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Canada's Competition Bureau Needs Clarity on When a Strategic Business Alliance Becomes a Criminal Cartel

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

The Competition Bureau should better define and clarify its legal view on when ordinary business practices or strategic alliances will be treated as offences and subject to civil review or criminal prosecution. Otherwise, businesses may be inhibited in their ordinary activities, or inclined to avoid entering strategic agreements with competitors that would be of benefit to Canadian consumers. In addition, the Bureau has not pursued court actions testing the criminal provisions of the recently revised *Competition Act*, and this may have resulted in harmful price-fixing activities going unchecked. This is the consensus of the C.D. Howe Institute's Competition Policy Council, which held its second meeting November 3, 2011.

The Competition Policy Council comprises top-ranked academics and practitioners active in competition policy. The Council, chaired by Finn Poschmann, Vice President, Research at the C.D. Howe Institute, provides analysis of emerging competition policy issues, including those potentially faced by the federal Competition Bureau. 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.

At the November 3 meeting, the Council addressed the following questions: "How can competition policy legislation and enforcement discourage truly anti-competitive agreements without discouraging healthy cooperation? What guidance should the Competition Bureau provide, to better define when an agreement is likely to be subject to criminal prosecution? Are severe potential criminal sanctions for competitor agreements warranted?"

The Council's view is that because illegal price-fixing behaviour can be difficult to detect, the availability of severe criminal sanctions, under the recently amended Section 45 of the *Competition Act*, constitutes an important and desirable deterrent to criminal behaviour. However, the possibility of severe criminal penalties, and the potential for damages and other costs associated with private actions, make clarity essential on what is an offence and whether it will be treated as a criminal matter under Section 45, or a civil matter under the new Section 90.1. Recently increased criminal penalties and civil damages, and uncertainty surrounding their potential application, increase the likelihood that legal chill will forestall socially beneficial business choices.

The Council called on the Competition Bureau to take the necessary steps to clarify its interpretation of the *Competition Act* as to what activities will be treated as potentially criminal offences, or when Section 90.1 will apply. Accordingly, the Competition Bureau should restore its prior practice of issuing binding advisory opinions to firms, when requested, as to whether proposed conduct or a potential business alliance would contravene the *Act*, and be subject to criminal prosecution or civil action. Further, the Bureau should commence criminal proceedings, where appropriate, and intervene in private actions to develop sound and clear jurisprudence regarding competitor agreements.

Criminal Prosecution and Civil Review

Recent amendments to Section 45 of the *Competition Act* defined as a criminal offence and increased the penalties for business conduct perceived as egregiously anti-competitive, such as an agreement among competitors to fix prices, allocate markets or restrict output.[1] The amendments also removed the legal requirement for the prosecution to prove the existence of the economic harm presumed to result from such conduct.

Among the objectives of the reform of Section 45, according to Canada's Competition Bureau, was to remove "the threat of criminal sanctions for legitimate collaborations to avoid discouraging firms from engaging in potentially beneficial alliances." The reforms exposed other forms of agreements among competitors, such as strategic alliances and joint ventures, to review under a new civil provision in Section 90.1. Under civil review, a business' employees are not subject to fines or imprisonment, but firms may be subject to an injunction barring their conduct.

Clarifying Competition Act Enforcement

However, Canadian firms lack a clear understanding of the circumstances under which agreements will be subject to the significant criminal sanctions available under the amended Section 45.

One reason is that the Competition Bureau no longer provides clear guidance to firms as to whether their agreements violate the *Competition Act*. Firms are largely required to self-assess their potential liability, by relying on the Competition Bureau's *Competitor Collaboration Guidelines*, which do not carry the force of law. In May 2011, the Commissioner of Competition announced that while, "(i)n the past, the Bureau has issued written opinions that make a determination of whether or not sufficient information exists to initiate an investigation," in future the Bureau would announce only, "a determination of whether or not a provision of the *Act* is applicable to the proposed conduct." In the Council's view this is insufficient guidance, considering the significant consequences of the new legislation.

In the Canadian legal system, firms look to case law that sets precedents for how the law will apply to them. Since the amendments to the *Act*, the Competition Bureau has not pursued, in court actions, domestic criminal cases that would have provided guidance on how it will interpret and enforce the new Section 45, nor has it intervened materially in private enforcement actions. In the absence of active participation by the Bureau in such litigation, there is a greater risk that case law may develop that sets precedents that are not in the public interest. In the absence of prior guidance and government enforcement, case law may evolve that, for example, defines currently legal and beneficial strategic alliances as illegal conduct.

1 The punishment for a criminal offence was increased from a maximum of 5 years in prison and a $10 million fine to 14 years in prison and a $25 million fine.

There was some uncertainty among Council members as to the extent and scope of defences that firms can rely on in a prosecution under Section 45, particularly where parties claim that an allegedly anti-competitive agreement is ancillary to a potentially legitimate agreement that could result in cost-savings that would benefit consumers. Some members felt that such a defence could allow firms to more easily escape prosecution, using the veneer of a larger agreement, while others felt that colluding firms engaged in price-fixing rarely arrange their practices specifically to avoid criminal prosecution.

What the Panel Recommends

The Council unanimously agreed that, owing to the difficulty of detecting cartel-like behaviour, egregious conduct such as price-fixing should remain subject remain to criminal prosecution. There was general agreement that the activity proscribed under the new Section 45 should be considered automatically illegal.

However, to avoid deterring legitimate and potentially beneficial agreements, Canadian firms need to have a clear understanding of the circumstances under which agreements will be subject to the significant criminal sanctions available under the amended Section 45. Accordingly, to clarify its interpretation of the *Competition Act* as to what activities will be treated as potentially criminal offences, the Competition Bureau should:

- Reinstate its practice of providing binding advisory opinions, when firms seek them, to confirm whether proposed conduct or an agreement among competitors would contravene the *Act* and whether proceedings would take place under Section 90.1; and
- Initiate criminal proceedings, where appropriate, and intervene in private actions to ensure that sound jurisprudence emerges to guide future firm behaviour.

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

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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