COMPETITION LAW

Anti-cartel enforcement mechanisms are converging at the international level

By Mark Katz

One often hears about the rifts that divide competition authorities, for example, the disagreements between the U.S. and E.U. over the proposed GE/Honeywell merger and, more recently, the treatment of Microsoft. But the more fundamental movement in competition law circles is not toward divergence but "convergence", i.e., the notion that the interests of both government authorities and private parties are best served by having common enforcement principles, processes and procedures applied consistently across jurisdictions.

Nowhere is this more evident than with respect to anti-cartel enforcement. There is a wide and ever-growing consensus among competition law authorities about the harm caused by cartels, and about the best ways to detect and prosecute them.

The views expressed in a recent speech by Neelie Kroes, Europe's Competition Commissioner, are an apt reflection of this consensus:

"I am an economist by training. My analytical experience tells me that it is rare in life that issues are either entirely one thing or another – or, if you like, purely black or white. But with cartels my judgment is clear-cut. Cartel behaviour is illegal, unjustified and unjustifiable – whatever the size, nature or scope of the business affected."

Key trends

Three ongoing trends in the global enforcement effort against cartels are particularly noteworthy:

• *Tougher penalties:*

The exposure to penalties for cartel participants continues to escalate, as authorities attempt to ensure that the risks of anti-competitive conduct outweigh any potential rewards. Record fines are being imposed, laws requiring stricter sanctions are being enacted or proposed, and punitive measures are increasingly being used to target individuals, whether through financial penalties, imprisonment (especially in the United States) or enforcement steps such as "border watches" and extradition.

• *Leniency/amnesty/immunity programs:*

The name used to describe these programs may differ from jurisdiction to jurisdiction, but the objective is the same: to induce cartel participants to "blow the whistle" on each other by holding out the prospect of complete immunity from prosecution for the first party to come forward to the authorities. These programs are now viewed as an essential aspect of effective anti-cartel enforcement and the number of jurisdictions utilizing them continues to increase. In the last year alone, competition authorities have adopted leniency programs – or

Mark Katz

see AUTHORITIES p. 18

Joint U.S. FTC/DOJ commentary is worth a look for Canadian lawyers

The commentary provides a helpful compendium of how the 1992 Horizontal Merger Guidelines have been applied and refined in practice.

By Paul Crampton

On March 27, the United States Federal Trade Commission ("FTC") and Department of Justice ("DOJ") jointly issued a *Commentary on the Horizontal Merger Guidelines* (the "Commentary" – available at www.ftc.gov/bc/bcmergacq.htm). The Commentary provides a helpful compendium of how various aspects of the 1992 *Horizontal Merger Guidelines* (the "Guidelines" — available at www.usdoj.gov/atr/pulic/guidelines/hmg.htm) have been applied and refined in practice.

Given the similarity between the Guidelines and the Canadian Competition Bureau's 2004 *Merger Enforcement Guidelines* ("MEGs" — available at www.competitionbureau.gc.ca/ under the mergers menu in "For Business"), and the increasing levels of coordination between the Bureau and its U.S. counterparts, the Commentary will be very useful for Canadian practitioners.

Refinements in analytical approach

The stated purpose of the Commentary is to elaborate upon how the Guidelines are applied in practice by the FTC and DOJ (the "Agencies"). However, careful readers will note that the Commentary reflects significant refinements in the Agencies' analytical approach.

First, by underscoring the integrated nature of market definition and the assessment of competitive effects, the Commentary makes it clear that the Agencies no longer rigorously follow the five-step analytical process described in the Guidelines. Among other things, that process distinguished between market definition/market share calculation and the assessment of competitive effects. Instead, product and geographic markets are now defined as part of a broader assessment of likely competitive effects which, since the 1997 amendments to the Guidelines, includes a consideration of any efficiencies claimed by the merging parties. The Commentary suggests that, in some circumstances, evidence of a merger's likely effects may be the analytical starting point and may even eliminate the need to identify with specificity the appropriate market definition.

Second, the Commentary confirms in a more subtle way that the weight given by the Agencies to evidence relating to market shares and concentration is no longer as great as when the Guidelines were written. The Commentary goes so far as to say that "the Agencies regularly close merger investigations, including those involving markets that would have fewer than four firms" (p.20), and that "market concentration may be unimportant under a unilateral effects theory of competitive harm" (p.16). Apparently, it would not have been possible to make such statements in 1992.

The full significance of the latter quote cannot be understood without keeping in mind that the Agencies have been more focused on unilateral effects analysis since the release of the Guidelines. Prior to that time, the Agencies tended to be more concerned with coordinated effects (e.g., oligopolistic price or non-price behaviour). The DOJ's clearance, within days of the Commentary's release, of the Whirlpool/Maytag merger, fortuitously underscores the declining significance of market shares and concentration levels south of the border, as the merger reportedly resulted in a firm with a market share of approximately 70 per cent.

Third, Commentary also reflects that the Agencies' approach to the assessment of the likelihood of both coordinated and unilateral effects has become significantly more sophisticated. As to the former, the Commentary elaborates upon potential non-price coordinated effects and the significance that the Agencies place on evidence of past coordination. The Commentary also notes the importance of assessing how a merger impacts upon the factors that constrain rivals' ability to coordinate their actions before the merger.

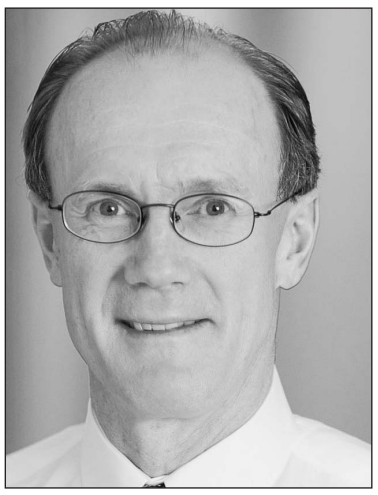
As to unilateral effects, the Commentary elaborates upon the Agencies' approach to assessing the closeness of merging parties' differentiated products, including through the use of diversion ratios, and provides insights into how the Agencies assess unilateral effects relating to auction and bargaining markets. The Commentary also states, somewhat surprisingly, that a "merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product in the sense that the largest diversion ratio for every product of the merged firm is to a non-merging firm's product" (p. 28). This may come as a surprise to those who until now have assumed that it is sufficient to demonstrate that none of the products of one of the merging parties is the first best substitute for any of the products of the other merging party, and *vice versa*.

Fourth, in what appears to be an effort to rehabilitate the role of customer evidence after the relevance of customer testimony was broadly questioned in the *Oracle/Peoplesoft* (*331 F. Supp. 2d 1098; 2004 U.S. Dist. LEXIS 18063)* and *Arch Coal/Triton* (*329 F. Supp. 2d 109; 2004 U.S. Dist. LEXIS 15996*) cases, the Commentary devotes an entire subsection to "The Importance of Evidence from and about Customers". Among other things, it states that "[c]ustomers typically are the best source" of evidence regarding substitutability (p. 9), and then notes: "In all cases, the Agencies credit customer testimony only to the extent the Agencies conclude that there is a sound foundation for the testimony" (p. 10).

Finally, consistent with statements that have been made by Agency officials over the last several years, the Commentary confirms that the Agencies investigate and apply the Guidelines to consummated mergers. This marks a significant shift from the Agencies' practice in the 1980s and 1990s.

Application of the U.S. merger guidelines

Practitioners on both sides of the border will find particularly helpful the many examples in the Commentary that are drawn from actual cases. In essence, the Commentary provides annotated illustrations of how the Agencies have applied key parts of the Guidelines, including:



Paul Crampton

- various aspects of the analytical approach to market definition
- the interactive nature of the exercise of defining markets and assessing competitive effects
- the market characteristics relevant to the assessment of coordinated effects
- the role of evidence of past coordination
- how "maverick" theory and the role of excess capacity held by fringe firms are integrated into the overall assessment
- the assessment of unilateral effects in homogeneous and differentiated product markets, as well as in auction and bargaining markets
- sunk costs and risks associated with entry
- other significant obstacles to successful entry
- the timeliness and sufficiency of entry
- various aspects of the Agencies approach to efficiencies (which differs significantly from the approach in Canada).

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Canada is a leading participant in the campaign against cartels

AUTHORITIES
–continued from p. 17–

announced the intention to adopt one – in Japan, Spain, Denmark, Austria, Mexico and Greece. In addition, existing programs have been updated in jurisdictions such as Australia, the European Union, Germany and the United Kingdom.

• *International cooperation*

At one time, international cooperation in competition law enforcement was regarded with suspicion, as simply another way for the United States to extend the "long arm" of its antitrust statutes extraterritorially. Now, however, cross-border coordination is being embraced as an irreplaceable aspect of the war against cartels, which often operate on a multi-jurisdictional basis. This cooperation takes place through both formal agreements and informal coordination among authorities. It also involves the exchange of practical know-how between officials in organizations such as the International Competition Network, which provides a forum for competition authorities to address issues of common concern (the ICN's motto: "all competition, all the time").

Canada plays its part

Canada has been a leading and enthusiastic participant in the global campaign against cartels. (In fact, as we Canadians like to remind everyone, our criminal prohibition against cartels actually predates that of the United States by one year.)

The Canadian Competition Bureau has made it clear that combating domestic and international cartels (usually called "conspiracies" in Canada) is a top enforcement priority. As a reflection of this commitment, there have been over 70 convictions for cartel-related offences in the last decade, involving aggregate fines of over $230 million. Just recently, record fines for a domestic cartel were imposed on the participants in a conspiracy relating to the distribution of carbonless sheets.

There also are an increasing number of cases in which individuals implicated in the conspiracy – in addition to the corporate offenders for which they work – have been penalized. Penalties for individuals still largely involve the imposition of fines rather than jail sentences, but it should come as no surprise if, at some point, the Bureau seeks to imprison an individual defendant as well.

Perhaps as a sign of things to come, the penalties levied in the carbonless sheets matter referred to above included a requirement that key personnel involved in the conspiracy be removed from their positions with the companies in question. Canada's Commissioner of Competition, Sheridan Scott, was quoted as saying that this type of penalty should "put corporate executives and employees on notice that they are accountable for their actions".

As with other competition authorities, the Bureau points to its own "Immunity Program" as an important element of its success in obtaining cartel convictions. The Bureau's program, which was adopted in its current form in 2000, is loosely modelled on the U.S. "amnesty" program and is also broadly consistent with similar programs in place in other jurisdictions. Like these other programs, the key aspect of the Canadian program is to offer immunity to the first (but only the first) party to provide evidence of an offence. The goal is to de-stabilize and expose cartels by creating a compelling economic incentive to cooperate with the authorities.

The Bureau recently launched a consultation process to solicit responses from stakeholders on a series of issues that have arisen since it established the immunity program in 2000. Topics to be addressed include: (a) confidentiality of information provided; (b) extension of immunity to directors, officers and employees; (c) whether immunity applicants should be required to pay "restitution" to "victims" of the cartel (even though they would avoid criminal penalties); and (d) the circumstances under which a grant of immunity may be revoked. The goals of the consultation process are to ensure the program's "optimum contribution" to the Bureau's anti-cartel efforts and that the Canadian approach is generally in step with that of other jurisdictions.

Canada is also a party to several state-to-state treaties and inter-agency agreements designed to promote and facilitate cooperation in cartel investigations (among other things). It also has developed very effective informal ties with authorities in other jurisdictions. A recent and well-publicized example of the type of cooperation this generates took place in February, when the Bureau, Korea's Fair Trade Commission, the European Commission and the Antitrust Division of the U.S. Department of Justice conducted coordinated investigations into the cargo operations of certain airlines.

The "take-away" message

The Bureau's active enforcement efforts have made it a risky proposition to engage in cartel conduct in Canada (or that has an effect in Canada). And the stakes will only get higher if the Bureau has its way. Recently, the Bureau sought to increase the fines for engaging in unlawful conspiracies from $10 million to $25 million (per count) and it has proposed to transform the conspiracy offence into a "*per se*" offence, eliminating the need to prove a negative ("undue") impact on competition. Although these specific measures are controversial in Canada and have yet to be adopted, it is clear that enhancing its ability to tackle cartels remains high on the Bureau's agenda.

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Litigation causes psychological vulnerability and less healing

LIMBERT
–continued from p. 14–

immune components, and impaired removal from the injured tissues of body fluid and "waste" products.

Psychological constraints

Our grasp of the physiology of psychological healing is at best rudimentary, and is beyond the scope of this brief article.

Similarly, the psychophysiological mechanisms whereby pre-existing or new-onset psychological conditions inhibit healing are much less well understood than the physical constraints. The youthful scientific disciplines of psychoneuroendocrinology ("mind-nerves-hormones") and psychosomatic medicine ("mind-body") are only just starting to lay the infrastructure for such understandings.

Meantime, empirical evidence of statistical association continues to accumulate. The profusion, diversity, consistency and strength of the evidence are such that it is increasingly difficult to argue that there is not a strong causal link between beliefs and mental health on the one hand and bodily healing on the other.

Both prior and newly triggered psychological conditions inhibit tissue repair. Commonly undiagnosed psychological injuries that result from physical trauma include Major Depressive Disorder, Post Traumatic Stress Disorder, various Anxiety and Phobic states, and Somatoform Disorders.

Irrespective of the client's state of psychological health, litigation prevents healing. Meta-analysis, the most powerful statistical tool for analysis of clinical research data, leaves little room for doubt: pursuit of a claim for personal injury itself causes delayed and impaired healing.

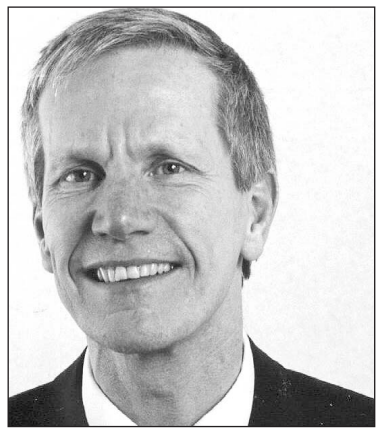
Alternative causal explanations, such as greater severity of injury or being unemployed do not fit the facts.

Medicolegal implications

Concurrent medical conditions and associated injuries constitute a physical "thin skull" or "crumbling skull" for recovery. failure to heal, continuing impairment and disability can be medicolegally understood only in context of the total state of health and fitness of the victim of personal injury.

Similarly, psychological vulnerability is a major predictor for the development of chronic pain and for slow, incomplete recovery.

A scientifically supportable estimate of the adverse effects of compensation litigation is 24 per cent. That is, about a quarter of disability and the failure to



Dr. John Limbert

respond to therapy can be attributed to pursuit of a legal claim for damages.

Just as physicians are required by law to disclose all material adverse effects of a medical intervention for informed consent, it can be argued that litigators who consent to act for a client have an obligation to first disclose such adverse effect on healing.

Dr Limbert is a physician with 24 years clinical experience and 12 years in full-time medical malpractice and personal injury consulting and publishing as Medical Litigation Consultants. These issues are treated at greater length, and the source research is referenced, in Dr Limbert's continually updated "Electronic Handbook of Legal Medicine for Personal Injury and Medical Malpractice Lawyers" published September 2002.

Competition counsel often have advanced economics degrees

ANALYSIS
–continued from p. 16–

nomics, today significant informal on-the-job training is a minimum, and competition law counsel frequently have advanced or graduate degrees in economics. This economic sophistication is a boon for private enterprise and the corporate counsel that advise them.

Fundamentally, the more economically sophisticated a firm's competition law counsel, the better a firm can identify, assess and manage antitrust risk, and therefore the more likely it is that the firm will be able to navigate through the minefield that is competition law to a more profitable future.

Consider *Superior Propane* ([2000] C.C.T.D. 15 (Comp. Trib.), rev'd [2001] 3 F.C. 185 (C.A.), [2002] C.C.T.D. 10 (Comp. Trib.), aff'd [2003] 3 F.C. 529 (C.A.)). Superior wanted to grow to the next strategic level, but to do so it had to acquire its closest competitor, ICG. That meant a merger to 70 per cent market share and, in some areas, a merger to monopoly. Most competition lawyers gave the merger little chance of success. But Superior's counsel navigated the merger to completion successfully, through the use of Canada's merger efficiencies defence, itself a complex economic law, which involves balancing the negative effects on society from a substantial lessening of competition against the productivity and efficiency gains likely to be realized by allowing the merger.

As noted by Justice Frank Iacobucci, "the aims of the [Canadian Competition] Act are more 'economic' than they are strictly 'legal'." These economic aims are achieved largely through economic analysis. While all jurisdictions have significantly increased the role of economic thought and economic analysis in formulating their competition policies and applying their competition laws, perhaps no country has moved farther than Canada to embrace economic sophistication to improve the law. While there is still some work to do to reform Canada's competition laws, 110 years later, at least in the area of competition law, Holmes appears to have been nothing short of a visionary.

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