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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Canada (Competition Bureau) --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Introduction

1. As an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act*¹ (the "Act"), Canada's Competition Bureau (the "Bureau") recognizes the importance of carrying out its mandate in a principled and measured manner that promotes confidence in its decision-making and consistency in its enforcement approach.

2. "Procedural fairness" is a legal concept in Canada that arises from statute and common law. According to the Supreme Court of Canada², the duty of procedural fairness is "flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected."³ Furthermore, "the purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker."⁴ Factors deemed relevant to determining the content of the duty of procedural fairness include, among others: the nature of the decision being made and process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the individual or individuals affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself.⁵

3. While certain of the practices outlined in this submission clearly fall within the scope of the Canadian interpretation of procedural fairness, others are more appropriately understood as proactive measures adopted by the Bureau to ensure transparency and predictability in its enforcement practices and policies.

2. Overview of Canada's civil competition law regime

4. The Act is a federal law that contains civil and criminal provisions designed to address anti-competitive business conduct in Canada. The civil provisions deal with competitor collaborations, abuse of dominance and other restrictive trade practices,⁶ civil deceptive marketing practices and merger review. With the exception of the deceptive marketing provisions, the civil provisions are included in Part VIII of the Act.⁷

5. Subsection 10(1) of the Act defines circumstances in which the Commissioner may initiate a formal inquiry. Having commenced an inquiry, the Commissioner can apply, in appropriate circumstances, for use of formal powers, such as an order for a person to be examined on oath or solemn affirmation (paragraph 11(1)(a) of the Act), or an order compelling production of documents and information (paragraph 11(1)(b) of the Act).

¹ R.S.C 1985, c. C-34.

² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

³ *Ibid.* at 837.

⁴ *Ibid.*

⁵ *Ibid.* at 838 - 840.

⁶ Other restrictive trade practices include tied selling, exclusive dealing, market restriction, refusal to deal and price maintenance.

⁷ Pursuant to the request for written contributions for this roundtable [COMP/2010.60], the Act's criminal provisions and the civil deceptive marketing provisions are not addressed in this submission.

6. The Bureau is responsible for the enforcement of the Act, but has no adjudicative function. Rather, the courts and the Competition Tribunal (the "Tribunal"), a specialized body comprised of judicial members⁸ and non-judicial members with expertise in economics and business, have the authority to make a final determination as to whether there has been a violation of the Act and to order remedies that may apply to the conduct in question. The Tribunal also has powers to issue interim orders to provide temporary relief in appropriate circumstances.⁹

7. During a civil investigation, if the Commissioner believes that there are sufficient grounds to initiate proceedings under the civil provisions of the Act, she can bring an application to the Tribunal.¹⁰ The Tribunal has its own procedural rules,¹¹ which are similar to those that apply in civil cases before Canadian courts. They include procedural fairness protections, such as the right to be heard, to submit evidence and to respond to the other party's arguments and evidence. While the Tribunal's hearings and decisions are public, procedural safeguards also protect the disclosure of confidential information to the public. The Tribunal's decisions are publicly available on its website.¹²

3. Procedural fairness and transparency in civil investigations

8. This section provides an overview of certain procedural fairness protections, and proactive transparency initiatives undertaken by the Bureau, in respect of five key aspects of civil investigations: (i) the Bureau's decision-making process; (ii) information requests; (iii) confidentiality; (iv) agreed resolutions of enforcement proceedings; and (v) judicial review and interim relief. As discussed in greater detail below, these protections and initiatives play a fundamental role in ensuring that Bureau decisions are economically and legally sound, while appropriately respecting the interests of the parties throughout the investigative and adjudicative processes.

3.1 Bureau decision-making process

9. Upon receipt of a merger notification filing or a complaint alleging a violation of the civil provisions of the Act, case teams are assigned to conduct a preliminary examination.¹³ Where the Commissioner has reason to believe that grounds exist for the making of an order under Part VIII of the Act, the Commissioner may order the commencement of an inquiry under section 10 of the Act. The existence of an inquiry is a legal requirement for the use of the information-gathering power available to the Commissioner under section 11 of the Act.

10. In the course of the preliminary examination and inquiry, the Bureau will pursue various avenues of investigation to obtain relevant information, including information in the possession of complainants, third party market participants (*e.g.*, consumers, competitors, suppliers), and the firm or firms that are the subject of the inquiry. This information is carefully analyzed within the legal and economic framework of

⁸ Judges from the Federal Court.

⁹ The Tribunal's interim relief power includes interlocutory and interim injunctions. A discussion of the Tribunal's order-making powers is beyond the scope of this submission.

¹⁰ Note that the Bureau is represented in such proceedings by lawyers from (or retained by) the Department of Justice.

¹¹ *Competition Tribunal Rules*, SOR/2008-141.

¹² Competition Tribunal's website: <http://www.ct-tc.gc.ca>.

¹³ Case teams usually consist of two or more competition law officers, and Bureau economists and a legal advisor from the Department of Justice.

the Act, and often with the assistance of external legal and economic advisors, and industry-specific experts, as part of the case assessment process.

11. A variety of measures ensures that the Commissioner considers robust information and sound analysis in all matters to determine the most appropriate manner to resolve them. In particular, the Commissioner is involved in regular briefings with case teams and experts, and may participate in meetings with the parties at various stages of the inquiry. The merits of pursuing complex matters, which often represent significant investments in Bureau resources, are also debated rigorously by senior managers to ensure that the Bureau develops viable theories of competitive harm and legal strategy before recommending that an order be sought from the Tribunal.

12. The final disposition of an examination or inquiry depends upon whether the evidence establishes that the elements of the relevant reviewable practice are satisfied or, in the case of merger review, that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. If the Commissioner concludes that the evidence is insufficient, the matter is discontinued.

13. In matters where the Commissioner is satisfied that the evidence supports an application to the Tribunal for a remedy, the Commissioner will, as a matter of practice, normally directly communicate to the parties the concerns regarding the alleged contravention of the Act. The Bureau provides parties that are the subject of a formal inquiry during the investigation with an opportunity to present arguments and evidence to senior Bureau decision-makers, including, in many cases, the Commissioner, and again immediately prior to the filing of a formal application with the Tribunal or the courts to obtain a remedy. These senior-level meetings generally include counsel for the parties, senior officials representing the parties (if a corporate entity) and, at times, economists retained by the parties to conduct an economic impact analysis of the alleged conduct or merger. Bureau counsel and staff present their views of the evidence to the parties, including the Bureau's economic analysis. While these meetings do not always resolve a particular case, they assist in understanding the other side's position and can help to narrow areas of contention likely to be litigated before the Tribunal or the courts.

3.2 Information requests

14. In all cases, the Bureau strives to maintain a consistent and appropriately disciplined approach to information requests that enhances the predictability and transparency of its enforcement activities. The Bureau regularly engages in discussions with parties and their counsel prior to making a request for information; however, the nature and timing of these discussions depend, to some extent, on the particular conduct at issue, the provision(s) of the Act under which the conduct is being investigated, and whether the case is at the examination or inquiry stage.

15. While the Bureau is equipped with formal tools to compel the production of information (described below), the Bureau can also gather information through informal, voluntary information requests. Voluntary information requests are often used in merger reviews, as well as in examinations under the competitor collaboration and restrictive trade practices provisions of the Act. Decisions as to whether to use formal or voluntary information-gathering techniques are made on a case-by-case basis depending on the circumstances, although the Bureau often uses both techniques in the same matter.

3.2.1 Formal information requests

16. Bureau officers and counsel for the Commissioner work closely together to produce clear and targeted orders for the production of documents, written answers or testimony. The Act contains safeguards that apply to information submitted in response to formal, court-authorized information requests. Section 19 of the Act establishes a mechanism by which a person ordered to produce a record

may raise claims of solicitor-client privilege before the courts. Where a claim of solicitor-client privilege is made, the record is sealed in a package and placed in the custody of a person deemed acceptable under subsection 19(3) of the Act, pending judicial review of such claim(s). Further, subsection 12(3) of the Act affords persons ordered to attend an oral examination and persons whose conduct is being inquired into, with the right to be represented by counsel. A person whose conduct is being inquired into and that person's counsel are also entitled to attend the examination, subject to certain exceptions (subsection 12(4)).

3.2.2 *Merger review: supplementary information requests*

17. Particularly with respect to information requests contemplated in the context of merger review, the Bureau's *Merger Review Process Guidelines* promote early dialogue and cooperation between the parties and the Bureau to enhance the efficiency and effectiveness of the merger review process, as well as transparency to the parties. The Guidelines encourage parties to enter into discussions with the Bureau prior to, or as soon as possible after, submission of a merger notification. The purpose of these early discussions is to assist Bureau officers in identifying issues that could require further examination, and to dispense expeditiously with those that do not. The Guidelines also confirm that Bureau officers will communicate preliminary views on potential competition issues as soon as possible within the statutory initial 30-day review period.

18. During this initial period, the Bureau may issue a so-called "supplementary information request", or "SIR", when a proposed transaction raises significant competition issues and additional information is required to complete a review. While not legally required to do so, prior to issuing a SIR, the Bureau will generally provide a draft to the recipient party and engage in dialogue with that party's counsel regarding the information requests set out therein. The principal purposes for this pre-issuance dialogue include ensuring that the party understands the information request; identifying confidentiality concerns; determining whether there are sources and forms of information that may be more directly responsive to the Bureau's concerns; and ascertaining whether there are any other issues that might impair the ability of the party to comply with the SIR as a result of, for example, ambiguities or inconsistent terminology. The Guidelines also describe voluntary measures that the Bureau will take to limit the number of persons who must be searched, the time period the Bureau generally applies to documents for establishing their relevance to a merger review, and information that must be supplied in response to a SIR.

19. The Guidelines have also introduced an internal appeal procedure for parties who wish to contest the scope of a SIR or to contest the Bureau's decision that a party's response to a SIR is incomplete. All of these measures promote limiting the burden on parties in responding to a SIR so that it is no greater than necessary, while ensuring that the Bureau is able to obtain the information required to conduct its review in a timely way in the public interest.

4. Confidentiality

4.1 *Protection of confidential information during examinations and formal inquiries*

20. The general policy of the Bureau with respect to confidentiality is set out in the Bureau's *Information Bulletin on the Communication of Confidential Information under the Competition Act* ("Confidentiality Bulletin").¹⁴

¹⁴ Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html>.

21. Subsection 10(3) of the Act provides that inquiries must be conducted in private, while section 29 protects the disclosure of information that is provided to or obtained by the Bureau in the course of executing its mandate. Specifically, section 29 protects:

- the identity of any person from whom information was obtained pursuant to the Act;¹⁵
- any information obtained pursuant to the Commissioner's formal information-gathering powers;¹⁶
- whether notice has been given or information supplied in respect of a particular proposed transaction;
- any information obtained from a person requesting an advance ruling certificate;¹⁷ and
- any information provided voluntarily pursuant to the Act.¹⁸

22. Subsection 29(1) includes exceptions whereby the Commissioner may communicate confidential information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. The communication of confidential information usually takes place in the context of advancing an inquiry under the Act or ensuring that a matter that falls outside of the Bureau's mandate, including a possible violation of the Canadian *Criminal Code* or a regulatory statute, is addressed by the appropriate authorities. The Act also authorizes the Commissioner to communicate specific information to the Minister of Transport or the Minister of Finance if the Commissioner receives a formal written request for information. However, the Act restricts these Ministers' use of the information to specific purposes pertaining to their legislative mandates, to regulate transportation undertakings and financial institutions, respectively.¹⁹

23. Pursuant to the Government of Canada's *Values and Ethics Code for the Public Service* (the "Code"), public servants have an obligation to not knowingly take advantage of, or benefit from, information obtained during the course of their official duties if that information is not publicly available. Disclosure of information contrary to subsection 29(1) of the Act would be a breach of this Code obligation, and could result in disciplinary action up to, and including, termination of employment. Such disclosure could also be considered as wrongdoing in the workplace and may be reported to, and considered by, the federal government's Public Service Integrity Officer.²⁰ Finally, where disclosure of

¹⁵ Under Canadian common law, this protection includes information that could identify such a person.

¹⁶ Formal powers include: orders under section 11 of the Act to obtain information from persons who have or are likely to have information that is relevant to a matter under inquiry; search warrants under sections 15 and 16 of the Act; and notifications for mergers meeting certain financial thresholds under section 114 of the Act.

¹⁷ An advance ruling certificate ("ARC") may be issued by the Commissioner to a party or parties to a proposed merger transaction who want to be assured that the transaction will not give rise to proceedings under section 92 of the Act. Section 102 of the Act provides that an ARC may be issued when the Commissioner is satisfied that there would not be sufficient grounds on which to apply to the Tribunal for an order against a proposed merger. The issuance of an ARC is discretionary. An ARC cannot be issued for a transaction that has been completed, nor does an ARC ensure approval of the transaction by any agency other than the Bureau.

¹⁸ *Competition Act*, R.S.C. 1985, c. C-34, paras. 29(1)(a)-(e).

¹⁹ *Competition Act*, R.S.C. 1985, c. C-34, s. 29.1 and 29.2.

²⁰ The Office of the Public Sector Integrity Commissioner of Canada is an independent agency of Parliament. The Office offers a confidential and independent mechanism for public servants or members of the public

information covered by section 29 confers an advantage or benefit of any kind on a public servant, this disclosure may be considered an offence under paragraph 121(1)(c) of Canada's *Criminal Code*, punishable by imprisonment for a term not exceeding five years.

24. Once an examination becomes a formal inquiry under the Act, disclosure of certain information is required in particular circumstances. Specifically, subsection 10(2) of the Act provides that, in response to a written request by a person whose conduct is being inquired into or any persons who have applied pursuant to section 9 to initiate a formal inquiry, the Commissioner shall inform that person as to the progress of the applicable inquiry. Also, pursuant to section 28 of the Act, the Minister of Industry may require the Commissioner to provide an interim report on the status of any formal inquiry.

25. In order to obtain a court order for the production of documents, testimony or written answers under section 11 or a search warrant under section 15 of the Act, the Commissioner is required to disclose sufficient information in a written application to satisfy a judge that the order should be issued. Such applications often require the disclosure of confidential information to the judge reviewing the application. The target is typically entitled to obtain this disclosure from the court file, although access to some confidential information may be restricted by a sealing order, where, for example, disclosure of the application would compromise the identity of a confidential informant or compromise the nature and extent of an ongoing investigation.

26. With respect to disclosure of information to parties who may be the subject of Tribunal proceedings, the Bureau takes steps to ensure that a target in a civil investigation has the right to review and respond to evidence that is as complete as possible, while respecting the need to protect the confidentiality of information in the Bureau's possession. The Bureau typically provides targets of civil investigations with an overview of the allegations against them, and an opportunity to respond to them as early as possible during the investigative process.

27. To comply with the requirements of the Act, the Bureau will not generally comment publicly on an ongoing investigation unless it has been made public through another source,²¹ or the parties consent to the Bureau making a public statement. The Bureau recognizes that greater transparency helps to inform the public about the Bureau's work and encourages compliance with the law. Accordingly, the Bureau strives to provide meaningful guidance to the public, when appropriate, including by way of technical backgrounders that explain the Bureau's analysis of a particular investigation and the reasons underlying its final conclusions. The Bureau will typically allow the party or parties to review the technical backgrounder shortly before its publication in order to identify any confidential information that, in their view, should be removed and to correct any factual errors that, in their opinion, should be addressed.²²

28. Other ways to announce the Bureau's findings include public statements (*e.g.*, news releases) that are available on the Bureau's website, and the Bureau's Annual Report to Parliament.

to disclose potential wrongdoing in the federal public sector. The Office reviews disclosures of wrongdoing and reprisal complaints, conducts investigations as needed and makes recommendations for corrective measures.

²¹ Examples of other sources include an application to the Tribunal and a merger review that has been referenced by the parties in a press release or public securities filing.

²² While consideration will be given to the comments of the party or parties prior to the publication of the technical backgrounder, the Bureau will make the final determination regarding the content of that document.

4.2 Protection of confidential information before the courts or the competition tribunal

29. In the case of formal proceedings before the courts or the Tribunal, when it is necessary to use confidential information, efforts to protect the information from disclosure will be taken if such action does not hinder the administration or enforcement of the Act. Measures include the use of sealing orders, confidentiality orders, confidential schedules to public documents, and *in camera* proceedings. These measures are ultimately under the control of the Tribunal or the courts, and necessarily subject to the generally public nature of the proceedings. Any such measures, as designed by the Tribunal or the courts, are necessarily informed by the fundamental concern that respondents have an opportunity to answer the case against them.

5. Agreed resolutions of civil enforcement proceedings

30. The Commissioner's approach to agreed resolutions under the Act is described in the Bureau's *Conformity Continuum Information Bulletin* ("Conformity Continuum").²³ The Conformity Continuum can best be understood as a system of compliance and enforcement instruments designed to complement one another and work interdependently to promote conformity with the Act.

31. Although the Conformity Continuum places emphasis on providing the business community with knowledge and tools to comply with the Act, where a remedy to a breach of the Act cannot be achieved by a consent agreement or, in limited circumstances, an informal compliance measure, the Bureau will not hesitate to apply to the Tribunal for an appropriate remedial order in a civil matter.

32. In circumstances in which the actions at issue represent less serious contraventions of the law, matters may be resolved on a consensual and less formalistic basis. For example, the Bureau may accept an undertaking from the party as an alternative to pursuing the investigation. Undertakings would typically be accepted in matters involving infrequent and inadvertent contraventions of the Act by cooperative parties willing to offset the damage to the marketplace.

33. Section 105 of the Act also permits the Commissioner and a party to sign a consent agreement with respect to matters under Part VIII of the Act. The consent agreement may then be filed with the Tribunal and, upon registration, has the same effect as if it were an order of the Tribunal.²⁴ The Act specifically contemplates the rights of third parties in the context of registered consent agreements. Pursuant to subsection 106(2) of the Act, a person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied.

34. Factors that the Bureau may consider when assessing the propriety of a consensual resolution include: (i) the economic impact of the conduct under review; (ii) the pervasiveness of the conduct in the industry under review; (iii) the incentive or ability of the party to maintain its market power; (iv) the conduct of the party and case history; and (v) the level of general and specific deterrence sought. The Bureau determines the most appropriate response based on factors that are relevant to the circumstances at hand. The objective is to select the most effective and efficient instrument to address the specific situation and achieve lasting conformity to promote the public interest in competitive markets.

²³ Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html>.

²⁴ Neither the Act nor the *Competition Tribunal Rules*, SOR/2008-141, places a time restriction on when a consent agreement may be filed with the Tribunal.

6. Judicial review and interim relief

35. The Act grants the Commissioner the power to make certain administrative decisions under the Act, such as causing an inquiry to be made (section 10) or discontinuing an inquiry (section 22). These types of decisions may be subject to judicial review. In this regard, the courts have stated that they will defer to such discretionary decisions in the absence of bad faith on the part of decision-makers, the exercise of discretion for an improper purpose, or the use of irrelevant considerations.²⁵

36. Beyond these certain decisions of a purely administrative nature, and as discussed above, Canada's competition law and enforcement system reflects a bifurcated model: the Bureau has no adjudicative function, and may only secure formal remedies through proceedings before the courts or the quasi-judicial Tribunal. In respect of civil matters, the Commissioner conducts investigative²⁶ and enforcement functions (including acting as a plaintiff in matters where she has filed an application for an order before the Tribunal), while the Tribunal performs the adjudicative function.

37. The Tribunal's decisions, whether final or temporary, are subject to appeal to the Federal Court of Appeal. Each of the Commissioner and the party or parties subject to a Tribunal order may seek to appeal a decision of the Tribunal; however, an appeal on a question of fact is only possible with leave from the Federal Court of Appeal. The Federal Court of Appeal's decision may be further appealed, with leave, to the Supreme Court of Canada.²⁷

38. Proceedings before the Tribunal and courts are transparent, while providing the reasonable degree of confidentiality with respect to competitively sensitive information deemed appropriate by the adjudicator. The involvement of judicial members of the Tribunal in civil matters²⁸ ensures appropriate attention to procedural fairness considerations. Overall, the Canadian adjudicative structure provides a high level of independence, while at the same time ensuring some degree of accountability in the performance of this function through the judicial appeal process.

7. Conclusion

39. Procedural fairness protections in the Act and proactive measures undertaken by the Bureau to enhance transparency in its practices and policies are key considerations for the Bureau in executing its enforcement mandate and promoting the legitimacy of its enforcement decisions.

40. The Bureau is involved in ongoing efforts to find new ways of enhancing even further the transparency and predictability to stakeholders, both through internal scrutiny of existing practices and procedures, and through various collaborative initiatives with external groups, including the Canadian Bar Association, and international dialogue, including this one undertaken by the OECD.

²⁵ *Charette v. Commissioner of Competition*, 2003 FCA 426; *Cin mas Guzzo Inc. v. Canada (Attorney General)*, 2005 FC 691, aff'd 2006 FCA 160; *Ashley v. Canada (Commissioner of Competition)*, 2006 FC 459; *Nova Scotia (Attorney General) v. Ultramar Canada Inc.*, [1995] 3 F.C. 713 at paras. 62-63, 65.

²⁶ In respect of criminal matters, investigations are carried out by the Bureau, while prosecutions are undertaken by the Director of Public Prosecutions of the Federal Prosecution Service, who has independent discretion to determine the sufficiency of evidence and whether a prosecution is in the public interest. Adjudication is before the superior courts of the provinces or the Federal Court of Canada.

²⁷ Under section 28 of the *Federal Courts Act*, the Federal Court of Appeal also has jurisdiction to judicially review decisions or orders of a judicial or quasi-judicial nature made by the Competition Tribunal.

²⁸ Or, in criminal cases, judges.