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EDITOR'S NOTE

Brian K. Grube

We are delighted to present four articles covering key developments in three competition law jurisdictions. Stefano Grassani reports on the European Court of Justice's decision in the T-Mobile case, which may signal an important shift in the treatment of "concerted practices" under EU and Member State law. Vadim Brusser examines the U.S. FTC's challenge to a now-aborted merger between two blood plasma products firms and what that challenge may portend for merger enforcement under the Obama administration. Elizabeth Odette updates us on developments in U.S. criminal antitrust enforcement. And Elisa Kearney, Mark Katz, and James Dinning explore the Canadian Competition Bureau's past and possible future use of wiretaps in cartel investigations.

We hope you find these articles to be useful and encourage you to contact us if you have any ideas for a future article or would otherwise like to get involved with the E-Bulletin or the Committee at large.

CHAIR'S REPORT

Thomas J. Collin

We want to thank Brian Grube for preparing this issue of the E-Bulletin and, even more, the authors who contributed these fine articles. The E-Bulletin reflects the collective efforts of many members of the Committee, and I am confident you will find it both informative and interesting.

The Joint Conduct Committee has been active on a number of fronts, and I want to briefly mention some of our efforts. The Committee helped to prepare responses to questions the

Section's Chair, Jim Wilson, received from U.S. Senator Kohl, following Jim's May 19 testimony on behalf of the ABA before the U.S. Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the *Leegin* repealer bill, S.148. The response is posted on the Section's website. Vice-chair Mark Botti organized a June 26 brown bag, *Are There Different Rule of Reason Tests for Vertical and Horizontal Conduct?*, as the third and final program in a series the Committee sponsored this year on Sherman Act § 1 issues. We are considering whether one or more of those programs may be appropriate for a 2010 Spring Meeting program.

The Committee has continued to assist the Section's International Task Force to prepare comments solicited by foreign governments on proposed legislation and regulations. Committee members Jason Hartley, David Higbee, Ian Conner, and Dustin Kenall drafted portions of comments earlier this year in response to the Australian government's request for comments on the meaning of the term "understanding" as used in the Australian Trade Practices Act. Those comments were submitted jointly by the Sections of Antitrust Law and International Law in March and are posted on the Section's website. Vice-chairs Brian Grube and Rebecca Farrington helped draft comments on the Canadian Competition Bureau's proposed Competitor Collaboration Guidelines. Those comments are now under review by the Section's Council.

We encourage all of our members to contribute to the Committee's activities, and I invite you to contact me or any of our vice-chairs to discuss your interests.

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THE DUTCH MOBILE PHONE CARTEL: IS THE EUROPEAN COURT OF JUSTICE HANGING UP ON CALLS FOR EFFECTS-BASED ANTITRUST ENFORCEMENT?

By Stefano Grassani, Pavia e Ansaldo – Milan (Italy)

Seldom seen are rulings richer in antitrust content than the decision the European Court of Justice (ECJ), the EU's highest court, handed down on June 4, 2009. The case involved an alleged cartel in the Dutch mobile phone market,¹ but the decision dealt with a number of critical and controversial issues—the notion of concerted practice “by object”; causation; the treatment of “pure” exchanges of information; the standard of proof applicable to concerted practices; and the goals of EU competition law—that may have far broader implications. This article provides an overview of how the ECJ dealt with those issues, and will leave deeper analysis of those topics for another day.

EU antitrust law has become a subject of interest and lively debate among US practitioners. But it may be useful to recap the fundamentals that guide antitrust enforcement on the other side of the Atlantic with respect to joint conduct, so readers can fully appreciate the importance of the ECJ's judgment:

- The relevant EU statute is Article 81 of the EC Treaty.² Like Section 1 of the Sherman Act, Article 81 prohibits anticompetitive conduct arising out of a contract, combination or conspiracy among two or more separate entities; also, as in the United States, the European courts (the ECJ and its lower court, the Court of First Instance (CFI)), over time have construed Article 81 broadly to bring within its reach all joint conduct that may substantially affect competition.
- Article 81 prohibits not only anticompetitive agreements, but also “concerted practices.” The ECJ has defined “concerted practices” as “a form of co-ordination between enterprises which, without having reached the state where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”³ As the ECJ itself has noted, for a concerted practice to exist there is *no* need to prove the existence of an actual plan between competitors, since “each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and the undertakings to which he makes offers or sells. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any

direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”⁴

- Joint conduct (including concerted practices) not only may infringe Article 81 where the conduct causes anticompetitive effects. But joint conduct also may be illegal (indeed, *per se* illegal) if it has as its (unquestionable) object the restriction of competition within the EU. The “object” and “effects” tests are alternative, not cumulative. Enforcing agencies and courts first determine whether the challenged joint conduct has an unlawful object. If so, there is no need to “wait to observe the concrete effects of an agreement.”⁵ Rather, it is only where the object of the joint conduct is not manifestly anticompetitive that it is necessary to consider whether the conduct may (or did) cause anticompetitive effects.
- EU courts traditionally have held that price fixing (both horizontal and vertical), market sharing, output restrictions, and bid-rigging warrant *per se* treatment under Article 81 and are considered anticompetitive based on their “object”: “[T]hese agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81.”⁶ By contrast, the exchange of information (especially historical and non-price information), has not been enough to establish an unlawful “object,” except in cases where the exchange was made as a part of a broader conspiracy.⁷

Background of the ECJ's Decision

The case before the ECJ was referred by a Dutch civil court in connection with a cartel investigation initiated by *Nederlandse Mededingingsautoriteit* (or NM), the Dutch competition agency, which sought to prosecute the five major mobile phone operators active in the Netherlands at the time under both Dutch and EU competition law.⁸

The focus of the NM's investigation was a single meeting, which allegedly had taken place on June 13, 2001, between representatives of the five operators, during which they discussed, *inter alia*, the terms by which certain mobile phone dealers' commissions would be reduced effective Sept. 1, 2001.¹⁰ The NM found that the defendants had engaged in a *per se* illegal concerted practice, even though the defendants allegedly participated in only that single, apparently isolated, “contact.” The NM did not allege that the defendants discussed prices or even exchanged price or output data. Moreover, given the prevailing market conditions—which were alleged to be oligopolistic with new entry being unfeasible¹¹—it arguably would have been

reasonable to expect that dealer remunerations would have been reduced, even absent any agreement among the defendants. The NM imposed fines on the defendants.

Defendants challenged the NM's decision and, on appeal, the competent Dutch court, under Article 234 of the EC Treaty,¹² referred a series of questions to the ECJ:

- What are the standards for establishing that a concerted practice is per se illegal under EU law?
- To what extent does EU jurisprudence on "causation" apply to cases brought by a national competition agency under national antitrust law?
- In the absence of an anticompetitive "object," may the required causal link between a concerted practice and anticompetitive effects be presumed if the concerted practice is based on only an isolated event, or may such a presumption only be invoked after the conduct has occurred with some degree of regularity over some period of time?

The ECJ's answers to these questions touch on issues at the foundation of EU competition law and likely will fuel debate among practitioners and scholars for some time.

The Application of the Per Se Rule to Concerted Practices

The ECJ began by announcing that the per se test under EU law applies to concerted practices as well as agreements. In both cases, the relevant facts are (i) the object the conduct is intended to achieve, and (ii) the underlying economic and legal context. A per se violation may be found where the conduct, by its nature, is "injurious to the proper functioning of normal competition."¹³

While it seems that intent may not be an essential factor in deciding whether a concerted practice is restrictive, it is clear from the ECJ's language that intent is not irrelevant.¹⁴ In prosecuting concerted practices, the enforcement agencies and the courts will first consider the subject matter of the concerted practice, in the economic context in which it is pursued. If this preliminary assessment shows that injury to competition may be "sufficiently deleterious," there is no need to evaluate the actual effects of a concerted practice (if any) once its anticompetitive object is established. Where, however, "an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent."¹⁵

It remains to be seen what constitutes a "sufficiently deleterious" injury to competition, especially given the

Court's statement that the per se rule may be triggered where the alleged conduct

has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.¹⁶

Strictly construed, this statement could subject all conduct to per se treatment—even more so if one considers the legal analysis which Advocate General Kokott¹⁷ submitted to the ECJ, urging the Court to stipulate that "for the prohibition of Article 81 . . . to be triggered it is sufficient that a concerted practice has the potential—on the basis of existing experience—to produce a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, that is, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can at most be of relevance for determining the amount of any fine and in relation to claims for damages."¹⁸

Is a Single Exchange of Information "Sufficiently Deleterious"?

Having established that per se treatment is warranted where the object of a concerted practice is such that "sufficiently deleterious" injury to competition may be presumed, the ECJ turned to applying this new test to the facts of the case which, again, involved only a single meeting during which the defendants allegedly exchanged non-price information.

Since its seminal 1998 *John Deere* decision, the ECJ has refused to attach per se liability to information exchanges among competitors, even those that occurred in oligopolistic markets. By contrast, the ECJ explained in this case that an exchange of information may infringe Article 81 even if it does not concern prices:

[I]t is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited (...) [C]ontrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.¹⁹

The ECJ concluded that “an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object.”²⁰ While perhaps not endorsing a per se rule for all exchanges of information, the ECJ’s language certainly raises questions about the consistency of its judgment in this case with *John Deere*.

The Goals of European Competition Law

The ECJ’s decision also will likely reignite and indeed fuel debate over the goals of EU competition law. Advocate General Kokott maintained that EU competition law “is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution).” In this way, “consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.”²¹ The Advocate General further explained that “conduct may be per se illegal not only where it is capable of having a direct impact on ‘consumer welfare,’ but also where it prevents, restricts or distorts competition within the common market because if a conduct affects competition as such it may be presumed that it may also have a negative impact on consumers.”²²

The ECJ appears to have adopted these arguments in noting that the EU competition rules are designed to protect “not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”²³

Standards of Proof/Choice of Law

Under well-settled case-law of the Commission,²⁴ confirmed by EU courts, there is a presumption that if companies exchange information with their competitors and remain active on the market, their actions will take account of the information they exchanged. The ECJ in this case was called upon to decide whether that presumption also applies in national antitrust proceedings brought under EU law or whether national courts can apply their own national laws.

This choice-of-law question is complex. It involves a determination of the nature of the presumption: whether it is part of the substantive test applied to exchanges of information under EU law in which case national courts must apply the presumption; or, rather whether it is a question of procedural law and, thus, subject to the national laws of the presiding court in accordance with the principle of procedural autonomy of the Member States.

During the proceedings before the ECJ, the Commission claimed that the presumption of a causal link was intended to form a constituent element of the concept of concerted practice within the meaning of Article 81 and not a

procedural rule that is independent of that concept, so that the national courts and tribunals are obliged to apply it.

The ECJ seems to concur: “The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. It must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market.”²⁵

Therefore, the presumption of a causal connection stems from Article 81 and it consequently forms an integral part of applicable Community law.

Isolated vs. Repeated Games

Lastly, the ECJ, in discussing the issue of causation, made controversial statements regarding the relevance, for purposes of enforcing EU antitrust rules on joint conduct, of “isolated games” or “contacts.”

As discussed above, the facts of the case were unique in the sense that the only evidence of concerted conduct lies in a one-time meeting that occurred between the parties in 2001. The defendants argued before the ECJ that, according to the settled case-law,²⁶ a presumption of a causal connection is warranted only where parties to a concerted practice meet on a regular basis. The Commission countered that the presumption of a causal connection was not dependent on the number of meetings that gave rise to the concerted action, provided it can be established that the number of “contacts” is sufficient to result in coordination of conduct on the market. In the case, the parties allegedly discussed at their June 2001 meeting the terms of the reduction of dealer remunerations and, as a result of that meeting, they were able to remove uncertainties as to which operator would reduce its expenditure on recruitment, when and to what extent it would do so, and the time frame within which the other participating operators would do likewise.

It is interesting to recall that, in the above-mentioned precedents,²⁷ the ECJ said that a presumption of causation was justified “particularly when they concert together on a regular basis over a long period.” The ECJ interpreted that wording to say that, far from supporting the argument that there is a presumption of a causal connection only if the undertakings meet regularly, the latter must necessarily be interpreted to mean that the “presumption is more compelling where undertakings have concerted their actions on a regular basis over a long period.”²⁸ Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty.

As a result, the ECJ concluded that, depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails:

Needless to say, the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve. What matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.²⁹

¹ Judgment of the European Court of Justice, June 4, 2009, Case C-8/08.

² EC Treaty, Article 81: “1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.

³ See *Imperial Chem. Indus. Ltd. v. Comm’n*, Case 48-69, 1972 ECR 619 (CJ).

⁴ *Coöperatieve Vereniging “Suiker Unie” UA and others v. Comm’n*, - Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, 1975 ECR 1663 (CJ).

⁵ “There is no need to wait to observe the concrete effects of an agreement once it appears that it has as its object the prevention restriction or distortion of competition (109). It is not disputed by the TACA parties that the four agreements identified above are intended to restrict competition between them within the common market”, in Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - Trans-Atlantic Conference Agreement), OJ 1999 L 95/1, 4 CMLR 1415381.

⁶ See, e.g., EC Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), ¶ 18.

⁷ *John Deere Limited v. Comm’n*, Case C-7/95P, 1998 ECR I 3111 (CJ), and *New Holland Ford Ltd v. Comm’n*, Case C-8/95P, 1998 ECR I 3175 (CJ).

⁸ To ensure the effective and uniform application of Community legislation, national courts may, and sometimes must, refer cases to the ECJ and ask the ECJ to clarify a point concerning the interpretation of Community law. The ECJ’s reply takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given; other national courts before which the same problem is raised are likewise bound by the Court of Justice’s judgment. Thus, it is through references for preliminary ruling that several important principles of Community law have been established, sometimes in reply to questions referred by national courts. See, footnote 12 below.

⁹ Ben Nederland BV (10.6%), KPN (42.1%), Dutchtone NV (9.7%), Libertel-Vodafone NV (26.1%) and Telfort Mobiel BV (11.4%).

¹⁰ The alleged discussion supposed concerned the extent, timing, and details of a proposed reduction of standard dealer remunerations in the Dutch market in connection with the procured sale of “post-paid” subscriptions. A distinction is made in the Netherlands between “prepaid packages” and “post-paid subscriptions.” When purchasing a prepaid package from a mobile operator, customers purchase—and pay in advance for—a credit of call minutes that can be used for calls up to the value of the credit purchased. By contrast, with a post-paid subscription, customers are billed for the number of minutes they use in a preceding period and generally also pay an additional flat subscription fee.

¹¹ As the ECJ acknowledged in its judgment, there was no possibility of establishing a sixth mobile telephone network because no further licences were issued in the Netherlands and access to the market for mobile telecommunications services was possible only through an agreement with one or more of the five existing operators.

¹² EC Treaty, Article 234: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice”.

¹³ Judgment of the European Court of Justice, June 4, 2009, Case C-8/08, ¶ 29.

¹⁴ See *id.* ¶ 27 (“there is nothing to prevent the Commission of the European Communities or the competent Community judicature from taking [intent] into account (see, to that effect, IAZ International Belgium and Others v Commission, paragraphs 23 to 25)”).

¹⁵ See *id.* ¶ 28.

¹⁶ See *id.* ¶ 31.

¹⁷ Advocates General are lawyers of recognized competence appointed by Member State governments to assist the ECJ in its judicial review functions and, in particular, to present, with complete impartiality and independence, an “*opinion*” to the ECJ where the Rules of Procedure of the ECJ so provide.

¹⁸ Opinion of Advocate General Kokott delivered on 19 February 2009, Case C-8/08, *T-Mobile Netherlands BV and Others*, ¶ 46.

¹⁹ Judgment of the European Court of Justice, June 4, 2009, Case C-8/08, ¶ 39.

²⁰ See *id.* ¶ 41. The ECJ noted that an indirect link existed, in relation to mobile phone post-paid subscriptions, given that the remuneration paid to dealers was evidently a decisive factor in fixing the price to be paid by the end user.

²¹ Opinion of Advocate General Kokott, Case C-8/08, ¶ 58.

CSL AND TALECRIS ABANDON MERGER AFTER FTC CHALLENGE: FTC ALLEGES BLOOD PLASMA PRODUCTS MERGER WOULD INCREASE COORDINATED INTERACTION

By Vadim Brusser, Weil, Gotshal & Manges LLP

On May 27, 2009, the U.S. Federal Trade Commission (FTC) filed an administrative complaint challenging CSL Limited’s (CSL’s) acquisition of Talecris Biotherapeutics Holdings Corporation (Talecris), a subsidiary of Cerberus-Plasma Holdings, LLC (Cerberus). The FTC alleged that the proposed acquisition threatened to substantially lessen competition in the markets for four plasma-derivative therapies. The FTC also filed a complaint in federal court seeking to enjoin the transaction until its administrative proceedings concluded. Shortly after announcing they would oppose the FTC’s challenge, the parties abandoned the transaction.¹

The FTC’s Complaint

On August 12, 2008, the Australian-based CSL publicly announced that it would acquire U.S.-based Talecris for \$3.1 billion. CSL and Talecris both make and sell protein therapies derived from human blood plasma. CSL and Talecris allegedly are two of the three largest makers of plasma products in the world.² Their products are used to treat a range of serious illnesses, including immune deficiency diseases, blood disorders, and neurological disorders.³ Certain illnesses require extended treatment, and some plasma products can cost over \$90,000 a year.⁴

The FTC alleged the transaction would substantially reduce competition in four markets for plasma-derivative protein therapies: immune globulin (Ig), albumin, Rho-D, and Alpha-1. The merger allegedly would have reduced the number of competitors from three to two in the Rho-D and Alpha-1 markets, leaving Ortho Clinical Diagnostics and Baxter International (Baxter) as the only other competitors in those markets, respectively.⁵ CSL’s post-merger market share in each of those markets would have been 42 percent (Rho-D) and 82 percent (Alpha-1).⁶

In the Ig and albumin markets, the merger allegedly would have reduced the number of competitors from five to four, with two of those remaining competitors, Grifols,

²² *Id.* ¶ 59.

²³ Judgment of the European Court of Justice, Case C-8/08, ¶ 38.

²⁴ The EC Commission, through its Directorate General for Competition, has the duty to enforce the competition rules within the EU.

²⁵ Judgment of the European Court of Justice, Case C-8/08, ¶ 51.

²⁶ See, e.g., Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125 and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287.

²⁷ See Hüls, ¶ 162 and *Commission v Anic Partecipazioni*, ¶ 121.

²⁸ Judgment of the European Court of Justice, Case C-8/08, ¶ 58.

²⁹ *Id.* ¶¶ 60-61.

S.A. (Grifols) and Octapharma AG (Octapharma), being small and having only a limited ability to expand.⁷ CSL’s post-merger shares of those markets allegedly would have exceeded 48 percent (Ig) and 45 percent (albumin).⁸

Coordinated Interaction

The FTC’s case focused on a coordinated effects theory. The FTC alleged that even before the merger, the plasma industry functioned as a “tight oligopoly” and that the firms in the industry coordinated their behavior.⁹ The elimination of Talecris as a competitor, according to the FTC, only would enhance the ability of the remaining firms to control the supply of plasma products.

The FTC framed its coordinated effects theory with a number of key allegations. First, the FTC claimed that market conditions in the alleged plasma-derivative product markets were already conducive to coordinated behavior.¹⁰ The industry was highly concentrated as the result of prior consolidation that since 1990 had reduced the number of competitors from 13 to 5.¹¹ In addition, the firms’ plasma products were homogenous, and pricing was standardized, so the firms allegedly could predict their competitors’ prices. The firms also could allegedly track the supply of plasma products because demand for those products was stable (and high); indeed, the complaint alleged that CSL and Baxter had created oligopoly models “to estimate and predict changes in supply and demand.”¹²

Second, the FTC alleged the plasma firms used “widely available” information to “monitor each others’ activities with respect to plasma collection, manufacturing, and output,” and shared other information to “signal” their competitors and to reach (tacit) agreements on output decisions.¹³ The resulting market transparency, according to the FTC, made it possible for the plasma firms to control the supply of plasma products and to keep prices at supra-competitive levels.¹⁴

The FTC also cited public statements by Baxter executives to illustrate the allegedly transparent nature of the plasma industry. During an investor call, for example, Baxter’s CFO allegedly said: “from everything we read and all the signals we get, there is nothing that says anyone would” change their competitive behavior.¹⁵ On another occasion, a Baxter executive allegedly said Baxter would

limit its output increases if its competitors were not “irrational” and did not “trash price and take share.”¹⁶ The publicly-available version of the FTC’s complaint did not identify any comparable statements by CSL or Talecris, but in a motion to make its complaint public, the FTC observed that CSL and Talecris had made similar assertions.¹⁷

The FTC also claimed that Talecris, based on its “aggressive” expansion, served as a unique competitive constraint.¹⁸ The complaint alleged that competition between Talecris and CSL had been particularly aggressive in the Rho-D market.¹⁹ Citing another public statement by Baxter that the proposed acquisition was “a positive stabilizing move within the industry,”²⁰ the FTC alleged that eliminating Talecris would increase the remaining firms’ ability to detect and punish deviations from the firms’ coordinated activities. Based on these factors, the FTC concluded that the proposed acquisition would “eliminate the only significant threat to this durable and highly profitable oligopoly,” and enhance the ability of the remaining firms to reach agreement on output and to punish deviations from those agreements.²¹

The FTC further alleged that entry barriers—including high, up-front and sunk costs, intellectual-property hurdles, and multiple stages of regulatory review by the U.S. FDA and state health agencies—made new entry or expansion by existing firms unlikely to timely offset any reductions in output prompted by the merger.²²

Implications

In addition to adding to a number of recent successes, the FTC’s challenge of the CSL/Talecris merger reflects a number of trends. It reflects the increasingly aggressive stance the agency is taking with the changed administration. This enforcement action also suggests that mergers in industries that do not appear to be performing competitively pre-merger are likely to face intensive antitrust scrutiny. It also continues the FTC’s practice to initiate administrative proceedings and preliminary injunction proceedings in federal court simultaneously—a practice some have criticized. And finally, though this is not new, it highlights the FTC’s continued reliance on parties’ internal documents to support its enforcement actions. In this case, the parties’ documents appeared to be particularly problematic, providing a basis for the FTC at least to allege cartel-like conduct within the industry.

⁶ *Id.* ¶ 60, Appendices A-D.

⁷ *Id.* ¶ 2.

⁸ *Id.* ¶ 60, Appendices A-D.

⁹ *Id.* ¶ 4.

¹⁰ *Id.*

¹¹ *Id.* ¶ 24.

¹² *Id.* ¶¶ 20-21, 38.

¹³ *Id.* ¶¶ 29, 37.

¹⁴ *Id.* ¶¶ 33-39.

¹⁵ *Id.* ¶ 39.

¹⁶ *Id.* ¶ 36.

¹⁷ FTC Motion to Place Complaint on the Public Record, *CSL Ltd.*, Dkt. No. 9337 (FTC May 29, 2009), www.ftc.gov/os/adjpro/d9337/090529clsmtn.pdf.

¹⁸ Compl. ¶ 7.

¹⁹ *Id.* ¶¶ 72.

²⁰ *Id.* ¶¶ 7.

²¹ *Id.* ¶¶ 5, 66.

²² *Id.* ¶¶ 75-80.

¹ FTC Bureau of Competition Statement Regarding the Announcement that CSL Will Not Proceed With Its Proposed Acquisition of Talecris Biotherapeutics (June 6, 2009), www.ftc.gov/opa/2009/06/csl.shtm.

² Compl. ¶¶ 10, 14, *CSL Ltd.*, Dkt. No. 9337 (May 27, 2009), www.ftc.gov/os/adjpro/d9337/090527cslcmpt.pdf.

³ *Id.* ¶¶ 10, 45.

⁴ *Id.* ¶ 20.

⁵ *Id.* ¶¶ 67-73.

RECENT US CRIMINAL ANTITRUST DEVELOPMENTS

By Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P.

International Cartels. During the first half of 2009, the U.S. Department of Justice's Antitrust Division (DOJ) collected nearly \$250 million in criminal fines in its ongoing prosecution of international cartels in the marine hose, air transportation, and liquid crystal display (LCD) panel industries. Two executives, both foreign nationals, pled guilty and agreed to serve prison terms in connection with those investigations.

In the DOJ's investigation into the LCD panels industry, Hitachi Displays agreed in March 2009 to plead guilty and to pay a \$31 million criminal fine for its role in conspiring to fix prices of LCD panels sold to Dell, Inc. LG Display Co. Ltd., Sharp Corp., and Chunghwa Picture Tubes Ltd. have also admitted to their involvement in fixing prices for LCD panels sold to U.S. companies and have collectively paid criminal fines totaling more than \$585 million. In addition, an executive from Hitachi (a Japanese national) was indicted for his role in the alleged conspiracy, and an executive from LG Display Co. Ltd. (a Korean national) agreed to plead guilty, serve a 12-month prison sentence and pay a \$30,000 fine.

The DOJ's investigation into the air transportation industry also continued in the first half of 2009 with three international airlines agreeing to plead guilty to fixing prices on air cargo shipments and pay a total of \$214 million in criminal fines. One airline also was charged with fixing fares charged on passenger flights from the United States to Korea. Also, a Dutch airline executive agreed to plead guilty, serve eight months in prison, and pay a \$20,000 criminal fine for conspiring to fix air cargo shipment prices. So far, fifteen airlines and four executives have been prosecuted in connection with this investigation.

The DOJ's marine hose investigation continued in the first half of 2009 as well with a French based subsidiary of a Swedish company agreeing to plead guilty and pay a \$3.5 million criminal fine. Previously, three corporations have agreed to plead guilty, and twelve individuals have been charged, nine of whom have pled guilty.

Domestic Cartels. The DOJ investigated several domestic conspiracies in the first half of 2009. In the DOJ's continuing investigation into the marine fenders and pilings industry, a U.S. subsidiary of a Swedish firm based in Virginia agreed to plead guilty and pay a \$7.5 million criminal fine for participating in a conspiracy to rig bids for contracts to sell plastic marine pilings. Also, the chief executive officer of a former Virginia marine products company pled guilty and agreed to pay a \$100,000 criminal fine and serve time in jail for his role in rigging bids for contracts of foam-filled marine fenders and buoys. Six

individuals and two corporations previously agreed to plead guilty in connection with this investigation.

The president and vice-president of an Illinois refuse disposal container repair company were indicted for conspiring to defraud the City of Chicago on a contract for the repair of refuse containers. This is the first case in the DOJ's ongoing investigation into this industry.

The DOJ charged two Baltimore businessmen with conspiring to rig bids at tax lien auctions in Maryland, stemming from an investigation by the DOJ and the FBI into the anticompetitive conduct at tax lien auctions. In June 2008, another executive pled guilty but has yet to be sentenced.

The DOJ also continued to prosecute non-antitrust offenses discovered in its antitrust investigations, including obstruction of justice, bribery, mail fraud, bank fraud, wire fraud, conspiracy to defraud the United States, and tax evasion.

ACPERA provisions extended. The detrebling provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) which were set to expire June 23, 2009 have been extended for one year until June 22, 2010. The ACPERA Extension Act was signed into law on June 19, 2009. *See* Public Law 111-30. The detrebling provisions limit civil liability for participants in the Antitrust Division's Corporate Leniency Program to the actual damages caused by the participant if it cooperates with victims' civil lawsuits. Co-conspirators remain liable for joint and several treble damages for violations of Sections 1 or 3 of the Sherman Act and similar state laws.

THE USE OF WIRETAPS IN CANADIAN COMPETITION LAW INVESTIGATIONS

By Elisa Kearney, Mark Katz and James Dinning, Davies Ward Phillips & Vineberg LLP

It is well known that U.S. antitrust authorities have achieved notable success using electronic surveillance to gather incriminating evidence of cartel conduct. The most famous incident involved video and audio recordings collected by the Antitrust Division of the U.S. Department of Justice (DOJ) capturing price-fixing discussions by members of the lysine cartel in the 1990s.¹ This evidence led to a U.S. \$100 million fine, which at the time was six times greater than any antitrust fine ever imposed for price fixing in the United States. The video/audio evidence in the lysine case was gathered with the cooperation and consent of an informant, "consensual monitoring" being the only basis upon which the DOJ could gather electronic evidence at the time. In 2006, the DOJ was granted the additional authority to intercept communications without the consent of any of the participants.² In the words of one DOJ lawyer at the time, "the decision to grant that power is a signal that the United States places antitrust crimes on

par with such other significant economic crimes as bribery, bank fraud and mail and wire fraud.”³

Other antitrust authorities obviously regard cartel conduct as being similarly pernicious, but only a few are equipped with electronic surveillance powers comparable to those of the DOJ. The U.K.’s Office of Fair Trading (OFT), for example, has the power to carry out “intrusive surveillance” in criminal cartel investigations (i.e., covert use of wiretaps and videotaping on any residential premises or in any private vehicle) when authorized by the OFT’s Chairman and the Office of Surveillance Commissioners.⁴ By contrast, the European Commission has no criminal enforcement powers and no authority to conduct electronic surveillance.

Canada’s Competition Bureau (the “Bureau”) is another antitrust authority that may utilize electronic surveillance to gather evidence in some situations. The Bureau was granted this power in 1999 but has used it only sparingly. The constitutional and legal restrictions applicable to electronic surveillance may be responsible for this limited use. However, the Bureau’s recent use of wiretap evidence to assist in the prosecution of a high profile cartel case may signal that the Bureau will take a more aggressive approach in the future.

Authorizations to Intercept Private Communications in Canada

Interception Where a Party Consents. Subsection 184(1) of the Canadian *Criminal Code* (the “Code”) makes it an offense to use “any electro-magnetic, acoustic, mechanical or other device” to willfully intercept a private communication. It is not an offense, however, where the person intercepting the communication “has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it.”⁶ Consent must be voluntary, in the sense that it is free from coercion, and made knowingly, in that the person consenting must be aware of what he is doing, the significance of his act, and the use the investigator may be able to make of the consent.⁷ Where there is more than one originator or more than one intended recipient, consent by any one participant is sufficient.

Despite this statutory language, the Supreme Court of Canada ruled in *R. v. Duarte*⁸ that any interception of a private communication by governmental authorities or their agents without prior judicial authorization is a violation of the right to be secure against unreasonable search or seizure provided in section 8 of the Canadian *Charter of Rights and Freedoms*. As a result, subsection 184.2 was added to the Code and requires governmental authorities or their agents to obtain judicial authorization to intercept even those private communications for which they have the consent of one of the participants.⁹ To grant such an authorization, a judge must be satisfied that: (a) there are reasonable grounds to believe that an offense has

been or will be committed; (b) either the originator or the communication or the intended recipient has consented to the interception; and (c) there are reasonable grounds to believe that information concerning the offense will be obtained through the interception.¹⁰ These requirements are less stringent than where consent to intercept has not been obtained (discussed below).

Interception Where No Consent Has Been Obtained. Sections 185 and 186 of the Code set out the procedures for obtaining authorizations to intercept where no consent has been obtained. Under section 186, a judge must be satisfied of the following before granting an authorization:

- (a) the authorization is in the interests of the administration of justice, i.e., reasonable and probable grounds exist to believe that the offense has been or is being committed¹¹ and that the authorization sought will afford evidence of the offense; and
- (b) other investigative procedures have been tried and have failed or are unlikely to succeed, or the urgency of the matter is such that it would be impractical to carry out the investigation of the offense using only other investigative procedures.¹²

The application for an authorization must be signed by the Attorney General or Solicitor General of the province in which the application is made or an agent specifically designated for that purpose, and include an affidavit sworn by the responsible official setting out:

- (i) the particulars of the alleged offense and the facts upon which the application is based;
- (ii) the type of communications to be intercepted, the names and addresses of the people whose communications would be intercepted, the manner of the interception to be used, and the period of time for which the authorization is requested; and
- (iii) whether other types of investigative procedures have been tried and have failed, why other investigative procedures are unlikely to succeed, or why the matter is sufficiently urgent that it would be impractical to carry out the investigation using only other investigative procedures.¹³

A wiretap authorization can be granted for up to 60 days, subject to an unlimited number of renewals for additional 60 day periods upon application to a judge. Notice of the interception must be given to the person who was subject to the interception within 90 days after the period for which authorization was given; such notice period may be extended for up to three years upon authorization from a judge. The notice requirement is satisfied merely by notifying the person that he or she was the object of an interception; the person has no right to a copy of the authorization or the underlying affidavit.¹⁴ However, an accused must be given reasonable notice of the prosecution’s intention to use the content of private

communications obtained from an authorization as evidence, together with a transcript of the communication or a statement setting out the full particulars of the communication, before the content of such communication may be received in evidence in trial.¹⁵

The Use of Wiretaps and Other Electronic Surveillance in Competition Bureau Investigations

The Code was amended in 1999 to give the Bureau the authority to utilize judicially authorized wiretaps and other forms of electronic surveillance to intercept communications without consent when investigating several key offenses under the Competition Act (the “Act”): (a) conspiracies in relation to prices, quantity or quality of production, markets or customers, or channels or methods of distribution; (b) bid rigging; and (c) telemarketing. Wiretaps without consent are not available for the other criminal offenses under the Act (e.g., misleading advertising) although wiretaps and other forms of electronic surveillance may be used for these other offenses when at least one of the participants consents. In no circumstance can wiretaps or other electronic surveillance be used by the Bureau to gather evidence in connection with one of the Act’s “civil reviewable practices”—such as abuse of dominance—since these are not criminal offenses.¹⁶

Information Bulletin. The Bureau has published an Information Bulletin describing its approach to the use of wiretaps and other interceptions of private communications.¹⁷ In addition to setting out the process for obtaining an authorization, the Information Bulletin notes the following points about the Bureau’s use of wiretaps:

- The Bureau will only use its authority to intercept private communications without consent “under exceptional circumstances, for instance, in cases where the nature of the offense or the difficulties of obtaining evidence through other tools justifies the use of interception of private communications.”¹⁸
- That said, the Bureau takes the view that it need not exhaust all possible investigative steps before resorting to the interception of private communications.¹⁹
- If, during an authorized interception of communications, the Bureau obtains information that appears to be evidence of another offense or reviewable matter, the Bureau’s position is that it may use the evidence in other civil or criminal proceedings.²⁰
- The Bureau stresses that it supports the principle of “minimalization,” so that if there is a strong likelihood of inappropriate material being collected (e.g., privileged communications), it will outline this probability in its application. The Bureau will also

monitor its wiretaps on an ongoing basis and discontinue the interception as soon as it becomes clear that inappropriate material is involved.²¹

The Bureau’s interpretation of the scope of its powers relating to wiretaps and other interceptions of private communications bears no legal weight and has never been subject to meaningful judicial scrutiny.

Cases. There are only a limited number of cases in which the Bureau has publicly acknowledged that it used wiretaps to gather evidence. For example, the Bureau used wiretaps to gather evidence in a telemarketing fraud case in 2005.²² The case involved an investigation into the deceptive telemarketing practices of two companies in Quebec, Alexis Corporation and 3587932 Canada Inc.. Eleven individuals eventually pled guilty for their role in a prize-pitch scam targeting consumers in Australia; ten of the eleven defendants received conditional jail sentences, ranging from six to twenty-four months.²³ According to the Bureau, the wiretap evidence it gathered was helpful in securing the guilty pleas.

More recently, the Bureau relied on extensive wiretaps to gather evidence of price fixing involving retail gasoline markets in Quebec. Media reports indicate that the Bureau collected over 2000 phone conversations during the course of its investigation into the cartel.²⁴ Charges were laid in June 2008 against thirteen individuals and eleven companies accused of fixing gasoline prices in Victoriaville, Thetford Mines, Magog, and Sherbrooke, Quebec. While many defendants have indicated their intent to vigorously contest the charges, to date eight individuals and five companies have pled guilty, with fines totaling over \$2.7 million and four prison sentences handed down totaling 44 months.²⁵

Implications for International Cartels

We are not aware of any instance in which the Bureau has used its wiretapping powers in the investigation of an international cartel with effects in Canada. However, it is possible that the Bureau could attempt to share evidence gathered through its wiretapping efforts with other foreign antitrust authorities. Section 193 of the Code permits the disclosure of lawfully intercepted private communications “to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere.”

It is also possible that the Bureau could ask an immunity applicant with a presence in Canada to consent to the interception of communications with other cartel participants as part of its cooperation obligations. Although cessation of cartel activity is usually a precondition for obtaining immunity in Canada, one can foresee the circumstances in which the Bureau might be flexible in applying this requirement if it suited its

enforcement purposes. Of course, counsel for the immunity applicant would have to ensure that this arrangement is carried out in such a way that it does not put the grant of immunity at risk.

Finally, legislation currently before Canada's Parliament would, if enacted, permit the Bureau to execute a wiretap in Canada in aid of foreign antitrust authorities pursuant to mutual legal assistance treaties covered by Canada's *Mutual Legal Assistance in Criminal Matters Act*.²⁶

Practice Points

Given that the Bureau has not made extensive use of its wiretapping powers, there is no developed body of practice to deal with wiretap issues in the context of Bureau investigations. However, a few comments based on our own experience may be of assistance.

First, companies that are subjected to a Bureau search should be sensitive to the possibility that their premises may be wired and that employees' cellular, business, and home telephone lines could be tapped. For that reason, they should refrain from discussing the Bureau's investigation in locations that are not secure or without counsel present in order to maintain privilege over their communications.

Another point to be aware of in the context of a search is that Part VI of the Criminal Code provides strict rules that prevent the disclosure of private communications intercepted by electronic surveillance except in certain limited situations. Parties subject to a Bureau wiretap should consider whether the law has been properly complied with.

Finally, it is worth noting that the legality of evidence gathered through electronic surveillance should never be assumed. Depending upon the circumstances of a given case, a broad range of legal arguments can be put forward to seek the exclusion of such evidence in any subsequent proceedings.

Conclusion

The Bureau has identified the detection and prosecution of cartels as its key enforcement priority. The Bureau's ability to obtain judicially authorized wiretaps is a potentially powerful weapon in that effort. Although the Bureau has not used its powers of electronic surveillance frequently in the past, recent successes may signal a greater willingness by the Bureau to use wiretapping more often in its investigations, with significant consequences for both domestic and foreign-based cartels. But the use of electronic surveillance in the context of competition law investigations has never been subject to meaningful judicial scrutiny and constitutional and legal restrictions may hamper the Bureau's use of electronic surveillance.

² The interception of electronic communications is regulated by the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520). For detailed information on Electronic Surveillance powers in the United States, see The United States Attorneys' Manual, Title 9-7.000, www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

³ Cartel Enforcement In The United States (And Beyond), Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Presented at the Cartel Conference, Budapest, Hungary, www.usdoj.gov/atr/public/speeches/221868.htm

⁴ See Office of Fair Trading, "OFT publishes guidance on new powers to investigate cartels" (Jan. 6, 2004), www.oft.gov.uk/news/press/2004/01-04.

⁵ R.S.C. 1985, c. C-46.

⁶ *Id.* § 184(2).

⁷ *R. v. Goldman* (1979), 51 CCC (2d) 1 (SCC).

⁸ *R. v. Duarte*, [1990] 1 SCR 30.

⁹ In contrast, the U.S. Antitrust Division does not require prior court authorization to monitor individual communications with the consent of one of the participants. *Supra* note 2.

¹⁰ See note 5, *supra*, § 184.2.

¹¹ The Bureau's Information Bulletin on Interception of Private Communications and the *Competition Act* (see note 17, *infra*) states that the standard is whether there are reasonable and probable grounds to believe that the offense "has been or is about to be committed" [emphasis added]. The cases contradict this stated standard, however. In *Duarte*, the Supreme Court of Canada stated that the standard was whether the offense "has been or is being committed." See note 8, *supra*, ¶ 26. Similarly, in *R. v. Grant* (1998), 130 CCC (3d) 53, the Manitoba Court of Appeal held that "[a]n authorization cannot be granted to prevent criminal activity in the future" (¶ 26). The standard in the Bulletin also differs from the standard for obtaining authorization to intercept communications where a party consents, pursuant to which a judge must be satisfied that there are reasonable and probable grounds to believe that the offense "has been or will be committed" [emphasis added].

¹² See note 5, *supra*, § 186(2).

¹³ See note 5, *supra*, § 186(4).

¹⁴ *R. v. Zaduk* (1978), 38 C.C.C. (2d) 349 (Ont. H.C.J.), *aff'd* (1970), 98 D.L.R. (3d) 133 (Ont. C.A.).

¹⁵ See note 5, *supra*, § 189. All accused must be served with such notice and not merely those accused who were the subject of the interception. *R. v. Viscount* (1977), 37 C.C.C. (2d) 522 (Ont. Co. Ct.).

¹⁶ See note 5, *supra*, § 183. Amendments to the Act's conspiracy provisions will come into force on March 12, 2010 creating a new per se criminal offense for agreements between competitors relating to price, supply or market allocation. Other agreements between competitors that have the effect of lessening competition substantially will be addressed under a new civil provision. The Bureau will be entitled to obtain wiretaps to investigate alleged violations of the new conspiracy offense but not the new civil provision. See Bill C-10, *Budget Implementation Act*, 2009, 2nd Sess., 40th Parl., 2009, § 442.

¹⁷ Competition Bureau, Information Bulletin, *Interception of Private Communications and the Competition Act* (Sept. 22, 1999), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01220.html.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² Competition Bureau, "Competition Bureau Investigation into Deceptive Telemarketing Operation Concludes" (Jun. 20, 2005), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01869.html.

²³ A conditional jail sentence is a prison sentence that is served in the community. Conditional sentences require the individual charged to, amongst other things, remain within the jurisdiction of the court, report to a supervisor as directed and appear before the court when required to do so. In addition, a conditional jail sentence may require the individual charged to perform community service.

²⁴ Marianne White, *Price fixing rife in Quebec: lawyers*, The Montreal Gazette (Apr. 7, 2009).

¹ Transcripts of segments from the lysine tapes can be viewed on the website of the U.S. Department of Justice at www.usdoj.gov/atr/public/speeches/212266.htm.

²⁵ Competition Bureau, “Three More Guilty Pleas in Quebec Gasoline Cartel Case” (May 21, 2009), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03055.html.

²⁶ Bill C-46, Investigative Powers for the 21st Century Act, 2nd Sess., 40th Parl., 2009.

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