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Closing the Back Door Route to Cartels: The Need to Clarify the Regulated Conduct Doctrine

Report of the C.D. Howe Institute Competition Policy Council

The Competition Bureau should actively engage in competition matters in regulated sectors of the economy, where anti-competitive conduct may be protected by government legislation or authority. This is the consensus view of the C.D. Howe Institute's Competition Policy Council, which held its fourth meeting on November 8, 2012.

Members of the Council held that the Bureau should more clearly delineate the scope of anti-competitive practices that it sees as protected by provincial or federal legislation or delegated authority; and it should be directly engaged in regulatory decisions that potentially impair competition. As well, the Bureau should contribute independent analysis in merger reviews in regulated sectors.

The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, chaired by Finn Poschmann, Vice President, Research at the C.D. Howe Institute, provides analysis of emerging competition policy issues. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions of competition policy and share views with practitioners, policymakers and the public. Konrad von Finckenstein, former Commissioner of Competition and Chairman of the Canadian Radio-television and Telecommunications Commission (CRTC), joined this meeting of the Council as a special guest.

At Issue: The Regulated Conduct Doctrine (RCD) protects cartels, and potentially other forms of anti-competitive conduct, that would otherwise be subject to scrutiny under the *Competition Act* if, according to the Competition Bureau's interpretation, the conduct is authorized by provincial or federal legislation or authority. Although the RCD is prominent in provincially regulated sectors – such as agriculture marketing boards, professional services, energy and alcohol retailing – conduct in federally regulated sectors – such as transportation, telecommunications and broadcasting – may also potentially be protected under the RCD.

The Council would like to thank Robert Mysicka of Stikeman Elliott LLP for providing a briefing note to the Council on the subject of the Regulated Conduct Doctrine.

At the November 8th meeting, the Council addressed the following questions: “Does the RCD, as interpreted and applied by the Bureau, make good law and economic policy? What steps can and should the federal government and the Bureau take to limit the scope and application of the RCD, and how should the Bureau revise its interpretation of the doctrine? In what affected sectors should the Bureau seek to enforce rather than forebear application of the *Act*?”

There was a range of views among the Council members about how the Bureau should refine its view of *Competition Act* enforcement in regulated sectors, which all agreed is currently unclear. Some members contended that the Bureau, in the absence of case law, should develop more detailed guidelines on how the RCD will apply. Others, taking on the perspective of the Bureau, expressed scepticism that it would be willing to engage in such an exercise and, in any event, at least with respect to criminal matters, private litigation will help clarify the RCD’s boundaries over time. There was unanimity, however, on the point that the Bureau should have a role in analyzing the competitive effects of mergers in regulated sectors. The Council concluded that the Bureau should conduct a serious review of the scope, interpretation and economic implications of the RCD, as it has evolved through common law and statute. The Council’s key recommendation is that the Competition Bureau should clarify how the RCD will apply and how the Bureau might act as an advocate of competition in regulated sectors.

The Regulated Conduct Doctrine

The RCD is a common law doctrine – now enshrined in section 45(7) of the *Competition Act* (the *Act*) with respect to cartels – that enables firms in regulated sectors to cite regulatory decisions or direction from other legislation as a defence, or exemption, when pursuing anti-competitive behaviour that likely would be otherwise illegal under the *Act*.¹ The doctrine may harm consumers, or inhibit broader economic efficiency, if it inhibits the Competition Bureau from appropriately enforcing the *Act*.²

The RCD poses particular challenges in a federation, such as Canada, where provincial legislation may offend the competition and efficiency goals of the federal *Act*. The regulation may reflect local preferences, and democratic values may justify respect for such regulatory approaches. On the other hand, the regulation may also be the result of lobbying by concentrated interests, at the expense of local consumers or of producers and consumers located in other provinces.

The Council’s View on the Regulated Conduct Doctrine

The Council addressed the issues of how the RCD should apply to (1) anti-competitive regulated conduct and (2) merger reviews.

1 Available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/page-1.html>.

2 The RCD is summarized by the following ruling in *R. v. Independent Order of Foresters*: “The doctrine simply means that a person obeying a valid provincial statute may in certain circumstances, be exempted from the provision of a valid federal statute. But there can be no exemption unless there is a direction or at least authorization to perform the prohibited act.”

The Bureau's Approach to Anti-Competitive Regulated Conduct

The Council unanimously agreed that the extent to which the RCD protects firms from charges of anti-competitive conduct is needlessly unclear. The group felt the case law defining the extent of the RCD is indeterminate and that the Bureau's bulletin outlining its approach on this matter is vague.³

However, the Council disagreed on how the Bureau should address this matter. Some felt that the Bureau should provide clearer published guidance to firms as to how the RCD might protect anti-competitive conduct, such as the criteria the Bureau will use or by providing examples of when the RCD will apply. Within this group, some expressed a desire that the Bureau state clearly that the RCD should only apply narrowly, giving the Bureau significant scope to protect competition even in regulated industries. Others, however, thought that as a practical matter the Bureau would not want to limit its discretion over whether to accept the RCD in future disputes, and thus would not be likely to publish clearer guidance on its views of the doctrine. There was, however, a consensus that how the RCD applies to potentially criminal anti-competitive conduct will become clearer over time, because directly affected private parties have the capacity to bring cases.⁴

In other instances in which regulatory decisions potentially protect behaviour, some Council members argued that the Bureau could play a useful role in advocating pro-competitive policies as part of the regulatory process. On this view, the Bureau could take on an advocacy role within its constraints – as an independent enforcement agency of the federal government – as an intervener in regulatory proceedings that could direct or authorize anti-competitive behaviour. Such intervention would mean that if a regulator declined to follow the advice of the Bureau, the regulator would be required to state publicly the reasons it believes the anti-competitive behaviour it condoned was in the public interest.

Merger Review

An additional concern with regulated conduct is the potential that firms pursuing pro-competitive mergers may face additional costs or uncertainty because of the requirement that the merging firms earn two separate approvals: one from the regulator, and another from the Bureau. There is also the risk of an excessively strict mergers regime if two bodies, the regulator and the Competition Tribunal, each have a veto. The Council felt that greater clarification of the role of the Bureau and of sector-specific regulators would be appropriate, especially in telecommunications and broadcasting. Some members believed that this could occur through clarification and refinement of the existing parallel CRTC and Bureau review processes. An alternative model would be for the Bureau to analyze the competition aspects of mergers in regulated sectors, exploiting the Bureau's comparative advantage with respect to economic analysis, with the ultimate decision left to the sector-specific regulator who would be required to justify any decision inconsistent with the Bureau's conclusions regarding competition. This is roughly what has arisen in the transportation and financial sectors, in which mergers are subject to approval by the Ministers of Transport and Finance.⁵

3 The Bureau's bulletin is available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>.

4 A recent example is *Fournier Leasing Company Ltd. v. Mercedes-Benz Canada Inc.*

5 Sections 94 (b) and (c) of the *Act* specify that the Competition Tribunal shall not make an order if mergers have been approved as per the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in banking and the *Canada Transportation Act* for federally regulated transportation firms.

Conclusions and Recommendations

The Council unanimously agreed that there should be more clarity on how the RCD applies in regulated sectors. Although there are multiple approaches as to how the Bureau might directly intervene to enforce the *Act*, the Council also recommended that the Bureau be actively engaged in regulated sectors. It should do so in merger reviews in which its opinion on the economic effects of mergers would be otherwise lacking, and it should explicitly identify the economic costs and inefficiencies of the anti-competitive behaviour that is protected by provincial and federal legislation. There was some support within the Council for a relatively narrow interpretation of the doctrine, and thus a relatively broad scope for competition law to apply in regulated sectors.

To these ends, the Council believes that the Bureau should conduct a thorough review of the boundaries of the RCD and examine how it can best promote competition in regulated sectors.

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Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any institution or client.

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