



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

January 11, 2008

Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, ON
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CANADA

Dear Members of the Review Panel:

The Antitrust Division and the Federal Trade Commission, the two counterparts in the United States to Canada's Competition Bureau, have followed with great interest the creation of the Competition Policy Review Panel and the publication of its consultation paper, *Sharpening Canada's Competitive Edge*. We recently completed an analogous process in the United States, with the April 2007 release of the Report and Recommendations of the Antitrust Modernization Commission.¹

The Competition Law chapter of the Consultation Report mentions four topics with which we have considerable experience: the standard of review for criminal cartel conspiracies, whether international competitiveness benefits from a policy that favors domestic competitors, the treatment of efficiencies in merger analysis, and the power to conduct market studies. We offer our perspective on these topics in the remainder of this letter.²

¹ See http://www.amc.gov/report_recommendation/amc_final_report.pdf. Canada's Commissioner of Competition participated in that process and provided a very useful perspective from a thoughtful external observer of our system. These comments are provided in a reciprocal spirit.

² This letter represents the views of the Department of Justice and the Chairman of the Federal Trade Commission, and does not necessarily represent the views of the Commission itself or any other Commissioner.

The Per Se Standard for Hard Core Cartels³

Section 45 of Canada's Competition Act prohibits conspiracies that *unduly* prevent or lessen competition. This contrasts with the analogous provision under U.S. antitrust law – §1 of the Sherman Act – which has long been held to prohibit *per se* any naked restraint or hard-core cartel agreement. As stated by our Supreme Court, “[s]ome types of restraints ... have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*. *Per se* treatment is appropriate [o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.”⁴

The *per se* condemnation of hard core cartels is critical to the success of the United States' criminal antitrust enforcement regime. The United States' position on the importance of an effective anti-cartel enforcement program has long been clear. The effective detection and prosecution of hard core cartels has been, and remains, the primary law enforcement priority at the Antitrust Division of the Department of Justice. There is a broad consensus in the global antitrust community that hard core cartels – whether in the form of price-fixing, output restrictions, bid rigging, or market allocation – are the most egregious of antitrust law violations; in the words of our Supreme Court, these acts of collusion are the “supreme evil of antitrust.”⁵

The term “hard core cartel” is not defined in U.S. law, regulations, or guidelines, but the scope of the *per se* offense is well-understood. As stated in the antitrust offenses section of the United States Sentencing Commission Guidelines,

there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. ... The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual anticompetitive effect.⁶

Thus, under U.S. law, hard core cartel conduct is treated as *per se* illegal. The *per se* rule focuses solely on the conduct – the agreement to fix prices, rig bids, or allocate markets. This approach does not require any proof of harm to competition and does not allow parties to claim an efficiency justification. There is no “undueness” standard, and no *de minimis* exception to the rule. Hard core cartel agreements, because of their pernicious effect on competition and lack of

³ Because criminal antitrust jurisdiction in the United States is vested exclusively with the Department of Justice, this section was drafted by, and solely reflects the views of that agency.

⁴*State Oil v. Kahn*, 522 U.S. 3, 10 (1997)(citations omitted).

⁵*Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004).

⁶ United States Sentencing Commission, *Guidelines Manual*, §2R1.1 Commentary (Nov. 2005).

redeeming economic value, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused. Moreover, under a *per se* analysis, companies are not entitled to attempt to demonstrate the alleged reasonableness or necessity of the challenged conduct. Thus, companies may not justify price fixing by arguing that it was necessary to avoid “cutthroat” competition, that it actually stimulated competition, or that it was ineffectual or resulted only in “reasonable” or “acceptable” prices. The essence of price fixing, bid rigging, and market allocation is simply this: the consumer believes he or she is making a purchase in a competitive market when, in reality, the sellers have secretly agreed not to compete.

Thirty years ago, Judge Robert Bork explained the rationale for the *per se* rule as follows:

Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market. There is no unfairness in applying the *per se* rule to parties whose agreement was useless, since their intent was wrongful. This consideration bears more properly on prosecutorial discretion in bringing such cases and on judicial discretion in imposing penalties. The *per se* rule against price-fixing and market-division agreements is thus justified not only on economic grounds but also because of the rule's clarity and ease of enforcement.⁷

U.S. courts apply *per se* rules in criminal cartel prosecutions in order to appropriately account for the unmitigated harmfulness of cartels. The DOJ carefully delimits its criminal enforcement to focus only on hard core violations. The higher burden of proof in criminal cases (requiring proof “beyond a reasonable doubt,” as opposed to the “preponderance of the evidence” standard used in United States civil law) and the narrowness of what criminal enforcement condemns (the fixing of prices, bids, output, and markets, as opposed to conduct subject to the “rule of reason” or monopolization analyses used in civil antitrust law) establish clear, predictable boundaries for business. When criminal cases focus on conduct that has no plausible business justification and that usually occurs in secret, accompanied by preemptive cover-ups and misrepresentation, defendants cannot reasonably argue that they failed to grasp the illegality of their actions. All of these features – high burdens of proof, well-defined coverage, clear boundaries – allay the potential fears of law-abiding business persons, who can easily determine whether their own conduct will form the basis of a criminal case.

The *per se* approach provides certainty with respect to the legality of specific conduct. Business executives know that hard core cartel conduct is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They typically involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior. In an economy based on free and open competition, hard core cartel activity cannot be justified or excused.

⁷ Robert H. Bork, *The Antitrust Paradox* 269 (1978).

At the same time, it is important to maintain a bright line between criminal activity – naked price-fixing – and other forms of horizontal conduct. Courts are likely to respect the enforcement agency's decision to seek significant deterrent sanctions, including incarceration, in cases where there is no plausible argument that defendants might have had some legitimate objective associated with their conduct, where the conduct is not open or routine in the industry, and where the law and enforcement policy of the agency have left no doubt as to the unlawfulness of the conduct.

International Competitiveness and Policies that Favor Domestic Firms

The question posed by the Panel about how changes to Canada's competition regime could promote the competitiveness of Canadian firms is an important one. That question, when read in context with concerns noted in the Consultation Paper about Canadian firms coming under the control of foreign investors, could be taken to suggest a competition policy that would favor domestic firms over foreign ones. The same suggestion has been made in the United States, typically with the suggestion that American firms might be more competitive on the world stage if they were sheltered from competition at home.

Empirical studies have shown that the benefits of such a policy, however, are illusory and that protecting national champions is detrimental to competitiveness. By providing subsidies to or trade barriers for a domestic champion or restricting foreign ownership, it may be possible to preserve the domestic firm far longer than it might otherwise survive in the market. In doing so, the policy might protect domestic jobs for those who work for the national champion, but likely would prevent the creation of jobs elsewhere in the economy. Importantly, the evidence shows that any benefits to protecting national firms come at a substantial cost. In fact, the removal of trade barriers leads to great increases in efficiency. One study suggests that if post-Uruguay Round trade barriers were removed, global wages would rise by \$1.9 trillion – including increases of \$512 billion in Europe and \$537 billion in the United States.⁸

The fact is that competition in the domestic market, regardless of its origin, begets efficient, productive firms that are better able to compete on global markets, which in turn increases economic growth and standards of living at home. Beginning in 1991, the McKinsey Global Institute undertook a twelve-year study to determine why some nations remain wealthy, while others remain poor even after years of international aid. In his book providing the results of the study, the Institute's founder, William Lewis, explained that, "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."⁹

⁸ Secretary of the Treasury Henry M. Paulson, Address at the Confederation of British Industry Annual Conference (Nov. 28, 2006), available at <http://www.treas.gov/press/releases/hp178.htm>.

⁹ William Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* 103 (2004).

The consequences of protection from competition have been documented. As described by Mr. Lewis in his book examining differentials in national wealth, Japanese industries that face intense domestic and international competition – automobiles, electronics, and steel – perform at productivity levels that are, on average, approximately 130 percent of the levels in the United States. In contrast, Japan’s large retail sector, which is heavily sheltered from competition by tax laws, zoning requirements, and other government-imposed restrictions, functions at roughly 50 percent of U.S. productivity levels.¹⁰

Other researchers have reached similar conclusions. In his study of why companies in some nations compete more successfully internationally than those in others, Michael Porter found that Sweden’s government had tended to promote certain larger industries that operated on a global scale.¹¹ That promotion, in part accomplished through relaxed application of Sweden’s antitrust laws, Porter believes, resulted from the view that “greater scale at home is necessary to meet global competition.”¹² Porter concluded that the country’s policies had resulted in reduced competitiveness of Swedish firms and a reduction in innovation from those entities.¹³ Thus, he explained more generally, “creating a dominant domestic competitor rarely results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad.”¹⁴

Without fierce domestic and foreign rivals to push it to innovate and become more efficient, the national champion will not engage in best practices. As Judge Learned Hand explained over a half century ago:

[u]nchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract the inevitable disposition to let well enough alone.¹⁵

In a speech to American antitrust lawyers, then Secretary of the Treasury, Dr. Lawrence Summers maintained that antitrust law remained a vital part of national economic policy precisely because competition is more effective than industrial policies designed to champion domestic firms.¹⁶ He added:

If you ask why the American economy has managed to experience relatively low inflation and unemployment for so long, the competitiveness of American industry, the drive for

¹⁰ *Id.* at 25.

¹¹ Michael E. Porter, *the Competitive Advantage of Nations* 352 (1990).

¹² *Id.* at 350.

¹³ *Id.* at 351.

¹⁴ *Id.* at 662.

¹⁵ *United States v. Aluminum Company of America*, 148 F.2d 416, 427 (2d Cir. 1945).

¹⁶ Lawrence Summers, *Competition Policy in the New Economy*, 63 *Antitrust L.J.* 353, 357 (2001).

efficiency that that has created, the contribution in particular that imports have made to that competitiveness is enormously important, and so the general proposition that competitive markets, rather than national champion firms, and competitive global markets are desirable should be a very strong principle and one that should be upheld.¹⁷

Recognizing the vital role that free markets play in protecting consumers and promoting economic growth, we have learned the importance of a competition policy that favors competition over protection and ignores the nationality of the firms at issue. In the United States over the past century, courts, practitioners, and scholars have concluded that robust competition produces substantial benefits for consumers and societies as a whole by promoting growth, spurring innovation, and facilitating the efficient allocation of resources. When we try to direct or manage competition, and we protect only specific competitors and their special interests, consumers, and the economy as a whole, lose. Thurman Arnold, who led the Antitrust Division in the United States more than sixty years ago, explained that, “[t]he economic philosophy behind the antitrust laws is a tough philosophy. [T]hose laws recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win.”¹⁸ Likewise former FTC Chairman Pitofsky stated on the occasion of the 90th anniversary of the FTC, “the national champion argument is almost certainly a delusion . . . The [FTC] has no discretion to authorize anticompetitive but ‘good’ mergers because they may be thought to advance national trade interests.”¹⁹

Moreover, once issues beyond price, output, quality, and innovation enter the picture, the temptation for politics to become involved in the individual decisions of competition enforcers can become almost irresistible. In the United States, it is well understood that antitrust is fundamentally a law enforcement process, based on the application of consistent economic principles that vary little with election cycles. The lack of political involvement in competition policy increases confidence in both enforcement and non-enforcement decisions. While an open robust political system is vital to maintaining a free and prosperous society, history has shown that the give-and-take of the political process is not the best mechanism for deciding whether a merger or other conduct is likely to reduce competition.

We take these principles to heart in our enforcement work. There are numerous examples in which the FTC and DOJ have brought cases or sought other relief to protect consumers even where doing so might have been to the disadvantage of an American company, because it was ultimately to the advantage of U.S. consumers.²⁰ In each case, an agency decision not to take

¹⁷ *Id.*

¹⁸ Quoted by Rep. Jack Brooks, Address at Symposium in Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division, January 10, 1994, Washington, DC.

¹⁹ FTC's 90th Anniversary Symposium, *More Than Law Enforcement: The FTC's Many Tools - A Conversation with Tim Muris and Bob Pitofsky*, 72 Antitrust L.J. 773, 808 (2005) [hereinafter Muris/Pitofsky Conversation].

²⁰ See Deborah Platt Majoras, *Convergence, Conflict, and Comity: The Search for Coherence in*

action might have promoted a U.S. national champion in the area. But, taking the national identity of rivals into account would not only make for poor economics, but would inevitably make the application of the antitrust laws highly subjective, undermine the credibility of competition officials, and, over time, deprive the antitrust laws of their legitimacy.²¹

Treatment of Efficiencies in U.S. Merger Review

In contrast to Canadian law, the U.S. antitrust laws do not contain a specific efficiencies defense in merger cases. The U.S. antitrust agencies do, however, take efficiencies into account in their analysis of the competitive effects of a merger, as described in April 1997 revisions to the agencies' *Horizontal Merger Guidelines*. The agencies integrate efficiencies into their assessments of competitive effects; for example, there may be circumstances under which it is possible to assess whether efficiencies in the form of quality improvements are sufficient to offset possible price increases following a merger.

The efficiencies section of the Guidelines,²² provides guidance on issues such as (1) how the agencies determine if claimed efficiencies are properly attributable to the merger (whether the efficiencies are "merger-specific"); (2) what the parties must do to substantiate efficiencies claims; (3) the circumstances, as a practical matter, in which the agencies are likely to find efficiencies claims persuasive; and (4) the limited circumstances under which consideration will be given to out-of-market efficiencies and to in-market efficiencies that are not expected to have short-term, direct effects on prices.

In March 2006, the agencies issued a detailed *Commentary on the Horizontal Merger Guidelines*, with descriptions of past agency investigations and enforcement actions to illustrate how the Guidelines have been implemented. The Commentary includes a section on efficiencies, with 15 case descriptions covering analysis of the types of "merger-specific" and "cognizable" efficiencies considered by the agencies, verification and substantiation of claimed efficiencies, the sufficiency of efficiencies in the balancing process, consideration of out-of-market efficiencies, fixed-cost efficiencies, and issues relating to supporting documentation.²³

International Competition Policy 17, Remarks before the 34th Annual Conference on International Antitrust Law & Policy, (September 27, 2007) available at <http://www.ftc.gov/speeches/majoras/070927fordham.pdf>.

²¹ In the United States, the Committee on Foreign Investment in the United States (CFIUS) which is chaired by the Secretary of the Treasury, considers the effects of mergers involving a foreign acquirer on the national security of the United States. 50 App. U.S.C. § 2170.

²² Available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm#4>

²³ Available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm#42>

The Conduct of Industry Studies²⁴

The FTC uses several tools to fulfill its mission of making markets work for consumers. In addition to bringing cases to remedy anticompetitive business conduct, it conducts studies of key market segments that present substantial competition issues.²⁵ Indeed, one of the original purposes behind the creation of the FTC was to study the operation of markets to guide legislation, enforcement, and business conduct.²⁶ Understanding how markets work, how efficiently they perform, and what can be done to make them work more efficiently is part of what has been termed the “research and development” component of competition law enforcement.²⁷

The FTC's enabling statute authorizes it to require persons, partnerships, or corporations to file special reports under oath answering questions “as to the organization, business, conduct, practices, management, and relation to other corporations . . . of the respective persons, partnerships, and corporations.”²⁸ This provision gives the FTC authority to use compulsory process in market investigations.²⁹ In recent years, the FTC has used its formal investigative power to conduct studies in the areas of authorized generic drugs,³⁰ pharmacy benefits management,³¹ generic drug entry,³² and gasoline pricing.³³ The generic drug entry study, for example, led to

²⁴ Because only the FTC has the authority to compel the submission of information outside of the context of a law enforcement investigation, this section was drafted by that agency.

²⁵ See, Muris/Pitofsky Conversation, *supra* note 19, in which two former FTC Chairmen – appointed by Presidents of different parties – agree on the importance of this approach.

²⁶ See generally, Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L.J.* 1, 59-60 (2003).

²⁷ William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 *Antitrust L.J.* 861 (2005).

²⁸ Federal Trade Commission Act, § 6(b), 15 U.S.C. § 46(b).

²⁹ A practical distinction should be drawn between industry studies in which formal investigative powers are required, and policy studies that rely on voluntary submission of information. FTC and DOJ routinely conduct policy studies involving key economic sectors. Recent examples include the real estate and retail grocery industries, health care, and the interface between antitrust and intellectual property. Policy studies are typically conducted on the basis of voluntary submission of information and public participation by a broad range of interested parties, and do not require the submission of information under legal compulsion.

³⁰ See <http://www.ftc.gov/os/comments/genericdrugstudy3/index.shtm>.

³¹ Federal Trade Commission, *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies* (2005), available at <http://www.ftc.gov/reports/pharmbenefit05050906pharmbenefitrpt.pdf>.

³² Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: an FTC Study* (2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

³³ Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increase* (2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>; *Interim Report on Gasoline Pricing: A Report to Congress* (2006), available at <http://www.ftc.gov/os/2006/03/0510243GasolinePricesInvestigationInterimReporttoCongress.pdf>.

enforcement actions and also prompted regulatory reform and statutory amendments.³⁴

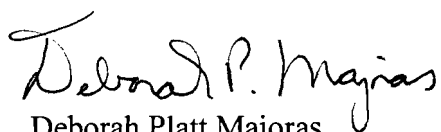
While recognizing the value of industry studies, the FTC has found that the power to compel information outside of the law enforcement context must be used judiciously. Broad authority is susceptible to overuse, and to perceptions that the agency is engaged in a “fishing expedition” that imposes burdens on firms that are disproportionate to potential benefits to the agency and consumers. In the 1970s, for example, the FTC conducted the “Line of Business” program through which it surveyed firm profitability data in the hope that this would help identify industries in which market power was being exercised. Not only did the program fail to yield a single law enforcement case, it engendered strong business and legislative criticism that the agency had overstepped its bounds. Often, the most productive use of the FTC’s authority is as a follow-up or complement to bringing individual cases, building on the knowledge gained from litigation against particular practices.

Consequently, the FTC today uses this power with restraint. Orders must be authorized by the full Commission; the decision is not delegated to the staff level. In addition, the Paperwork Reduction Act of 1980 requires that the FTC seek approval from the Office of Management and Budget before submitting requests for information to a group of more than nine recipients. 44 U.S.C. § 3502(4). Nonetheless, it is useful to have the tool available in the event that competition does not appear to be acting to protect consumer welfare and economic efficiency in a key sector.

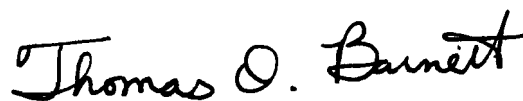
Conclusion

We hope this discussion of U.S. antitrust law and policy will prove helpful to you as you debate possible changes to Canadian law. If the U.S. antitrust agencies can be of further assistance as your review progresses, please feel free to contact us again.

Yours sincerely,



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³⁴ Muris/Pitofsky Conversation, *supra* note 19, at 777.