding sufficient clarity for risk assessment.

- Some acknowledged that AMPs may be acceptable, but only in clear cases of abuse of dominance.

- Some participants suggested including a qualified provision where a business "should have known or ought to have known" that the activity was anti-competitive in order to be made subject to AMPs.

- Some suggested that a task force of experts be struck to study whether AMPs are necessary and / or desirable under the *Competition Act.*

- Others suggested that rather than imposing AMPs, the Government should increase the budget of the Competition Bureau to allow for more effective enforcement of the *Act*.

- Some participants suggested that the Bureau should also make efforts to improve the Tribunal's injunctive process. It was argued that a speedier process would prove to be a more useful tool to small business than AMPs.

Assessment

The views on the proposal for AMPs were widely divergent. Some participants regarded the proposal as a positive step towards increased effectiveness of the civil provisions. They supported AMPs as a good incentive for businesses to comply with the *Act* in a timely fashion. The majority of intervenors, however, were opposed to the proposal. They submitted that their was no basis for introducing AMPs and that AMPs would put an additional burden on firms to conduct careful analysis of their practices, hence, hindering the competitive environment. Some participants put forward a number of alternatives that could be carefully considered with a view to arriving at other solutions.

## Restitution

Option

The Discussion Paper proposes that persons found to have engaged in misleading advertising pursuant to subsection 74.01 (1) a) of the *Act* [representation to the public that is false or misleading in a material respect] may be ordered to make restitution to misled consumers.

The proposals also contemplate that the Commissioner of Competition could apply to the Competition Tribunal or a court to obtain an accessory order freezing the assets of the target to ensure that money is available for restitution. A restitution fund would be court administered (via the respondent or a fund administrator) and any remaining balance in the fund may be allocated to a non-profit organisation benefiting persons in circumstances similar to those who were entitled to restitution.

Restitution is proposed as a remedy that intends to encourage businesses to comply with the *Act*. It is an additional measure that deals specifically with consumer loss. The general purpose of this proposal is to ensure that consumers deceived by advertisers' false representations will be able to obtain compensation.

Comments

Intervenors supporting the proposal for restitution offered the following reasons:

- There is currently no practical way to compensate consumers for the harm they have suffered or to make firms accountable to consumers for their misleading claims. Restitution is an essential remedy in dealing with false and misleading business practices.

- Some intervenors voiced their frustration with the lack of effective remedies for consumers in the *Competition Act*. Supporters explained that they felt the consumer is the very cornerstone of competition policy in Canada. Instead of simply thinking along the lines of business interests, the Government should attempt to consider the effects of the options on society as a whole. The duty to consider consumer interest is elevated in Canada, since the consumer movement is relatively small and not active in bringing forward competition issues.

- Some participants pointed to the experience of foreign competition agencies with restitution to reinforce the usefulness of this remedy for consumers.

- Most supporters of the proposal also indicated that they were more likely to agree that the remaining balance of any restitution fund be given to a non-governmental organisation as was suggested in the Discussion Paper.

Intervenors who opposed restitution offered the following reasons for their concerns:

- The power to order restitution is unnecessary and duplicative. They indicated that the Bureau has failed to justify the inclusion of this remedy or to provide sufficient details as to its proposed implementation. The Tribunal, it is argued, already has the power to award AMPs in cases of deceptive marketing practices, and the Discussion Paper proposes to expand the statutory cause of action to allow injured consumers to sue for and recover damages in cases of reviewable misleading advertising and deceptive marketing practices. In short, there are already ample enforcement measures available to take corrective action, including criminal proceedings, without the need to turn to restitution orders.

- The risk of cumulative remedies will chill lawful competitive advertising. The intervenors expressed the view that adding restitution as an available remedy may discourage companies from engaging in conduct that is legal. If all the proposed reforms were to be enacted (i.e. AMPs at the discretion of the court, private actions for recovery of damages, restitution and accessory orders) it is likely to cast a 'chill' over all forms of aggressive competitive advertising.

- Providing for restitution orders is an inappropriate shift of emphasis towards consumer protection. Intervenors argued that the focus of the Bureau's work should be on the protection of the competitive process as a whole and not on individual consumers. They also noted that restitution is already available in provincial consumer protection legislation.

- Restitution is warranted only for criminal matters. Intervenors raised that misleading advertising can be pursued under both criminal and civil tracks. If the conduct meets the criminal test (knowingly or recklessly), restitution is already available under the *Criminal Code*, and injured consumers can sue for damages under section 36. They added that restitution should not be introduced to deal with 'fly by night' fraudulent operations since they are best dealt with under section 52 (criminal regime), section 36, and the Mareva injunctions.

- Those opposed to the proposal generally objected to the creation of a restitution fund that would invest any remaining balance towards the operations of a non-profit organization. They thought that the funds remaining in a fund should be returned to the respondent, and indicated that to deal with them any other way would not amount to restitution.

- They cautioned against the costs associated with identifying affected persons, determining entitlements and administering restitution. They expressed concern with the impact of the costs that business would incur in preparing and defending themselves against this type of action (discovery costs).

Some intervenors indicated possible suggestions and modifications:

- Should the government decide to move forward with the proposal, some intervenors submitted they would urge the Government to adopt an incremental approach to strengthening civil provisions or require that the Tribunal choose one remedy between restitution, AMPs or damages.

- Some indicated that restitution should be limited to the amount paid by the consumer plus an appropriate level of interest.

- Some intervenors recognized that such a regime can be complex, time-consuming and costly. Hence, they suggest defining restitution in more detail in regulations, guidelines or even by incorporating "class action" legislation in the *Act*. Some suggested that clarification of certain technical issues, such as the treatment of negotiated settlements, partial return to consumers and disbursement, is necessary before moving forward.

- They suggested allowing easy access to restitution as well as affording a venue for victimized consumers to have a say in the choice of remedies requested by the Commissioner.

- Some intervenors suggested that the proposal for restitution should be compatible with provincial legislation.

- One intervenor suggested that a good way to spend the leftover monies would be to apply them to the Competition Bureau for enforcement purposes.

Assessment

The views expressed on the appropriateness of the proposal for restitution varied substantially depending on the intervenors. Some participants believed this remedy would offer practical access to compensation for consumers harmed by false claims. However, a majority of participants disagreed with the introduction of a restitution mechanism under the *Act*. They suggested that other more suitable alternatives were currently available to consumers to obtain compensation such as provincial legislation and criminal proceedings. A point of major concern expressed by many participants was the potential duplicative effect of restitution with the proposal to expand a civil cause of action under section 36.

## Civil Cause of Action

Option

Section 36 of the *Competition Act* currently enables private parties to sue for damages suffered as a result of conduct contrary to any criminal provisions of the *Act* or a violation of a Tribunal order made pursuant to the civil provisions of the *Act*. There is no right to recover damages suffered as a result of non-criminal conduct. The Discussion Paper proposes to expand the statutory cause of action under section 36 to create a new cause of action for damages resulting from non-criminal conduct where the Tribunal has made an order.

This proposal responds to the Committee's call for more measures to increase the effectiveness of the reviewable matters provisions. The general purpose of this proposal is to ensure availability of relief for persons injured by non-criminal anti-competitive behaviour. It is aimed at encouraging timely and meaningful compliance with the *Act* and increasing convergence with the competition laws of other jurisdiction.

Comments

A number of intervenors supporting the expansion of a civil cause of action repeated the arguments stated in reference to AMPs and the restitution proposal. Supporters pointed to the need for a wider range of available incentives, and for a concerted effort to align Canada's competition laws with trade partners. They offered the following additional reasons for their support:

- Allowing persons having suffered damages to recover their losses in a civil court can further the purposes of the *Competition Act*.

- The ability to recover damages for harm suffered as a result of non-criminal anti-competitive conduct would increase the effectiveness of the *Act*.

- Civil cause of action would be beneficial to injured consumers because it provides for a means to obtain compensation.

- As proposed, this option strikes an appropriate balance between the need for additional incentives and protection against strategic litigation. Overall, it is scaled to conduct, provides a higher level of deterrence and compensates injured persons.

- There are advances internationally towards allowing injured persons to sue for damages in competition matters.

- This is a recourse that businesses are familiar with.

The intervenors who opposed the expansion of a civil cause of action, for the most part, repeated the objections that were stated in reference to AMPs and the restitution proposal. Overall, opponents do not believe that the Discussion Paper has adequately demonstrated the case for expanding the right of private parties to sue for damages for civil conduct, and warn of a chilling effect that may deter pro-competitive conduct.

Intervenors opposed to the proposal for civil cause of action offered the following reasons:

- The Government had given assurances to stakeholders that damages in the context of private access to the Tribunal would not be available and that this issue would be revisited in June 2004. Some intervenors felt that the introduction of this option would signal a policy reversal.

- Others viewed the introduction of this proposal as premature and explained that there is a need to gain more experience with private access to the Competition Tribunal.

- They were concerned that exempting consent agreements would give the Commissioner overwhelming settlement leverage. However, other participants also indicated that they would be deterred from entering into consent agreements with the Commissioner if such agreements would be subject to an action in damages.

- Intervenors expressed concern with the increased risk of strategic litigation that might result from this proposal.

- Some intervenors argued that civil cause of action would bring Canada closer to an American-style litigation system.

- They argued that the proposal would turn reviewable matters into torts.

- They suggested that contract and tort law already provide for an extensive legal framework in private commercial matters.

- They expressed concern with the impact of the costs that business would incur in preparing and defending themselves against this type of action (discovery costs).

As an alternative to the current option, some participants recommended that a complete and real civil recourse mechanism be introduced that is not dependent on the Commissioner of

Competition and the Competition Tribunal. It was also proposed to incorporate class action legislation in the *Competition Act.*

Some of the intervenors opposed to AMPs and restitution seemed more agreeable to the proposal to expand section 36. Facing a choice between civil remedies and a statutory cause of action amendment, some opponents would choose an expanded right of action instead of either AMPs or restitution.

Assessment

Supporters argued that the right for business and individuals to sue for damages caused by non-criminal anti-competitive conduct is essential and should be allowed. A majority of intervenors opposed this proposal for a variety of reasons as outlined above, such as the risk of strategic litigation.

### Overall Assessment of the Proposals to Strengthen Civil Provisions

The views on the proposed amendments to the civil provisions were widely divergent. Some of the intervenors, generally representing small and medium business and consumer groups, urged that the proposals were necessary to deter anti-competitive behaviour. The majority of intervenors believed that the civil provisions being suggested were unnecessary and expressed concern that they would have a potentially negative cumulative effect. Should the Government decide to move forward with these proposals, several participants urged an incremental approach. There was no clear preference on which proposal, if any, would be most appropriate.

## Reforming the Criminal Conspiracy Provision

The Committee recommended a dual-track approach for agreements between competitors with a voluntary clearance system. To build on this recommendation, the Discussion Paper proposed a regime that would include the following main components:

- a criminal provision that would explicitly define clearly egregious anti-competitive 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.

Option

The option outlined in the Government's Discussion Paper proposes to create a 'two-track' approach to deal with agreements amongst competitors. The reformed criminal section 45 would only apply to hard-core cartels (exhibiting behaviours such as price fixing, market allocation and output restriction) while other types of agreements between competitors would be reviewed under a new civil provision. The current criminal conspiracy offence, which requires proof of an "undue lessening of

competition", would be replaced with a new offence making certain types of agreements amongst competitors or potential competitors illegal *per se* (i.e. without a competition test). The civil provision would deal with other types of agreements and would include a competition test and an efficiency factor. The civil provision would also be subject to AMPs with a civil cause of action.

The Discussion paper also proposes the establishment of a voluntary clearance system to help screen out pro-competitive strategic alliances.

The general purpose of this option is to effectively deter and punish hard core cartel behaviour, which has no redeeming social or economic benefit. It is intended to provide certainty and predictability for the business community in order to encourage pro-competative partnerships. It is aimed at increasing compatibility with the competition laws of other jurisdictions.

## Criminal Conspiracy Provision (Section 45)

Comments

Most of the contributors who supported the proposal to reform Section 45 of the *Competition Act* stated that there is a need to modernize the conspiracy provision. Some argued that the guilty pleas obtained in Canada against hard-core cartel cases are never independent of prosecutions in foreign jurisdictions and that Canada's prosecutorial record is extremely low when compared to any other country. Some also raised the inappropriateness of proving economic concepts under a criminal burden of proof.

However, most of those in favour suggested that any changes should be approached with caution. Several respondents expressed one or more of the concerns that were shared by intervenors objecting to the proposed reforms. Concerns that the changes would be over-inclusive, would cause a 'chill' in the business climate, or would become burdensome in the implementation phase, left many respondents suggesting that more thought and dialogue was necessary. Overall, supporters indicated that the weaknesses in the draft provisions could be addressed, and that with the necessary alterations the reforms would substantially improve Canada's competitive environment.

Intervenors who supported the notion of the dual-track reform of section 45 expressed strong concerns about the merits of the proposal as presented. The following, which were also raised by opponents of the reform, were mentioned as areas of concern:

- The phrase "persons who compete or could reasonably be expected to compete" goes beyond the concept of potential competitors, possibly including horizontal agreements that are not anti-competitive, as well as vertical agreements which most agreed should not be subject to section 45.

- Intervenors recognized the difficulty of drafting a *per se* section 45 that only targets hard-core cartels. The inclusion of an ancillary defense in section 45 was seen by many as an important safeguard against a *per se*'s overreach. However, intervenors criticized the proposed conditions needed to satisfy the defense outlined in the Discussion Paper.

Intervenors who opposed the changes to the conspiracy provision offered the following reasons for their concerns:

- The rationale for change has not been established. They were not convinced that there is general agreement on the need to reform section 45 along the principles of a dual-track approach. Respondents pointed to the lack of evidence that the Commissioner is unable to successfully prosecute 'hard core' conspiracies where it is established that an agreement or arrangement was made among the accused. They argued that the law was sufficiently stringent to deter anti-competitive behaviour and foster compliance.

- The conspiracy offence would become overly inclusive. They voiced concerns about the proposal to remove the "undue lessening of competition" element from the conspiracy offence. The proposal could capture or put at risk many legitimate agreements and activities among parties for which a criminal sanction would be inappropriate.

- Other respondents cautioned that it would be very difficult to find language that clearly distinguishes hard-core cartel conduct without sweeping in arrangements among competitors that are pro-competitive in nature.

At some roundtables, intervenors discussed possible alternatives to the current proposal. One such alternative, better known as "Professor Trebilcock's proposal", suggests the adoption of a two-track approach whereby the delineation between criminal and civil conduct would be based on a notification system that would provide immunity from criminal prosecution for the businesses notifying the Bureau of proposed agreements. Although some participants were interested in this proposal, many expressed concerns with the determination of the criminal nature of a conduct based solely on the covertness of the activity and the potentially large number of notifications the Competition Bureau would receive.

Other participants preferred a system similar to that in place in the United States, which provides significant prosecutorial discretion to the competition authority. It was suggested that the Canadian system should leave room for discretion on the part of the Attorney General.

It was suggested that the evidentiary complexities related to the current section 45 could be addressed with minor revisions to the substance of the provision.

Some commentators also raised concerns about the existing defences, in particular suggesting that the exemption related to the export of products from Canada remain in any reform of section 45. They were informed that there was no intention at this time to eliminate the "export defence". Since this "export defence" has international implications, they were invited to follow developments in international fora. Some participants suggested that the existing statutory defences provide clarity to the public and all should be kept in the legislation. They were informed that some were kept in the draft proposal and some were not because the proposal contains substantive changes which mean that certain defences are no longer relevant.

Some participants asked about the impact of the proposal on the common law defence of regulated conduct. They were informed that this was an issue that would need to be addressed

either through the substantive changes made to the language of a reformed section 45 provision or through a specific amendment dealing with regulated conduct.

## Civil Strategic Alliances Provision

Assuming that the reform of the criminal provision took place, commentators were divided on the need for a new civil strategic alliance provision. Some generally agreed with the approach of the proposal for alliances, especially since the review of alliances would resemble that of mergers.

Others were opposed, and raised the following points:

- A new civil strategic alliance provision is not required and could create a "chill" among businesses. Some intervenors argue that the merger provisions and the abuse of dominance provision are sufficiently broad and contain effective remedies to correct single or joint anti-competitive behaviour. A new civil strategic alliance provision is, therefore, simply unnecessary.

- Other respondents cautioned that it would be very difficult to find language that clearly distinguishes hard-core cartel conduct without sweeping in arrangements among competitors that are pro-competitive in nature.

- Some intervenors addressed the "chilling effect" assertion made in the Discussion Paper with a recommendation to revise the enforcement guidelines rather than making the sweeping arrangements suggested for section 45 of the *Act*.

At some roundtables, intervenors discussed the treatment of efficiencies proposed in the draft civil strategic alliances provisions, as well as the role of efficiencies under the Act generally and the approach proposed in Bill C-249. Although intervenors agreed that efficiencies ought to be considered in the review of strategic alliances and mergers, opinions diverged on how best to deal with efficiencies in those contexts. Some commentators supported efficiencies as a factor in the overall analysis, whereas some commentators preferred a defence such as the existing efficiencies defence in the merger provisions of the Act.

## Clearance Certificates

- Finally, again assuming that the reform took place, intervenors were divided on the need for clearance certificates. Although some welcomed the certainty and comfort certificates may bring businesses, they cautioned that the proposal did not clearly or sufficiently indicate the scope of the protection brought by certificates, for instance whether certificates bound the Commissioner. They suggested that the certificate process should bring immunity against all civil and criminal liability. Although the proposal is for a voluntary system, several participants agreed that prudent businesses would not be comfortable with taking a chance, and would add the clearance process as a built-in cost of forming a joint-venture or a strategic alliance.

- Some intervenors also advised that if the Government moved forward with the option, a system as efficient as possible, where business could access and benefit from information, would be very beneficial.

- Opponents also submitted that certificates would require substantial time, effort and resources. Moreover, several intervenors indicated that the *Act* already provides a mechanism whereby the Commissioner can issue a binding advisory opinion, which is essentially the same as issuing a clearance certificate. Opponents added that clearance certificates would not be sufficient to address the uncertainty created by the proposed changes. In fact, many predicted that clearance certificates would require resources (i.e. time, effort) that parties to strategic alliances and joint ventures could ill afford.

### Overall Assessment of the Proposals on Reforming the Criminal Conspiracy Provisions

Intervenors generally agreed that provisions to deal with hard core cartels should be effective, but they were divided on the need to reform the existing criminal provision. A large majority of intervenors reported concerns with the draft provisions proposed in the Discussion Paper and indicated that any changes should be approached with more study and careful consideration.

## Reforming the Pricing Provisions

Option

The Committee recommended that the pricing provisions be repealed and that discriminatory or predatory pricing behaviours be made reviewable matters under the existing provision for abuse of dominant position. The Discussion Paper's proposal for reforming the pricing provisions has two parts:

- to repeal the criminal pricing provisions; and

- to deal with behaviour under the civil provisions using a competition test

The Discussion Paper proposes repealing the criminal price discrimination, promotional allowances, predatory pricing and geographic price discrimination provisions of the *Act*, and that these pricing behaviours could be addressed under the existing provision for abuse of dominance. The Discussion Paper also proposes that predatory pricing be expressly included as an anti-competitive behaviour under section 78 (abuse of dominance) of the *Act*.

The Discussion Paper proposals on the pricing provisions also envisage that the proposed reforms on administrative monetary penalties and civil cause of action would apply to the decriminalized pricing provisions.

The general purpose of this proposal is to increase the effectiveness of enforcement activities against anti-competitive pricing behaviour, while also encouraging aggressive price competition.

Comments

Most commentators supported the proposals to reform the pricing provisions, but for different reasons. Some commentators supporting the proposals to reform the pricing provisions agreed that these practices are not inherently harmful to economic welfare, and can often be beneficial to competition. They stated that the current criminal prohibition against these pricing behaviours can discourage pro-competitive activities. They also agreed that these pricing provisions should not be subject to a criminal prohibition, since competition on prices is generally pro-competitive and should be encouraged. Some participants however, made the point that if these pricing provisions are decriminalized, the Bureau should bring more cases before the Tribunal and increase the effectiveness of its enforcement activities.

*Predatory Pricing*

Most intervenors agreed that predatory pricing can only be anti-competitive if the firm in question has market power and if the anti-competitive act has the effect of preventing or substantially lessening competition in a market. They agreed that dealing with predatory pricing behaviour under the civil provisions and using a competition test would provide a more suitable legal and economic framework within which to assess if a pricing action is anti-competitive. However, a few intervenors suggested that on predatory pricing a criminal prohibition be retained for clearly egregious cases where there is evidence of intent to harm a competitor.

Some intervenors expressed their opposition regarding the recommendation of the Committee to repeal paragraph 79 (1) a) of the *Act* ("substantially or completely control ... a class or species of business"). They felt that it was an important element of the abuse of dominance provision.

Finally, a number of commentators expressed support for the proposal to include predatory pricing as an anti-competitive act under section 78 of the abuse of dominant position provisions of the *Act*. However, they questioned whether the use of 'avoidable cost' was the appropriate measure of cost to be used and whether the legislation needs to include these words specifically.

*Price Discrimination*

Most intervenors agreed that price discrimination and promotional allowances could be dealt with under the abuse of dominance provision. Some intervenors suggested that these provisions could be repealed altogether.

Some intervenors indicated that they were unclear whether the provision on abuse of dominance would adequately address all issues related to price discrimination. They suggested that it might be more appropriate to create a new civil provision to address this issue.

*Administrative Monetary Penalties and Civil Cause of Action*

The intervenors who stated that their support for these proposals was linked with the increased effectiveness of the Bureau's enforcement activities indicated that they would not support these proposals without the inclusion of AMPs and a civil cause of action under the civil provisions.

Many intervenors, however, re-stated their concerns regarding the proposal to implement AMPs and to expand the civil cause of action for civil provisions. Several argued that predatory pricing could be effectively addressed by the proposal even without the addition of AMPs, and felt that the lower burden of proof in a civil setting and the current remedies available under the abuse of dominance provisions are sufficient to deter anti-competitive pricing practices of this nature. They indicated that the Tribunal can impose behavioural remedies that would prevent companies from pricing below avoidable costs and that a prohibition order is often sufficient.

### Overall Assessment of the Proposals on Reforming the Pricing Provisions

The majority of the intervenors supported the proposal to decriminalize these provisions based on diverse, and often diverging reasons. A large majority of the intervenors supported these proposals to reform the pricing provisions and agreed that the current provisions can discourage pro-competitive interactions. Some intervenors supported these proposals to increase the effectiveness of the Bureau's enforcement. Considerable disagreement persists on the need to implement AMPs and to expand the civil cause of action for the practices covered by existing pricing provisions.

## Market References

Option

The option would allow inquiries into the state of competition and the functioning of markets in any sector of the Canadian economy. The Discussion Paper proposes that the Commissioner be allowed to ask an independent body, such as the Canadian International Trade Tribunal (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.

This option is aimed at providing valuable information on industry sectors and contributing to the development of good policies to achieve economic objectives to the benefit of all Canadians.

Comments

Intervenors who supported the market reference proposal agreed with the principle that Canadians should be able to get a sense of the state of competition and the functioning of markets in any sector of the economy. International respondents explained that their competition authorities are vested with similar powers and that they have proven to be valuable assets. Some intervenors also suggested that research inquiries could have value beyond the objectives of the *Competition Act* by informing policy respecting labour, immigration, and employment. They argued that studies could look into a number of societal issues, moving beyond the impact of an industry on the market and competition. Some also agreed that if a tool to investigate industry from a global market perspective was developed and proposed it would be worthwhile considering.

Supporting parties, however, also raised concerns that the opposing intervenors had mentioned, for example, the difficulty of finding the appropriate body to conduct the inquiries. Many of the respondents in favor of market references believe that the CITT is not the appropriate body to conduct inquiries into the state of competition. Some indicated that the Competition Bureau, with its substantial expertise on competition matters and economics, should carry out the inquiries. Others mentioned that they are not aware of any existing organization with the independence, resources, impartiality, and expertise necessary to carry out such inquiries. And finally, some also stated that the establishment of proper procedures to initiate an inquiry is an issue that needs to be discussed in considering the market reference proposal.

Intervenors opposed to the proposal offered the following reasons for their concerns:

- They stated that the Commissioner already has all the tools necessary to properly investigate issues regarding anti-competitive conduct in an industry with a view to determining the facts. While some acknowledged that the Commissioner does not have the power to initiate such an outside inquiry as is being proposed, they point to the Government of Canada and Parliamentary Committees as having the powers to initiate and undertake similar investigations and studies into the state of competition in a number of sectors. Overall, those opposed to the proposal questioned the real need to provide the Commissioner with additional powers of inquiry.

- They indicated that a broad ranging reference into the state of competition in an industry could be time consuming and costly for both industry participants and government. Respondents referred to the government's tendency to launch inquiries into the petroleum industry and cited the significant costs and the failure to substantiate any real shortcomings in the market place.

- They believe that the CITT is not the appropriate body to conduct inquiries and does not have the experience or expertise to analyze markets and competitive effects in competition law terms. They pointed out that the CITT already has broad powers to inquire into economic, trade and commercial issues referred to it by the Governor-in-Council, and several opposed expanding that power by allowing a single Minister to unilaterally direct an inquiry.

- If the proposal was adopted by government, a few intervenors cautioned that the Competition Bureau should not be the designated authority to conduct such inquiries. Market references should be executed by an impartial body, independent of the enforcement authority.

- They suggested that inquiries of this sort can open the door to politically or strategically motivated decision-making that could impose unnecessary costs and burdens on Canadian companies. Gasoline retailing, banking, and airlines were a few examples of industries believed to have been targeted for reasons of diffusing political and popular pressure. They also mentioned that an inquiry into a state of competition may create the perception that there is something anti-competitive about an industry, and is likely to create a public expectation that at the end of the process some action will be taken.

- They indicated that the Discussion Paper makes no mention of procedural safeguards and does not address key process issues such as:

  - the scope of probing powers an investigative body would have;
  - the rights of protection that would be available to those asked to give evidence;
  - whether compelled information could be used in subsequent proceedings;
  - the possibility for industry members to submit, review and challenge evidence; and,
  - the process for conducting inquiries.

- Many felt that these due process and procedural issues need to be discussed before any proper evaluation of the proposal can be undertaken.

## Overall Assessment of the Proposals for Market References

Some of the intervenors were interested in the proposal because they felt that the government should be better informed on industry and the markets. However, they also shared the concerns of the large majority of the intervenors that were opposed to the proposal for market references. Most intervenors worry that these references would be triggered to deal with politically charged issues. They also expressed concerns with the potential high cost for businesses and industry participants of conducting such references. It was indicated that some of these concerns could be alleviated by procedural safeguards. Overall, most participants felt that other alternatives currently exist to assist the government in gaining knowledge of industries and sectors.

# Annex I

## Summary Report on the Submissions by Intervenors

The public consultation process included a submission phase and a roundtable phase. Through the submission process, stakeholders and interested parties, including representatives from small, medium and large businesses, consumer and business associations, labour, the federal, provincial and territorial governments, and not-for-profit organizations, were invited to submit written comments on the proposed amendments to the *Act* by September 30, 2003. Over 100 intervenors responded to the invitation to comment on the proposed changes to the *Competition Act* by making a submission. The written comments were posted on the Public Policy Forum website and a summary of the comments was prepared and made public on October 31, 2003.

The following is the Summary Report on the Submissions by Intervenors.

**Annex I**

# Summary Report on the Submissions by Intervenors

### Introduction

Last June, the Government of Canada launched consultations to obtain public comment on proposed legislative changes to the *Competition Act.* The proposed changes are outlined in a Discussion Paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace.* The Public Policy Forum was mandated to steer this consultation process.

Through this consultation process, interested parties could participate in a constructive dialogue and discuss solutions to the challenge of modernizing the Competition Act. The first step was to invite interested individuals and organizations to provide written comments on the proposed changes. The comments which have been received, as well as other information on the consultation process, have been posted on our web-site at www.ppforum.ca. The submissions have been analyzed, and the following summary discussion document has been prepared to help inform participants at a series of roundtables to be held across Canada.

### What We Heard

Over 80 intervenors responded to the invitation to comment on the proposed changes to the Competition Act. Most intervenors commented on two or more topics. The summary below is based on the key issues identified in the Discussion Paper.

## Strengthening the Civil Provisions

The House of Commons Standing Committee on Industry, Science and Technology ("Committee") originally recommended in its April 2002 Report that the Act have the necessary incentives to promote compliance with the civil reviewable matters provisions. The Government, in the Discussion Paper, outlines three proposals 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.

Written submissions were received from a wide range of intervenors. In general terms, supporters of the proposals to strengthen civil provisions tended to be representatives of small enterprises, consumers, provincial governments, foreign agencies or associations with membership that was predominantly composed of small business. Opponents were generally representatives of large firms, industry associations and lawyers.

### Administrative Monetary Penalties (AMPs)

The Committee recommended to give the Competition Tribunal the power to impose AMPs, at its discretion, as a remedy against persons that were found to have contravened certain civil provisions

of the Act (e.g., refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and abuse of dominant position).

The Government agreed with this recommendation and made a proposal in the Discussion Paper which also proposes to remove the statutory maximum on AMPs currently available against non-criminal misleading advertising and false representations.

The general purpose of this proposal is to increase the incentives for businesses to comply with the civil provisions of the Act by increasing the range of remedies available to the Competition Tribunal.

The supporting submissions agreed with the Discussion Paper that AMPs were a valuable means to enhance the competitive environment in Canada. They offered the following reasons for their support:

- The need to increase the range of remedies available to the Tribunal, since current remedies provide little incentive for business to comply with the Act in a timely manner.

- Most of Canada's trading partners have remedies in the form of monetary penalties to enforce non-criminal competition law provisions. Some of the respondents from foreign countries also indicated that the implementation of AMPs has been successful in their homelands.

Intervenors who opposed the implementation of AMPs, offered the following reasons for their concerns:

- The imposition of AMPs would lead to a fundamental change in the character of the civil provisions. They argued that when the civil provisions were originally enacted, no monetary penalties were provided because it was recognized that such conduct (other than misleading advertising) was not inherently anti-competitive and are often neutral or pro-competitive and efficiency enhancing. Reviewable conduct becomes anti-competitive only after a determination by the Competition Tribunal. Accordingly, it was considered appropriate that penalties be limited to forward looking remedies (such as cease and desist orders and orders designed to restore competition). The addition of AMPs would blur the line between civil and criminal conduct and would require firms to conduct careful analysis of their practices.

- AMPs are unwarranted and should not be expanded because of their punitive nature. They claim that AMPs are fines. They pointed to the proposal to have AMPs at the discretion of the courts as being further evidence that the purpose of AMPs is to punish and not to merely promote compliance. They cautioned against the introduction of AMPs without also including customary criminal law safeguards.

- They indicated that the case for reform is insufficient, and point to the Discussion Paper as having failed to provide evidence to suggest that the current remedies are inadequate in achieving their compliance goals. They argued that, in fact, the contrary is true, with the Competition Bureau being relatively successful in bringing cases under the existing civil provisions.

- AMPs would have a chilling effect on the Canadian economy. They argued that the proposed amendments would have the undesirable impact of deterring pro-competitive business practices. AMPs would undermine incentives to develop new products. Furthermore, they indicated that the cumulative effects of proposals to strengthen the civil provisions would overexpose firms to financial liability and increase the chilling effect.

Certain intervenors indicated possible alternatives to the proposal:

- faced with the impending adoption of the proposals, some intervenors submitted they would urge the Government to adopt an incremental approach to strengthening civil provisions;

- some intervenors suggested a limited AMP similar to that in Part VII.1 ($100,000, first instance/$200,000 for subsequent orders);

- some acknowledged that AMPs may be adequate in clear cases of abuse of dominance;

- some indicated a need to further study whether the adoption of AMPs is necessary or desirable (e.g. by creating a task force on remedies);

- others suggested that the Government should increase the budget of the Competition Bureau.

Although most supporters of the AMPs suggested that the Tribunal should be free to set the amount of the penalties depending on the circumstances of the case, some intervenors offered conditional support to the proposal. These intervenors recognize the existing weaknesses in the Act which warrant the introduction of additional remedies such as AMPs. However, they would lend their support only if the AMPs were limited to clear cases of infringement or to cases where the person ought to have known that their practice was illegal.

One intervenor, however, suggested that while they believe AMPs can play a valuable role in enhancing a regulator's capacity to respond, they would like the Competition Bureau to consider adopting a monetary benefit provision. Such a provision would allow for a maximum penalty to be specified in the Competition Act, but would also allow the Tribunal to increase the maximum amount of a penalty to strip away the "monetary benefit" that would otherwise accrue to the offender because of its conduct (disgorgement). Adopting this principle could be seen as a compromise between those that wish to cap penalties and those that believe the Tribunal should be free to set the amount.

**Restitution**

The Discussion Paper proposes that persons found to have engaged in misleading advertising pursuant to subsection 74.01 (1) a) of the Act [representation to the public that is false or misleading in a material respect] may be ordered to make restitution to misled consumers.

The proposals also contemplate that the Commissioner of Competition could apply to the Competition Tribunal or a court to obtain an accessory order freezing the assets of the target to ensure that money

is available for restitution. A restitution fund would be court administered (via the respondent or a fund administrator) and any remaining balance in the fund may be allocated to a non- profit organisation benefiting persons in circumstances similar to those who were entitled to restitution.

Restitution is proposed as a remedy that will encourage businesses to comply with the Act. It is an additional measure that deals specifically with consumer loss. The general purpose of this proposal is to ensure that consumers deceived by advertisers' false representations will be able to obtain compensation.

Intervenors supporting the restitution proposal offered the following reasons:

- There is currently no practical way of compensating consumers for the harm they have suffered, that firms should be accountable for their misleading claims;

- Restitution is an essential remedy in dealing with false and misleading business practices.

- Some intervenors voiced their frustration with the lack of effective remedies for consumers.

Intervenors who opposed restitution offered the following reasons for their concerns:

- The power to order restitution is not necessary and is duplicative. They indicated that the Bureau has failed to justify the inclusion of this remedy or to provide details as to how it is proposed to be implemented. The Tribunal, it is argued, already has the power to award AMPs, and the Discussion Paper proposes to expand the statutory cause of action to allow injured consumers to sue for and recover damages in cases of reviewable misleading advertising and deceptive marketing practices. In short, there are already ample existing enforcement measures available to the Bureau to take corrective action, including criminal proceedings, without the need to turn to restitution orders.

- The risk of cumulative remedies will chill lawful competitive advertising - They expressed that adding restitution as an available remedy may discourage companies from engaging in conduct that is legal. If all the proposed reforms were to be enacted (i.e. AMPs at the discretion of the court, private actions for recovery of damages, restitution and accessory orders) it is likely to cast a 'chill' over all forms of aggressive competitive advertising.

- Providing for restitution orders is an inappropriate shift of emphasis to consumer protection - They indicated that the restitution proposal signals a significant and inappropriate shift in the Bureau's enforcement practices. Intervenors argued that the focus of the Bureau's work should be on the protection of the competitive process as a whole and not on individual consumers. They also raised that restitution is already available in many provincial consumer protection legislation.

- Restitution is warranted only for criminal matters - Intervenors raised that misleading advertising can be pursued under both criminal and civil tracks. If the conduct meets the criminal test (knowingly or recklessly), restitution is already available under section 36 (right to sue for damages) or under the *Criminal Code*.

- They objected to the creation of a restitution fund that would invest any remaining balance towards the operations of a non-profit organization. They thought that the funds remaining in a fund should be returned to the respondent, and indicated that to deal with them any other way would not amount to restitution.

- They cautioned against the costs associated with identifying affected persons, determining entitlements and administering restitution.

Some intervenors indicated possible alternatives to explore further:

- One intervenor suggested that a good way to spend the left over monies would be to apply them to the Competition Bureau for enforcement purposes.

- Faced with the impending adoption of the proposals, some intervenors submitted they would urge the Government to adopt an incremental approach to strengthening civil provisions or require that the Tribunal choose one remedy between restitution, AMPs or damages.

- Another indicated that restitution should be limited to the amount paid by the consumer plus an appropriate level of interest.

- Some intervenors recognized that such a regime can be complex, time consuming and costly. Hence, they suggest elaborating restitution in more details in regulations, guidelines or even, by incorporating "class action" legislation in the Act.

- They suggested allowing easy access to restitution as well as affording a mean for victimized consumers to have a say in the choice of remedies requested by the Commissioner.

- Most supporters of the proposal also indicated that they were also more likely to agree that the remaining balance of any restitution fund be given to a nongovernmental organization as was suggested in the Discussion Paper.

**Civil Cause of Action**

Section 36 of the Competition Act currently enables private parties to sue for damages suffered as a result of conduct contrary to any criminal provisions of the Act or a violation of a Tribunal order made pursuant to the civil provisions of the Act. There is no right to recover damages suffered as a result of non-criminal conduct. The Discussion Paper proposes to expand the statutory cause of action under section 36 to create a new cause of action for damages resulting from non-criminal conduct where the Tribunal has made an order.

This proposal responds to the Committee's call for more measures to increase the effectiveness of the reviewable matters provisions. The general purpose of this proposal is to ensure availability of relief for persons injured by anti-competitive non-criminal behaviour.

A number of interventions supporting the expansion of a civil cause of action repeated their arguments that were stated in reference to AMPs and the restitution proposal. They offered the following additional reasons for their support:

- allowing persons who have suffered damages to recover their losses in a civil court can further the purposes of the *Competition Act*;
- the ability to recover damages for harm suffered as a result of an abuse of market power can only increase the effectiveness of the Act;
- will be beneficial to consumers;
- limited amendment that balances the need for additional incentives with limiting strategic litigation;
- international trend is making civil cause of action available for violations of certain competition issues.

A number of interventions oppose the expansion of a civil cause of action and for the most, repeat the objections that were stated in reference to AMPs and the restitution proposal. Overall, opponents do not believe that the Discussion Paper has adequately demonstrated the case for expanding the right of private parties to sue for damages for civil conduct, and warn of a chill effect that may deter pro-competitive conduct.

Some additional issues were also raised regarding the necessity of this proposal:

- Reversal of policy - the Government had given assurances to stakeholders that damages in the context of private access to the Tribunal would not be available and the issue of private enforcement would be revisited in June 2004.
- This proposal is premature - need to gain more experience with private access to the Competition Tribunal.
- Exempting consent agreements will give the commissioner overwhelming settlement leverage.
- Risk of strategic litigation.
- Risk of bringing Canada closer to an American-style litigation arena.
- The proposal will turn reviewable matters into torts.
- Contract and tort law already provide for an extensive legal framework in private commercial matters.

Some stakeholders in support of an expanded s.36 recognized that complex issues need to be explored further. These include the consequences of multiple plaintiffs, joint and several liability, direct/indirect purchasers. One stakeholder recommended a complete and real civil recourse mechanism that is not dependent on the Tribunal. Another one proposed to have class action legislation incorporated in the *Competition Act.*

Some of the intervenors opposed to AMPs and restitution, seem more amicable to the proposal to expand s. 36. Facing a choice between civil remedies and a statutory cause of action amendment, a few opponents would choose an expanded right of action instead of AMPs and restitution.

## Reforming the Criminal Conspiracy Provision

The Committee recommended a dual track approach for agreements between competitors with a voluntary clearance system. To build on this recommendation, the Discussion Paper proposed a regime that would 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.

### Conspiracies, Strategic Alliances and Clearance Certificates

The Discussion Paper proposes to create a 'two-track' approach to deal with agreements among competitors. The reformed criminal section 45 would only apply to hard-core cartels (such as price fixing, market allocation and input restriction) while other types of agreements between competitors would be reviewed under a new civil provision. The current criminal conspiracy offence, which requires proof of an undue lessening of competition, would be replaced with a new offence making certain types of agreements among competitors or potential competitors illegal *per se (i.e.* without a competition test).

The Discussion Paper outlines concerns expressed by stakeholders that the existing section 45 is over inclusive, with the result that businesses are 'chilled' against entering into pro-competitive arrangements, and that Section 45 is under inclusive, with the result that hardcore conduct is not adequately deterred.

The Discussion paper also proposes the establishment of a voluntary clearance system to help screen out pro-competitive strategic alliances.

The general purpose of this proposal is to effectively deter and punish hard core cartel behaviour, which has no redeeming social or economic benefit. It will also provide certainty and predictability for the business community in order to encourage pro-competitive partnerships.

Most of the intervenors that support the proposal to reform Section 45 of the Competition Act state that there is a need to modernize the conspiracy provision, and agree that other alliances or

arrangements involving competitors or potential competitors should be dealt with outside the criminal context. However, most of the supporting bodies also suggest that any changes should be approached with caution. Several respondents expressed one or more of the concerns that were shared by intervenors objecting to the proposed reforms. Concerns that the changes would be over inclusive, would cause a 'chill' in the business climate, or would become burdensome in the implementation phase, left many respondents suggesting that more thought and dialogue was necessary. Overall, supporters indicated that the weaknesses in the proposals could be addressed, and that with the necessary alterations the reforms would substantially improve Canada's competitive environment.

Intervenors who supported the notion of the dual-track reform of section 45 expressed severe concerns about the merits of the proposal as presented. The following, which were also raised by opponents of the reform, were raised as areas of concern:

- The phrase "persons who compete or could reasonably be expected to compete" goes beyond capturing the concept of potential competitors thus possibly including horizontal agreements that are not anti-competitive as well as vertical agreements, which most agreed should not be subject to section 45.

- The difficulty of drafting a per se section 45 that only targeted hard-core cartels was recognized. The inclusion of an ancillary defence in section 45 was seen by many as a important safeguard against a per se's overreach. However intervenors criticized the proposed conditions needed to satisfy the defence outlined in the Discussion Paper proposal.

Intervenors who opposed the principle of the dual-track reform of section 45 offered the following reasons for their concerns:

- The rationale for change has not been established. They were not convinced that there is general agreement on the need to reform section 45. Respondents pointed to the lack of evidence that the Commissioner of the Competition Bureau is unable to successfully prosecute 'hard core' conspiracies where it is established that an agreement or arrangement was made among the accused. They agreed that the law was sufficiently tough to deter anti-competitive behaviour and foster compliance.

- The conspiracy offence would become overly inclusive. They voiced concerns about the proposal to remove the "undue lessening of competition" element from the conspiracy offence. The proposal could capture or put at risk many legitimate agreements and activities among parties for which a criminal sanction would be inappropriate.

Assuming that the reform took place, commentators were divided on the need for a new civil strategic alliance provision.

- Supporters generally supported the approach of the proposal for alliances, especially as the review of alliances would resemble that of mergers.

- As well, the majority agreed that efficiencies ought to be included in the review of strategic alliances, though opinions diverged on how best to deal with efficiencies.

Opponents notably raised the following:

- A new civil strategic alliance provision is not required and could create a 'chill' among businesses - Some intervenors argue that the merger provisions and the abuse of dominance provision are sufficiently broad and contain effective remedies to correct single or joint anti-competitive behaviour. A new civil strategic alliance provision is, therefore, simply unnecessary.

- Other respondents caution that it will be very difficult to find language that clearly distinguishes hard core cartel conduct without sweeping in arrangements among competitors that are pro-competitive in nature. As one intervenor states: "it is quite possible that setting up a separate civil regime to review strategic alliances could actually cast a "chill" on such arrangements, rather than achieve the stated objective of facilitating them, and further hamper the ability of Canadian firms to operate effectively in the global market place."

- Another intervenor addresses the "chilling effect "assertion made in the Discussion Paper with a recommendation to revise the enforcement guidelines rather than making the sweeping arrangements suggested for Section 45 of the Act.

Finally, again assuming that the reform took place, intervenors were divided on the need for clearance certificates. Supporters welcomed the certainty and comfort certificates may bring businesses, but raised that the proposal did not indicate sufficiently clearly the scope of the protection brought by certificates, for instance whether certificates bound the Commissioner, and suggested that the certificate process should bring immunity against all civil and criminal liability.

Opponents also submitted that certificates are not required and would entail substantial time, effort and resources. As well, several intervenors indicated that the Act already provides a mechanism whereby the Commissioner can provide a binding advisory opinion, which is essentially the same as providing a clearance certificate. Opponents added that clearance certificates would not be sufficient to address the uncertainty created by the proposed changes. In fact, many predicted that clearance certificates would require resources (i.e. time, effort) that parties to strategic alliances and joint ventures could ill afford.

## Reforming the Pricing Provisions

The Committee 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. The Discussion Paper 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.

The Discussion Paper proposes to repeal the criminal price discrimination, discriminatory promotional allowances, predatory pricing and geographic price discrimination provisions of the

Act, and that these pricing behaviour be exclusively addressed under the existing abuse of dominance provision. The Discussion Paper also proposes that predatory pricing could be included as an anti-competitive act under the abuse of dominance provisions. The general purpose of this proposal is to increase the effectiveness of enforcement activities against anti-competitive pricing behaviour.

Commentators supporting the proposal to reform the pricing provisions agreed that price discrimination and promotional allowances practices are not inherently harmful to welfare, they are often pro-competitive. The current criminal prohibition against these pricing behaviour can discourage pro-competitive interactions. They also agreed that predatory pricing should not be subject to a criminal prohibition as low pricing is generally pro-competitive and it should be encouraged. Low-pricing can only be anti-competitive if the low-pricing firm has market power and the anti-competitive act has the effect of preventing or lessening competition substantially in a market.

In summary, commentators were of the view that the abuse of dominance provisions of the Act provide a more suitable legal and economic framework within which to assess if a pricing action is anti-competitive. However, a few intervenors, mainly associations with membership that was predominantly composed of small business and consumers, suggested that a criminal prohibition be retained for cases where there exists evidence of intent to harm a competitor.

However, commentators supporting the proposal cautioned against the proposal to allow the Competition Tribunal to impose AMPs as a mean to provide sufficient deterrence against anti-competitive price discrimination and predatory pricing. They are of the view that the lower burden of proof in a civil setting as well as the current remedies available under the abuse of dominance provisions are sufficient to deter anti-competitive pricing practices of this nature.

Regarding the recommendation of the Committee to repeal paragraph 79(1)(a) of the Act ("substantially or completely control ... a class or species of business"), some commentators expressed their opposition to this proposal. They feel that it seems reasonable to retain this requirement in the provision because market power is an essential element to demonstrate that competition has been prevented or lessened substantially in a market.

Finally, a number of commentators expressed support for the proposal to include predatory pricing as an anti-competitive act under section 78 of the abuse of dominant position provisions of the Act. However, they questioned whether the use of "avoidable cost" was the appropriate measure of cost to be used to address anti-competitive predatory pricing. As an alternative, the use of "an unreasonably low price" has been suggested.

# 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.

### Market References

The Discussion Paper proposes that the Commissioner be allowed to ask an independent 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.

The general purpose of this proposal is to contribute to the development of good policies to achieve economic objectives to the benefit of all Canadians.

Intervenors that supported the market reference proposal indicated that they agreed with the principle that Canadians should be able to get a picture of the state of competition and the functioning of markets in any sector of the economy. International respondents explained that similar powers are invested in their competition authority and it has proven to be a much valued asset. Another respondent suggested that research inquiries could have value beyond the objectives of the Competition Act by informing policy respecting labour, immigration, and employment.

Supporting parties, however, also raised concerns that the opposing intervenors had mentioned. For example, finding the appropriate body to conduct the inquiries. Many of the respondents in favor of market references believe that the CITT is not the appropriate body to conduct inquiries into the state of competition. Some indicated that the Competition Bureau, with its substantial expertise on competition matters and economics, should carry out the inquiries. Others mentioned that they are not aware of any existing organization with the independence, resources, impartiality, and expertise necessary to carry out such inquiries. And finally, some also stated that the establishment of proper procedures to initiate an inquiry is an issue that needs to be discussed in considering the market reference proposal.

Intervenors opposed to the proposal offered the following reasons for their concerns:

- The Commissioner already has the tools to conduct an investigation. They stated that the Commissioner already has all of the tools necessary to properly investigate issues regarding anti-competitive conduct in an industry with a view to determining the facts. While some acknowledged that the Commissioner does not have the power to initiate such an outside inquiry as is being proposed, they point to the Government of Canada, and Parliamentary Committees as having the powers to initiate and undertake similar investigations and studies into the state of competition in a number of sectors. Overall, those opposed to the proposal questioned the real need to provide the Commissioner with additional powers of inquiry.

- Time and cost. They indicated that a broad ranging reference into the state of competition in an industry could be time consuming and costly for both industry participants and government. Respondents referred to the government's tendency to launch inquiries into the petroleum

industry and cited the significant costs and the failure to substantiate any real shortcomings in the market place.

- CITT is not the appropriate body to conduct inquiries - They believe that the CITT does not have the experience or expertise to analyze markets and competitive effects in competition law terms. They pointed out that the CITT already has broad investigative powers at the discretion of the Governor-in-Council, and several opposed expanding that power by allowing a single Minister to unilaterally direct an inquiry.

- Political concerns and expectations. They suggested that inquiries of this sort open the door to politically or strategically motivated decision making that could impose unnecessary costs and burdens on Canadian companies. Gasoline retailing, banking, and airlines were a few examples of industries believed to have been targeted for reasons of diffusing political and popular pressure.

They also mentioned that an inquiry into a state of competition may create the perception that there is something anti-competitive about an industry, and is likely to create a public expectation that at the end of the process some action will be taken.

- No mention of procedural safeguards. They indicated that the Discussion Paper did not address key procedural and process issues such as:

    1) the scope of probing powers an investigative body would have;
    2) the rights of protection that would be available to those asked to give evidence;
    3) whether compelled information could be used in subsequent proceedings;
    4) the possibility for industry members to submit, review and challenge evidence; and
    5) the process for conducting inquiries.

For some, these due process and procedural issues need to be discussed before any proper evaluation of the proposal can be undertaken.

## Other Issue

Concerns have been expressed by some that consultations on proposed amendments to the Competition Act may be biased against SMEs. There seems to be a perception among members of that community that discussions on proposed changes to competition law legislation were dominated by lawyers and academics who represent mostly large businesses.

# List of Written Submissions on the Proposed Amendments to the Competition Act

Air Canada Pilots Association

Alberta Economic Development, Government of Alberta

Alberta Government Services, Government of Alberta

Aluminium Association of Canada

American Bar Association

Association of Canadian Advertisers Inc.

Association of Canadian Travel Agencies

BCE Inc.

Borden Ladner Gervais LLP

Canada's Association for the Fifty-Plus

Canada's Research-Based Pharmaceutical Companies

Canadian Advanced Technology Alliance

Canadian Association of Chief of Police

Canadian Association of Petroleum Producers

Canadian Automobile Dealers Association

Canadian Bankers Association

Canadian Bar Association

Canadian Booksellers Association

Canadian Cable Television Association

Canadian Chamber of Commerce

Canadian Coalition of Open Shop Construction Associations

Canadian Cosmetic Toiletry and Fragrance Association

Canadian Council of Chief Executives

Canadian Council of Grocery Distributors

Canadian Federation of Independent Business

Canadian Fertilizer Institute

Canadian Franchise Association

Canadian Gas Association

Canadian Independant Petroleum Marketers Association

Canadian Manufacturers & Exporters

Canadian Motion Picture Distributors Association

Canadian Nuclear Association

Canadian Petroleum Products Institute

Canadian Real Estate Association

Canadian Vehicle Manufacturers Association

Canpotex International Pte. Limited

Christian Labour Association of Canada

Commission de la concurrence suisse

Competition Policy Group

CompTIA

Credit Union Central of Canada

Davies Ward Phillips & Vineberg LLP

Department of Finance Canada

Department of Justice, Government of Saskatchewan

Fair Trade Commission of Jamaica

Family Funeral Home Association

Flavell Kubrick LLP

Forest Products Association of Canada

Goodmans LLP

Government of British Columbia

Government of Manitoba

Government of Nova Scotia

Government of the Northwest Territories

Hudson's Bay Company

Human Resources Development Canada

IMC Canada Limited

Imperial Oil Limited

Institute of Communications and Advertising

Insurance Bureau of Canada

Irving Oil Ltd.

Information Technology Association of Canada

Tim Kennish, c/o Osler, Hoskin & Harcourt LLP

Kraft Canada Inc.

Lang Michener Barristers & Solicitors

Literary Press Group of Canada

Manitoba Labour and Immigration

Merit Contract Association

Microsoft Canada

Ministry of Consumer and Business Services, Government of Ontario

Ministry of Transportation, Government of Ontario

Natural Resources Canada

Norwegian Competition Authority

NOVA Chemicals Corp.

Ogilvy Renault LLP

Option Consommateurs

Osler, Hoskin & Harcourt

Ottawa Police Service

Petro-Canada

Pfizer Canada Inc.

Potash Corporation of Saskatchewan Inc.

Prism Sulphur Corporation

Procter & Gamble Canada Inc.

Public Interest Advocacy Centre

Public Service Commission of Canada

Public Works and Government Services Canada

Railway Association of Canada

Stephen Ranney

Retail Council of Canada

RBC Financial Group

Saskatel

Shell Canada Limited

Ms. Carol Steele

Suncor Energy Inc.

Teck Cominco Ltd.

Telpay Incorporated

TELUS

The Canadian Motion Picture Distributors Association

The Canadian Real Estate Association
Professor Thomas W. Ross, Ph.D.

Transport Canada

TSX Group

Ultramar Ltd.

University of British Columbia

VISA Canada Association

Western Economic Diversification Canada

York Truck Centre

Zambia Competition Commission

## Annex II

# List of Roundtable Participants

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Family Funeral Home Association

Mr. Dennis Darby
Vice-Chair
Canadian Cosmetic Toiletry & Fragrance Association

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Canadian Council of Chief Executives

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President & CEO
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Mr. Pierre Dufour
Segeant
Canadian Association of Chiefs of Police

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Canadian Wheat Board

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Director, Law & Corporate Affairs
Microsoft Canada

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Partner, Gowling Lafleur Henderson LLP

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Government of Saskatchewan

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Regional Director
Christian Labour Association of Canada

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Natural Resources Canada

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Professor,
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Forest Products Association of Canada

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