

Canada and the EU: Continued Cooperation and Convergence?

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Any discussion of the enforcement cooperation activities of the Canadian Competition Bureau (the Bureau) and the Directorate General for Competition of the European Commission (the Commission) must at this stage focus not only on communications between them but also on results. It would appear that after years of working together in both bilateral and multilateral fora on the development of competition law enforcement policies and practices, and of cooperation in the investigation of individual cases, different results are still sometimes apparent. That said, the ultimate goal of consistency and convergence among the agencies can only be achieved through continued such dialogue and cooperation, and overall the glass should likely still be viewed as half full.

A significant amount of cooperation and convergence occurs through multilateral organisations such as the International Competition Network (the ICN) and the Organisation for Economic Cooperation and Development (the OECD). Indeed, the past year saw ICN membership attain the milestone of 100 members, composed of competition agencies from around the globe. The Canadian commissioner of competition, Sheridan Scott, was elected chairperson of the ICN in October 2006.² The work at the ICN and elsewhere has resulted in several policy initiatives such as those with respect to merger remedies, self-regulated organisations and abuse of dominance, as discussed below.

Indeed, in April 2007, representatives of the Bureau and the Commission met to discuss greater cooperation with respect to competition enforcement and policy issues.³ In particular, discussions explored options for building upon the 1999 Agreement between the European Communities and the government of Canada,⁴ which provides the framework for enforcement cooperation between Canada and the EU.

As is discussed below, however, the enforcement actions and policy initiatives of the past year with respect to mergers, abuse of dominance and cartels suggest that during this past year, at least, evidence of convergence of policies was strong, while evidence of convergence of results was more mixed.

Merger remedy guidelines

It is in the policy development area where evidence of cooperation is perhaps the strongest. For example, both Canada and the EU have taken steps this past year to clarify their respective approaches to merger remedies. The Bureau released its Information Bulletin on Merger Remedies in Canada on 22 September 2006.⁵ Reflecting more than 20 years of experience working with Canada's merger provisions, the Bureau intends the Bulletin to be a "living document" that will change as the Bureau's approach to merger remedies continues to evolve.⁶ In its current incarnation, the Bulletin underscores how merger remedies have been fine-tuned in several areas. Similarly, in April 2007, the European Commission launched a public consultation on its draft revised guidelines on merger remedies, with a new Remedies Notice to be adopted later in 2007, reflecting the results of the public consultation.⁷ While waiting for the definitive version to be adopted later this year, a comparison of the latest draft of the Remedies Notice with Canada's Bulletin reveals many similarities – and some subtle differences.

By way of similarities, both the Bulletin and the Remedies Notice express a strong preference for structural merger remedies such as divestitures, and state that it will be a rare case when either jurisdiction accepts stand-alone behavioural remedies.⁸ Both jurisdictions have a stated preference also for the divestiture of existing stand-alone businesses (ie, a bias against 'mix and match' packages), although the Bureau goes further to state a preference for the divestiture of the target company's business.⁹ It is also standard practice in both jurisdictions to state that, if an acceptable divestiture to an approved buyer is not completed by the merged entity within a specific (short) time frame, a trustee will be appointed to do so, and at no minimum price.¹⁰ In addition, both the European Commission and the Canadian Competition Bureau contemplate that, should the ability of the parties to complete an acceptable divestiture of the proposed assets be at all uncertain, an alternative divestiture package may well need to include additional assets, including so-called 'crown jewels', if need be.¹¹

While the Bulletin and the Remedies Notice indicate that the Bureau and the Commission have come to take similar approaches to merger remedies, there remain some points of distinction. For example, the Canadian authorities state that they will normally provide between three and six months for the completion of an acceptable divestiture by the parties themselves, before requiring that the process be turned over to a trustee.¹² The EC appears to be willing to be a bit more patient, however, stating that the parties will normally be granted six months for the first divestiture period, three months for the trustee divestiture period, where needed, and another three months to close the transaction.¹³ Another distinction between the two jurisdictions is the reference in the EC Remedies Notice to a non-reacquisition clause, a reference that does not appear in the Canadian Bulletin. A non-reacquisition clause would prevent the merged entity from subsequently acquiring influence over the divested assets unless the Commission finds that the market has changed sufficiently that such influence has become permissible; typically, the period of non-reacquisition of influence is 10 years.¹⁴

It is also interesting to note that the Canadian Bulletin highlights the Bureau's approach to working with competition authorities in other jurisdictions, whereas the Remedies Notice is silent on this issue. Although enforcement decisions are made on a case-by-case basis, the Bureau indicates the circumstances in which it is more likely to negotiate a remedy within Canada and when it is more likely to rely on remedies formalised by foreign jurisdictions. The Bureau is careful to note that it will rely on foreign remedies only if they resolve the competition issues in Canada.¹⁵

Self-regulating organisations

Another recent policy development has seen both the Bureau and the Commission turn their attention to the competition issues that may arise from self-regulated organisations (SROs). Indeed, Commissioner Scott stated that one of the considerations which led the Bureau to review SROs was that other jurisdictions, including the EU, have studied and undertaken initiatives regarding the SROs in their jurisdictions.¹⁶

The Bureau has launched a comparative study into a number of SROs across all Canadian provinces and territories to determine if

any of them use anti-competitive measures (relating to entry, fees, reserved rights, business structure and advertising) to limit access to their profession or to control the competitiveness of their members. The study is to include SROs for accountants, lawyers, optometrists, opticians, pharmacists and real estate agents, and will attempt to assess the economic impact on competition of any restrictions. The study is to lead to the publication of a final report that will identify whether reduced competition imposes any costs on consumers and the economy. Should any anti-competitive practices be identified, the Bureau's hope is that, as has happened in other jurisdictions, the professionals in question will modify their practices to improve competition.¹⁷ Indeed, Bureau announcements in the past year indicate reforms by dental hygienists in Alberta.

Merger review

Even as cooperation has been yielding obvious fruit on the policy front, several mergers in the past year suggest that while the Bureau and the Commission continue to consult, they still sometimes come to different conclusions based on the same set of facts.

Johnson & Johnson/Pfizer

Consulting with one another but acting separately, the Commission and the Bureau required different divestitures in connection with the acquisition by Johnson & Johnson of Pfizer Inc's consumer health care business, in part reflecting differing market conditions in North America and in Europe, but also reflecting differing views of at least one global business.

On 20 December 2006, the Bureau registered a consent agreement with the Competition Tribunal, resolving competition concerns in Canada. The Bureau concluded that the acquisition raised no competition concerns in seven of eight overlapping markets, but would likely lead to a substantial lessening of competition in the market for diaper rash ointment. In recognition of the Bureau's concerns, Johnson & Johnson agreed to divest the Zincofax brand of diaper rash ointment within Canada along with its related assets.¹⁸

Nine days earlier, the Commission had also cleared the transaction, subject to conditions. The Commission found that there were three product areas in which the proposed transaction would cause competition concerns. Johnson & Johnson agreed to divest its overlapping activities in topical dermatological antifungals (Italy) and in daily-use mouthwash (Greece). In addition, to address concerns about competition for nicotine replacement therapy products in the European Economic Area, Johnson & Johnson agreed to divest its international nicotine patch manufacturing business. Somewhat curiously, as Canada had apparently not had a problem with this business, the divestiture would exclude the US, Canada and South Korea unless the divestiture did not take place within a given time, in which case those three countries would be included.¹⁹

Inco/Falconbridge update

The divergent approach that different jurisdictions can take to the same facts was also highlighted during the past year in the course of the reviews of the proposed *Inco/Falconbridge* merger in Canada, Europe and the US. Indeed, the differing reception in North America and Europe has been cited as one of the key reasons for the merger's failure.

Inco first announced a takeover bid for Falconbridge in October 2005, and the Bureau cleared the transaction in January 2006, finding it unlikely that the merger would lead to a significant lessening of competition in Canada.²⁰ By contrast, in late February 2006, the Commission announced that it would open an in-depth, 90-working-day 'Phase II' inquiry into the merger, citing concerns that the combination of Inco and Falconbridge's nickel and cobalt enterprises may impede competition in Europe. In particular, European

Competition Commissioner Neelie Kroes cited concerns about the impact of the merger in a market already facing rising prices and a strong demand for raw materials.²¹ Following the investigation, the Commission cleared the transaction, with remedies, in July 2006.²²

Although the United States Department of Justice (DoJ) took nearly as long as the Commission to approve the transaction, issuing a second request in November of 2005 and approving the deal officially in June of 2006 (again, subject to remedies), Inco was reportedly privately advised by Washington officials in February 2006 that the deal would (eventually) be approved.²³ The DoJ defined the product market of concern as high-purity nickel and the geographic market as the world. The EC, meanwhile, identified three problematic product markets: nickel plating and electroforming (regional), high purity nickel (global) and high purity cobalt (global). Despite the different areas of concern, however, the two enforcement agencies required similar remedies: the divestiture of the Nikkelverk refinery in Norway and related assets as well as a supply agreement under which the merged entity would provide the feedstock for the Nikkelverk refinery.²⁴ This suggests a certain amount of convergence with respect to results in Europe and the United States, at least, despite the different processes. Add into the mix, however, that Canada – home to both Inco and Falconbridge – had approved the deal relatively quickly and required no remedy, despite examining the same global markets, and international cooperation between enforcement agencies appears to have been far from complete.

Moreover, the long delay in obtaining all necessary approvals allowed other players time to make their own bids, and in the end, Brazilian mining company CVRD acquired Inco while Swiss-based Xstrata PLC acquired Falconbridge.²⁵ Although it is not possible to predict whether the *Inco/Falconbridge* merger would have succeeded had the Commission and the US DoJ approved the transaction as expeditiously as the Bureau, it is nonetheless noteworthy that the merger failed in a situation where the Bureau and the other agencies took different paths.

*Alcoa/Alcan*²⁶

Alcoa's US\$33 billion bid for Alcan, launched in May 2007, was another that was subject to review in Canada, the US and the EC, among other places. Although Alcoa withdrew its unsolicited bid for Alcan in July, after Alcan concluded a friendly deal with Rio Tinto, it was evident that significant communication between the principal reviewing agencies in Canada, the US and the EC would have been required. Alcoa had begun discussions with competition authorities prior to announcing its bid for Alcan,²⁷ and announced early on that, to allow the bid to succeed in a timely manner, it had begun discussions with competition authorities of a package of targeted divestitures.²⁸ Some analysts predicted, however, that European regulators would again have provided the toughest roadblock, having blocked a number of international mergers in the recent past.²⁹

Abuse of dominance

The approach to interpreting and enforcing abuse of dominance provisions continues to evolve in both Canada and Europe. While both Canada and the EU participated in OECD roundtable discussions that culminated in a report on remedies and sanctions in abuse of dominance cases,³⁰ the major developments concerning abuse of dominance are likely to emerge from the Commission's review of article 82 and from the ongoing *Canada Pipe* case in Canada. The jury is still out as to whether the two jurisdictions' enforcement approaches are converging.

Article 82 review

In December of 2005, the Commission published a discussion paper concerning the application of article 82 of the EC Treaty competition rules to exclusionary abuses.³¹ The paper sought to establish a framework to continue enforcing article 82 rigorously, but to do so by building on the more economic type of analysis emerging in recent European case law. In particular, the Commission identified the proper focus for article 82 enforcement as being on behaviour that restricts or is likely to restrict the market and which harms consumers, and stated that a way must be found to account for efficiencies in an article 82 analysis.³² This was contrasted in the discussion paper with a more formalistic approach espoused in some of the case law.

The Commission received public comments on the discussion paper and held a public hearing in June of 2006. At present, the Commission is reflecting on the public consultation and the issues at stake and is evaluating how to progress with the review.³³ Recent court decisions may, however, have made the Commission's task of moving to a more economic-based approach more difficult. In cases such as *France Télécom v Commission*³⁴ and *British Airways v Commission*,³⁵ court decisions have reflected a traditional approach to exclusionary conduct under article 82; the *British Airways* decision has been described as taking “no account” of the discussion paper.³⁶

The Commission's slow movement in producing guidelines, combined with the effect of the recent court decisions, has raised questions about the scope for change in this area. Some commentators suggest that the European Court of Justice's discussion of market strength in the *British Airways* case gives the Commission leeway to develop a better assessment of the market impact of abusive conduct.³⁷ Others point out that the recent decisions do not preclude the Commission from adopting a more economics-based enforcement policy, but provide a reminder that the Commission and national competition authorities will have to prompt the changes through guidelines or future enforcement decisions.³⁸ Indeed, some commentators have expressed scepticism as to whether the Commission will produce guidelines at all.³⁹ Nonetheless, with the publication of the discussion paper, one must conclude that there is at least a desire in Europe to concentrate on exclusionary abuses only to the extent that they significantly reduce competition.

Canada Pipe

Meanwhile, in Canada, the Competition Tribunal has long since espoused an economics-based approach, but the commissioner's *factum* before the Federal Court of Appeal (FCA) in *Canada Pipe*⁴⁰ had appeared to espouse a more ‘per se’ approach to exclusive contracts by firms with high market shares.⁴¹

In the first instance, the commissioner of competition brought a case to the Competition Tribunal, alleging unsuccessfully that *Canada Pipe*'s loyalty programme contravened section 79 (abuse of dominance) and section 77 (exclusive dealing) of the Competition Act. On appeal, the FCA found that the Tribunal had erred when it focused its analysis on whether competition continued to exist in the market. The correct analysis should have compared the level of competitiveness in the presence of the loyalty programme against the level of competitiveness that would have prevailed in the absence of the loyalty programme.⁴² On 10 May 2007, the Supreme Court of Canada denied leave to appeal the judgment of the FCA in *Canada Pipe*.⁴³ As a result, the FCA decision stands as the Canadian authority on the interpretation of Canada's abuse of dominance provisions with respect to exclusive contracts. With leave to appeal to the Supreme Court having been denied, the case has been returned to the Competition Tribunal for a re-determination, which has not yet been scheduled.

This case provided the first appellate scrutiny of the Competition Act's abuse of dominance and exclusive dealing provisions. It will be worth observing whether, having been directed to use a more rigorous economic test, the Competition Tribunal's economic analysis will resemble that which may eventually be espoused in European guidelines – or whether the Tribunal will agree with the commissioner that the use of exclusive contracts by a firm with a very high market share can be presumed to have substantially lessened competition (an approach which resembles more closely the ‘traditional’ European approach). Time will tell whether the Canadian and the European approaches to exclusionary conduct are converging – and on what standard.

Cartels

The battle against cartels remains a priority for both Canada and the EU. The top competition officers in each jurisdiction reflect a similar commitment to defeating cartels. According to Commissioner Kroes, the Commission is endeavouring to ensure that the future continues to look “as bleak as possible” for cartelists.⁴⁴ Meanwhile, Commissioner Scott states that “cartels are a plague in any market. They merit, and will receive from us, the most strict attention”.⁴⁵ While the comments of the two commissioners indicate a shared distaste for cartels, their enforcement agendas in the past year have also focused on strengthening their respective investigative abilities.

Reflecting the Commission's view that fines are the most effective deterrent to cartelists, the Commission imposed a record €1.8 billion in cartel fines in 2006. New guidelines will permit the Commission to multiply an offender's initial fine based on the length of time that the offender participated in the cartel and to double fines for repeat offenders. According to Commissioner Kroes, it is vital that the Commission be able to identify cartels through its own investigations, rather than relying solely on the leniency programme to detect them. Perhaps most interestingly, the Commission is continuing to work towards fostering more private actions against cartels.⁴⁶

In Canada, as well, the focus has been on strengthening the institutional capacity to detect and investigate cartels. Across the country the Bureau has been spreading resources to regional offices and conducting seminars on detecting and preventing bid rigging, as well as building investigative skills, establishing strong local contacts and strengthening ties with law enforcement agencies.⁴⁷

Even with Canada and the EU focusing particularly on the fight against domestic cartels of late, the recent work of the ICN's Cartels Working Group indicates that international efforts to fight cartels remain strong. In addition to releasing a report on the Interaction of Public and Private Enforcement in Cartel Cases and the latest chapter (Cartel Case Initiation) of the Manual on Anti-Cartel Enforcement Techniques, the group also completed its report on Cooperation Between Competition Agencies in Cartel Investigations.⁴⁸ The project, led by the Commission, built on the previous year's discussion of the issues creating barriers to cooperation between agencies in cartel cases by identifying possible ways to improve cooperation. In particular, the report identified the following areas as having the greatest potential to improve cooperation:

- more jurisdictions adopting leniency programmes, and greater convergence between leniency programmes, would increase access to leniency programmes in general and would encourage and facilitate multiple leniency applications;
- greater cooperation in ensuring that the rights of defendants are respected between jurisdictions; and
- greater communication concerning what public information and agency information can and cannot be exchanged between agencies.⁴⁹

Competition/trade policy: the political sphere

Canadian and EU leaders met in Berlin on 4 June 2007 to discuss deepening, among other things, their economic partnership. The discussion on advancing EU-Canada economic integration and facilitating trade and investment flows built upon the negotiations between Canada and the EU towards a trade and investment enhancement agreement (TIEA) that have been ongoing since 2005. Of particular interest, the two sides agreed to intensify work on regulatory cooperation, calling upon regulatory authorities in each jurisdiction to “enhance regulatory compatibility and convergence by considering each others’ measure before adopting unique approaches”.⁵⁰ What impact this will have on competition issues will have to be monitored; in the past, it has been suggested that the TIEA may lead to streamlined merger review processes.⁵¹

In advance of the June summit, the Canada Europe Roundtable for Business (CERT) released a declaration, signed by 42 business leaders from Canada and Europe, urging the EU and Canada to actively pursue “every possible avenue to promote economic growth and prosperity through the liberalisation of trade and investment”.⁵² The group suggested focusing on, among other options, comity in competition law enforcement as a way to eliminate barriers to investment.

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The Bureau and the Commission have been talking the talk of cooperation and convergence for several years now, and there is no doubt that fruit is ripening as a result in several areas. Divergence of results in some cases, however, indicates that strengthened cooperation is in order.

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