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**The Treatment of Strategic Alliances under the Canadian Competition Act**

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## The Treatment of Strategic Alliances under the Canadian Competition Act

The purpose of this paper is to alert in-house counsel to the competition law issues that may arise from the formation of strategic alliances between competing firms. While most do not, a strategic alliance can attract criminal and/or civil liability under the *Competition Act* (the “Act”).

<sup>1,2</sup> The primary provisions in the Act that deal with arrangements among competitors are Section 45, the conspiracy provision and Section 92, dealing with mergers.<sup>3</sup> In this paper we offer some suggestions to enable in-house counsel to identify when a strategic alliance may be characterized as a pro-competitive arrangement, and when it may be viewed as a merger or conspiracy under the Act. This includes a discussion of the treatment of strategic alliances, by the courts, the Competition Tribunal and the Competition Bureau (“Bureau”), and a brief overview of the treatment of strategic alliances under the American antitrust regime. We will also discuss how proposed future amendments to the conspiracy provision may impact the treatment of strategic alliances by the courts and the Bureau. Finally, Appendix “A” sets out some practical guidelines regarding communications between competitors.

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<sup>1</sup> R.S. 1985, c. C-34, available at: <http://laws.justice.gc.ca/en/C-34/index.html>.

<sup>2</sup> A strategic alliance is reviewable under the conspiracy provision (Section 45), abuse of dominance provisions (Sections 78 and 79) or merger provisions (Section 92) of the Act. According to the Competition Bureau information bulletin entitled, *Strategic Alliances under the Competition Act*, relatively few cases are reviewed under both the criminal and civil provisions of the Act (section 3.2, paragraph 3).

<sup>3</sup> Section 36 of the Act enables private parties to sue for damages suffered as a result of conduct contrary to any criminal provisions of the Act or a violation of Competition Tribunal order made under the civil provisions of the Act. Those persons can recover damages equal to the loss or damage suffered, plus an amount to compensate up to the full cost of his or her investigation and the proceedings.

## I: What is a Strategic Alliance?

Strategic alliances play an integral role in business. According to the Commissioner of Competition's Information Bulletin on *Strategic Alliances under the Competition Act*<sup>4</sup> ("*Strategic Alliances Bulletin*"), firms have increasingly participated in strategic alliances as a means of improving their competitiveness in an age of increasing international competitive pressures, the globalization of markets, and generally decreasing trade barriers. Strategic alliances enable business partners to share risks, research and resources, gain access to new markets, and attain efficiencies. The important role of strategic alliances in enhancing the efficiency of Canadian firms is recognized by the Commissioner of Competition ("Commissioner").<sup>5,6</sup> According to the Department of Foreign Affairs and International Trade, "strategic alliancing has become one of the leading business strategies of the new millennium. Commonly utilized by high technology companies, they are increasingly popular with businesses in all industrial and service sectors across North America."<sup>7</sup>

A strategic alliance has been described as "a formal, mutually-agreed upon, commercial collaboration between companies." While participants in a strategic alliance may "exchange and/or integrate selected business resources for mutual benefit, they remain separate, entirely independent businesses." The forms which a strategic alliance may take include "simple market

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<sup>4</sup> In 1995, the Director of Investigation and Research (now known as the Commissioner of Competition) issued this policy statement to provide general guidance and clarify the Bureau's enforcement approach to strategic alliances under the Act. The *Strategic Alliances Bulletin* can be found at: [http://strategis.ic.gc.ca/pics/ct/alliance\\_e.pdf](http://strategis.ic.gc.ca/pics/ct/alliance_e.pdf).

<sup>5</sup> The Commissioner of Competition is appointed by the Governor in Council and is responsible for, amongst other things, the administration and enforcement of the Act.

<sup>6</sup> In a speech to the House of Commons Standing Committee of Industry, April 13, 2000, the Commissioner of Competition stated that the Bureau "need[s] to encourage the strategic alliances that Canadian firms rely on to compete in new, global markets". Also, the *Strategic Alliances Bulletin* recognizes that most strategic alliances are efficiency-enhancing and relatively few have anti-competitive effects.

<sup>7</sup> See the Department of Foreign Affairs and International Trade website at <http://www.infoexport.gc.ca/ie-en/DisplayDocument.jsp?did=5273&gid=538>.

exchanges or cross licensing agreements” or more complicated arrangements such as “cooperative-manufacturing agreements or joint-equity ventures”.<sup>8</sup>

The Act does not define “strategic alliances”. However, the *Strategic Alliances Bulletin* provides descriptions of common forms of alliances and concludes:

In short, the major features of strategic alliances appear to be: the relative continuing independence of the parties in respect of those matters not covered by the alliance; a set (albeit longer-term) time frame; limited scope of the arrangement and greater flexibility of the parties compared to takeovers or acquisitions; and, reciprocity between the parties, as seen in the sharing of objectives, information and key assets.<sup>9</sup>

## **II: When is a Strategic Alliance reviewable under the civil merger provisions of the Act?**

A strategic alliance is only reviewable under the civil merger provisions of the Act if it falls within the definition of “merger” under section 91. A merger is defined as,

... the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.<sup>10</sup>

Control, meaning *de jure* control, requires direct or indirect holding of more than 50% of a corporation’s voting rights.<sup>11</sup> The *Strategic Alliances Bulletin* and the *Merger Enforcement Guidelines* provide guidance on the meaning of “significant interest”.<sup>12</sup> According to the Commissioner, a “significant interest” arises when one or more persons directly or indirectly acquire or establish the ability to materially influence the economic behaviour of the business, or

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<sup>8</sup> Department of Foreign Affairs and International Trade website, *ibid*, note 7.

<sup>9</sup> *Strategic Alliances Bulletin*, *supra*, note 4, part 2.

<sup>10</sup> *Competition Act*, *supra*, note 1, Section 91.

<sup>11</sup> *Competition Act*, *supra*, note 1, Section 2(4).

<sup>12</sup> When a strategic alliance is reviewed under the civil merger provisions of the Act, it will be reviewed following the analytical framework set out in the *Merger Enforcement Guidelines* (*Strategic Alliance Bulletin*, *supra*, note 4, part 3.2.4). The *Merger Enforcement Guidelines* can be found at: [http://strategis.ic.gc.ca/pics/ct/meg\\_full.pdf](http://strategis.ic.gc.ca/pics/ct/meg_full.pdf). Presently the Bureau is seeking public comments on its *Merger Enforcement Guidelines* (Draft for Consultation March 2004).

part thereof. A “significant interest” may be deemed to have been acquired or established where one firm’s decisions in respect of pricing, purchasing, distribution, marketing or investment are materially influenced by another firm.<sup>13</sup> It does not require acquisition of an ownership interest. The *Strategic Alliances Bulletin* lists a number of factors which have been considered by the Bureau in determining whether a “significant interest” exists. “Ultimately, where the effect of the strategic alliance is to give one party the ability to materially influence the economic decisions of another, then the definition of a merger is likely satisfied”.<sup>14</sup> On whether an alliance will be examined under the merger or conspiracy provisions, the *Strategic Alliances Bulletin* provides:

Generally, the Bureau will examine alliances that involve the future acquisition of control as mergers, unless there is a basis for believing that the acquisition of control is a sham. Competitively sensitive information exchanged by competitors during merger negotiations which do not ultimately lead to a merger could provide grounds for an examination under the conspiracy provisions.<sup>15</sup>

No application under Section 92 (merger review) of the Act may be made against a person whom proceedings have been commenced under Section 45 on the basis of the same facts.<sup>16</sup>

### **III: When can a joint venture be exempt from the application of the civil merger provisions?**

Subsection 95(1) of the Act provides a seldom utilized exemption for specified joint ventures from the application of the civil merger provisions. To be exempt from an order under the civil merger provisions, the joint venture must be in respect of a combination (not a corporation) that is formed or proposed to be formed to undertake a specific project or a program of research and development. Further, it must be shown that the project or program would not have taken place

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<sup>13</sup> *Strategic Alliances Bulletin, supra*, note 4, part 3.2.4.

<sup>14</sup> *Strategic Alliances Bulletin, supra*, note 4, part 3.2.4.

<sup>15</sup> *Strategic Alliances Bulletin, supra*, note 4, part 3.2.

<sup>16</sup> *Competition Act, supra*, note 1. Section 98.

in the absence of the combination, that there is no change of control over any party to the combination, and that there is a written agreement which governs a continuing relationship between the parties, imposes on at least one of the parties an obligation to contribute assets, restricts the range of activities, and provides that the agreement terminates on the completion of the project or program. Finally, in order for the joint venture to be exempt from the merger provisions, the combination must not be likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program.

#### **IV: When can Strategic Alliances give rise to inquiry under the Conspiracy Provision of the Act?**

The Commissioner may launch a criminal investigation where there is evidence of an agreement in violation of Section 45 of the Act arising from an alliance or discussions related to a prospective strategic alliance.<sup>17</sup> In conducting an inquiry, the Commissioner has access to a number of investigative powers, including: the ability to obtain search warrants *ex parte*,<sup>18</sup> the ability to obtain *ex parte* orders authorizing the oral examination of individuals on sworn affidavit evidence,<sup>19</sup> the power to compel production of documents,<sup>20</sup> the power to seek judicial authorization to use wiretaps when investigating suspected conspiracies,<sup>21</sup> and the authority to conduct computer searches.<sup>22</sup> The Commissioner may refer the matter to the Attorney General at any stage of the inquiry. The Attorney General then determines whether criminal charges should be laid, and conducts prosecutions in the Courts.

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<sup>17</sup> *Competition Act, supra*, note 1, Section 10(b)(iii).

<sup>18</sup> *Competition Act, supra*, note 1, Section 15.

<sup>19</sup> *Competition Act, supra*, note 1, Sections 11(1)(a) and 11(3).

<sup>20</sup> *Competition Act, supra*, note 1, Sections 11(1)(b) and 11(2).

<sup>21</sup> Section 183 *et seq.* of the *Criminal Code*, R.S. 1985, c. C-46.

<sup>22</sup> *Competition Act, supra*, note 1, Section 16.

Under Section 45 of the Act, everyone "who conspires, combines, agrees or arranges with another person" to prevent or lessen competition "unduly" is guilty of an indictable offence and subject to criminal penalties.<sup>23</sup> Section 45 does not apply to agreements between federal financial institutions or companies who are affiliates of each other.<sup>24</sup> Convictions under Section 45 can result in imprisonment for up to five years (individuals) and/or a fine of up to \$10 million, per count. The elements of Section 45, as they apply to strategic alliances is described below.<sup>25</sup>

*(i) Have the parties to the alliance entered into an agreement?*

The existence of an agreement may be proved, with or without direct evidence, by circumstantial evidence.<sup>26</sup> Mere communication between alleged conspirators will not constitute an agreement,<sup>27</sup> but evidence of information sharing among competitors can lead to an inference of an agreement under Section 45.<sup>28</sup>

*(ii) Does the agreement, or is it likely to, unduly prevent or lessen competition?*

Section 45 only applies to agreements which are likely to prevent or lessen competition "unduly", relative to that which would have existed without the agreement.<sup>29</sup> In *Canada v.*

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<sup>23</sup> Section 45. (1) Every one who conspires, combines, agrees or arranges with another person  
 (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,  
 (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,  
 (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or  
 (d) to otherwise restrain or injure competition unduly,  
 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

<sup>24</sup> *Competition Act, supra*, note 1, Sections 45(7.1) and 45(8).

<sup>25</sup> Appendix 1 of the *Strategic Alliance Bulletin* contains six illustrative scenarios relating to Section 45 which are intended to assist firms in determining the status of various types of strategic alliances under the Act.

<sup>26</sup> *Competition Act, supra*, note 1, Section 45(2.1).

<sup>27</sup> *R v. Anthes Business Forms Ltd.* (1975), 26 C.C.C. (2d) 349 at 363 (Ont. C.A.).

<sup>28</sup> *R. v. Armco Canada Ltd.* (1974), 6 O.R. (2d) 521; *R v. Canadian General Electric Company Ltd.* (1976), 29 C.P.R. (2d) 1.

<sup>29</sup> Endnote 10 from the *Strategic Alliance Bulletin* states, with respect to "unduly": "It is possible that an offence may be established solely on the basis of evidence that the specific purpose or object of the agreement was to

*Pharmaceutical Society (Nova Scotia) (“PANS”)*,<sup>30</sup> the Supreme Court of Canada stated that “unduly” requires a combination of market power and behaviour that is likely to be injurious to competition.<sup>31</sup> The Court noted that numerous combinations are possible and that “a particularly injurious behaviour may . . . trigger liability even if market power is not so considerable”.<sup>32</sup> It is the Bureau’s position that the converse is also true: where the parties hold a considerable amount of market power, less injurious behaviour may trigger initiation of an inquiry under Section 45.<sup>33</sup>

*PANS* sets out the test for “unduly”. The test is a two-step approach to determine whether an agreement lessens competition “unduly” or substantially: (i) do the parties to the agreement have market power in the relevant market or will they be likely to obtain market power because of the agreement, and (ii) will the agreement likely be injurious to competition. The test for “unduly” focuses solely on the competitive effects, and not the efficiencies which may result from the agreement.<sup>34</sup> The first step of the test, whether the parties have market power in the relevant market, requires definition of the relevant market and consideration of factors such as market share, number of competitors and degree of competition, barriers to entry, product differentiation, and cross-elasticity of demand. In regard to the second part of the test, an agreement relating to price was found by one Court to unduly prevent and lessen competition

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prevent or lessen competition unduly. However, the Bureau’s enforcement approach has been to inquire into those agreements which are likely to have an anti-competitive impact on the market.” A trial court decision released after the *Strategic Alliance Bulletin* was issued expressly rejected this possibility: *R v. Clarke Transport et al* (1995), 130 D.L.R. (4<sup>th</sup>) 500, 64 C.P.R. (3d) 289, at para 78.

<sup>30</sup> [1992] 2 S.C.R. 606 (S.C.C.).

<sup>31</sup> The Bureau will address the issue of “unduly” within the framework discussed in *PANS*. In doing so, the Bureau will: (i) define the relevant product and geographic markets affected by the strategic alliance; (ii) determine whether the parties to the alliance possess market power in the defined relevant markets, or whether they are likely to obtain market power in these markets as a result of the alliance; (iii) assess what behaviour is specifically restricted or prescribed by the strategic alliance; and, (iv) determine if the alliance results in a combination of market power and behaviour injurious to competition which is serious or significant. From the *Strategic Alliance Bulletin*.

<sup>32</sup> *PANS*, *supra*, note 30, para.109.

<sup>33</sup> *Strategic Alliances Bulletin*, *supra*, note 4.

<sup>34</sup> “Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains to the public lie . . . outside of the inquiry under paragraph 32(1)(c) [now paragraph 45(1)(c)]”, *PANS*, *supra*, note 30, para. 88.

(the court did not take into consideration that the emphasis of the agreement was performance and service, the development of technology and the design of new products),<sup>35</sup> whereas an agreement between competitors to exchange and purchase product,<sup>36</sup> and an agreement relating to percentage price increases<sup>37</sup> were found by other Courts not to be injurious to competition.

The *Strategic Alliances Bulletin* provides some guidance in determining when an agreement is, or likely to be, injurious to competition:<sup>38</sup>

Price fixing, restrictions on output or market sharing are almost always of competitive significance, and hence the Director [Commissioner] will view such agreements as constituting injurious behaviour. Likewise, in cases where product quality, service, promotional activity or innovation are an important determinant of competitive rivalry such that an agreement in respect of one of these is likely to have a significant adverse effect on competition between the parties, the Director [Commissioner] may view such agreements as providing grounds for inquiry where the parties possess market power.<sup>39</sup>

Technology sharing agreements and reciprocal patent licensing between competitors may not amount to a serious restraint on competition.<sup>40</sup> But, conspiracy issues could arise if, ancillary to these agreements, the competitors agreed on prices or allocated markets between themselves.

“Unless the beneficial elements of the cooperative arrangement are tied to a broader conspiracy they will not be challenged by the Bureau.”<sup>41</sup>

(iii) *Do the parties to the strategic alliance have requisite mens rea?*

According to the Supreme Court of Canada in *PANS*, the requisite *mens rea* is established where the parties intended to enter into the agreement in question, were aware of its terms and intended

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<sup>35</sup> *R v. Albany Felt Co. of Canada* (1982), 143 D.L.R. (3d) at 714 (C.A. Que.).

<sup>36</sup> *R. v. Cominco Ltd.* (1980), 46 C.P.R. (2d) 154 (Alta. Q.B.).

<sup>37</sup> *R v. Aluminum Co. of Canada* (1976), 29 C.P.R. (2d) 183 (S.C. Que.).

<sup>38</sup> The *Strategic Alliances Bulletin* offers additional insight into the essential elements of the offence. However, it is important to note that it is not legally binding.

<sup>39</sup> *Strategic Alliances Bulletin*, *supra*, note 4, part 3.2.1.

<sup>40</sup> See the Intellectual Property Enforcement Guidelines at <http://strategis.ic.gc.ca/pics/ct/ipege.pdf>. The Bureau published these guidelines in order to articulate its approach to the interface between competition policy and intellectual property rights.

<sup>41</sup> *Strategic Alliances Bulletin*, *supra*, note 4, part 3.2.1.

to carry it out. The Crown must also show that the parties intended to lessen competition unduly, but need not adduce subjective evidence of intent. Generally, the intent is inferred from the effect.

*(iv) Section 45 Defences*

Section 45 does not apply if the agreement relates only to one or more of the following: the exchange of statistics; the definition of product standards; the size and shapes of product packaging; cooperation in research and development; the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media; measures to protect the environment; the exchange of credit information; the definition of terminology used in trade, industry or profession; or, the adoption of the metric system of weights and measures.<sup>42</sup>

Among these, the Bureau has stated that the first six are most likely to have application to strategic alliances.<sup>43</sup> None of these are absolute defences and under certain circumstances will not apply. If the strategic alliance lessens competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or if it restricts entry into or expansion of a business in a market, the defences do not apply.<sup>44</sup> There are also limits on the defence relating to the export of products from Canada.<sup>45</sup> On the point of when a defence may be lost, the *Strategic Alliances Bulletin* states,

It is the Director's [the Commissioner's] position that for a defence to be lost, it is not necessary that the agreement be directed explicitly at any of these fields, only that one of these dimensions of competition is likely to be lessened or prevented unduly as a result of the alliance. Consequently, a strategic alliance which may be directed primarily at research and development, but which is likely to have an undue effect on prices, for example, owing to an ancillary arrangement to jointly market and distribute the newly produced goods or services, may cause the Director [the Commissioner] to initiate an

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<sup>42</sup> *Competition Act, supra*, note 1, Section 45(3).

<sup>43</sup> *Strategic Alliances Bulletin, supra*, note 4, part 3.2.1.1.

<sup>44</sup> *Competition Act, supra*, note 1, Section 45(4).

<sup>45</sup> *Competition Act, supra*, note 1, Section 45(6). Note: the export defence provides no defence under competition laws of countries outside of Canada where alliance partners hope to sell their products.

inquiry under the conspiracy provisions. At the same time, the beneficial features of the strategic alliance will not be subject to challenge by the Director [the Commissioner] unless they are seen as part of a broader conspiracy.<sup>46</sup>

Defences also exist for agreements which relate only to the export of products from Canada,<sup>47</sup> as well as for agreements that relate only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public in the practice of a trade or profession relating to the service; or in the collection and dissemination of information relating to the service.<sup>48</sup>

If an agreement unduly lessens or prevents competition, efficiencies provide no defence under Section 45.<sup>49</sup>

*(v) Specialization Agreements*

The Act also allows an exemption from Section 45 for the use of specialization agreements between competing firms. This type of agreement is meant to provide a means by which firms may benefit from efficiencies only available through strategic alliances which adversely affect competition to some degree. As defined by the Act, a specialization agreement is a promise to discontinue entirely existing production of an article or service in exchange for an equivalent promise from the other party.<sup>50</sup> Specialization agreements may, if the criteria in Section 86 of

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<sup>46</sup> *Strategic Alliances Bulletin*, *supra*, note 4, part 3.2.1.1.

<sup>47</sup> *Competition Act*, *supra*, note 1, Section 45(5), and see limitation in 45(6)

<sup>48</sup> *Competition Act*, *supra*, note 1, Section 45(7).

<sup>49</sup> *PANS*, *supra*, note 30, para. 88.

<sup>50</sup> *Competition Act*, *supra*, note 1, Section 85.

the Act are met and are approved by the Competition Tribunal,<sup>51</sup> be registered and thus exempt from Section 45 of the Act.<sup>52</sup>

*(vi) Advisory Opinions*

Where the parties are in doubt as to whether a strategic alliance may infringe Section 45 or raise issues under the merger or other provisions of the Act, they can seek advisory opinions from the Bureau. Under Section 124.1 of the Act, written advisory opinions are binding on the Commissioner "...for so long as the material facts on which the opinion was based remains substantially unchanged and the conduct or practice is carried out substantially as proposed".

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<sup>51</sup> The Competition Tribunal will determine whether the alliance is likely to bring about efficiency gains greater than, and will offset, the effects of any prevention or lessening of competition that are likely to result. It must also be established that these efficiency gains would not be attainable if the specialization agreement was not implemented. From the *Strategic Alliances Bulletin*.

<sup>52</sup> Sections 85-90 of the Act outline the procedure under which specialization agreements may be exempted from Section 45 of the Act.

## V: Strategic Alliances under the American Antitrust Regime

American antitrust laws may be relevant to Canadian business in the formation and operation of cross-border strategic alliances. For example, a Canadian firm's sales may be exposed to U.S. antitrust laws and sanctions if that firm carries on business in the U.S. or makes any sales into the U.S.<sup>53</sup> Further, as discussed in the section VI of this paper, the analysis of competitor agreements in the proposed reforms to the Canadian conspiracy provision has similarities to the U.S. treatment of competitor agreements. Finally, U.S. precedents can be useful in assessing how an agreement may be treated under Canadian competition law. Below, we provide a brief overview of some elements of U.S. antitrust law which relate to strategic alliances.

Section 1 of the *Sherman Act*<sup>54</sup> prohibits “every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade”. Criminal prohibitions are imposed on agreements in restraint of trade.<sup>55</sup> However, not every agreement of this kind is necessarily an offence. U.S. courts use two types of analysis to determine whether an agreement between competitors violates the *Sherman Act*: *per se* and rule of reason.<sup>56</sup> The types of agreements that are challenged under the *per se* analysis are agreements that always or almost always tend to raise price or reduce output. The agreements that are challenged as *per se* illegal do not warrant a detailed inquiry into their competitive effects because they have been identified as agreements that are likely to

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<sup>53</sup> In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. 01-7115, the U.S. District Court of Columbia Court of Appeals held that a foreign person can sue another foreign person with regard to an alleged price fixing conspiracy provided some of the other persons who suffered harm as a result of the conspiracy are in the U.S. This decision may effectively require Canadian businesses to comply with many U.S. antitrust laws.

<sup>54</sup> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. *Sherman Act*, 15 U.S.C. § 1.

<sup>55</sup> Conspirators may also be liable in private suits where treble damages and litigation costs are available to private plaintiffs.

<sup>56</sup> *National Soc’y of Prof’l. Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

harm competition and have no significant pro-competitive benefits.<sup>57</sup> The types of agreements that have been held *per se* illegal are those that fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The rule of reason analysis is used for all other types of agreements that are not challenged as *per se* illegal. The rule of reason analysis is a factual inquiry into the overall competitive effect of an agreement, that is flexible and varies in focus and detail depending on the nature of the agreement and market circumstances.<sup>58</sup> The difficulty in identifying the line that separates *per se* and rule of reason analysis has been discussed in numerous U.S. cases. Ironically, many in Canada, including the Bureau and the Federal government, support the adoption of a *per se* rule here.

The U.S. authorities, the Federal Trade Commission and the Department of Justice, issued the *Antitrust Guidelines for Collaboration Among Competitors* (“*Competitor Collaboration Guidelines*”) in April, 2000.<sup>59</sup> The guidelines are relevant to the formation and operation of strategic alliances and are intended to explain how the U.S. authorities analyze certain antitrust issues raised by collaborations among competitors. The *Competitor Collaboration Guidelines* states that a “competitor collaboration” comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom.<sup>60</sup> Further, competitor collaborations may involve research

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<sup>57</sup> *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432-36 (1990).

<sup>58</sup> *California Dental Ass’n v. FTC*, 119 S. Ct. 1604, 1617-18 (1999); *FTC v. Indiana Fed’n of Dentists*, 476 I.S. 447, 459-61 (1986); *National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104-13 (1984).

<sup>59</sup> The *Competitor Collaboration Guidelines* can be found on the U.S. Federal Trade Commission website at: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>60</sup> The formation of a strategic alliance may constitute a merger and require pre-closing notification under U.S. antitrust laws.

and development, production, marketing, distribution, sales or purchasing, information sharing and various trade association activities.<sup>61</sup>

Parties may make a request to either the Federal Trade Commission or Department of Justice to review and provide advice with respect to potential violations of Section 1 of the *Sherman Act*.

## **VI: Future Amendments to Section 45: What does this mean for Strategic Alliances?**

Section 45 of the Act has been criticized for being simultaneously over inclusive and under inclusive in the sense that it may discourage businesses from entering into pro-competitive strategic alliances, yet not adequately deter hardcore cartel behaviour. Since there is no efficiency exception, Section 45 is seen by some to have a chilling effect on pro-competitive agreements between competitors.

On June 23, 2003, the Government of Canada released a discussion paper, which outlines proposed legislative changes to the Act, entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (the “Discussion Paper”).<sup>62, 63</sup> The Discussion Paper proposes a two-track conspiracy provision to deal with agreements among competitors: a *per se* criminal provision for “hard core cartels” and a civil provision for other agreements.<sup>64</sup> Currently, Section 45 of the Act treats conspiracies differently from some other major foreign antitrust regimes by requiring proof of an undue lessening of competition. The Discussion Paper states that “[r]eform could lead to increased compatibility with other jurisdictions and facilitate

<sup>61</sup> *Competitor Collaboration Guidelines*, *supra*, note 59, at 2.

<sup>62</sup> The Discussion Paper can be found at: <http://www.ppforum.ca/competitionact/dp2003.pdf>. The key areas of the Act that are dealt with in the Discussion Paper involve reform of the criminal conspiracy provision, strengthening of civil provisions, reform of the pricing provisions, and enabling the Commissioner to ask the Canadian International Trade Tribunal to inquire into the state of competition in any industry sector.

<sup>63</sup> In September 2002, the Bureau issued a request for public comments on how the *Strategic Alliances Bulletin* could be clarified. To view the responses go to: <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02508e.html>.

<sup>64</sup> The proposed criminal and civil provisions can be found at appendix 6 and 7 of the Discussion Paper, *supra*, note 62.

international investment and cooperation”.<sup>65</sup> The proposed criminal provision would make certain types of agreements among competitors or potential competitors illegal *per se* (i.e. without a competition test). The proposed criminal provision would be intended to apply only to hard-core cartels (such as price fixing, market allocation, customer allocation and input restrictions between competitors or potential competitors). The existing criminal fine limit of \$10 million per count would be eliminated. The proposed civil provisions would apply a full “rule of reason”, or substantial prevention or lessening of competition standard for all other agreements and would allow for consideration of any efficiencies arising from the agreement.<sup>66</sup> Under the proposed civil provision, the Tribunal could issue prohibition orders and levy civil "administrative monetary penalties" (aka fines) to address anti-competitive conduct.

The Discussion Paper also proposes a voluntary clearance process to screen out pro-competitive strategic alliances. The clearance process would give parties an opportunity to obtain assurance from the Bureau, in the form of a certificate, that a proposed agreement would not be referred to the Attorney General for prosecution, or become the basis for an application to the Tribunal for an order.<sup>67</sup> The stated purpose of this proposal is to provide certainty and predictability, in respect of proposed strategic alliances, for the business community in order to encourage pro-competitive partnerships. The proposal is an attempt to remove the “chilling effect” on pro-competitive alliances that would result from the threat of criminal sanctions.

In the context of strategic alliances, the government's goal of separating hard core cartels from other agreements is laudable. If that goal could be achieved, businesses could enter into *bona*

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<sup>65</sup> Discussion Paper, *supra*, note 62, at 13.

<sup>66</sup> The proposed civil provision contains a competition effects test. In assessing the competitive effects of an agreement, the Competition Tribunal would be authorized to consider a list of factors similar to those used in merger review.

<sup>67</sup> The proposed clearance process would resemble the system that already exists for mergers, under Section 102 of the Act, in the form of advance ruling certificates.

*fide* strategic alliances secure in the knowledge that their agreements would not subject them to criminal prosecution. The difficulty, however, is in the execution. As the government's discussion paper and the U.S. experience shows, it is extremely difficult, if not impossible, to clearly delineate, in advance, precisely which agreements should be given *per se* treatment, and which agreements should not.

The Government of Canada launched national consultations to obtain public comment on the proposed legislative changes to the Act which are outlined in the Discussion Paper. Stakeholders and interested parties were invited to submit written comments on the proposed amendments to the Act. A series of roundtables were held across Canada in November and December 2003, to allow stakeholders and interested parties to discuss the proposed amendments to the Act. The *National Consultation on the Competition Act Final Report*, April 8, 2004 (the "Final Report"), contains an analysis of the comments received from intervenors in both the submission and round table phases.<sup>68</sup> The Final Report indicates that there is no clear agreement amongst stakeholders on the proposals to reform Section 45 of the Act. The overall assessment of the proposals is that a "large majority of intervenors reported concerns with the draft provisions proposed in the Discussion Paper and indicated that any changes should be approached with more study and careful consideration".<sup>69</sup> The consultations are now closed and further consideration of the Section 45 amendments will likely be delayed until later in 2004 at the earliest.<sup>70</sup>

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<sup>68</sup> A copy of the Final Report is posted on the Public Policy Forum website at [http://www.pforum.ca/competitionact/final\\_report.pdf](http://www.pforum.ca/competitionact/final_report.pdf).

<sup>69</sup> Final Report, *ibid*, at 3.

<sup>70</sup> As predicted by Commissioner of Competition Sheridan Scott on January 14, 2004. "I suspect that the government would want to wait until after an election. That would be one sensitivity", remarked Commissioner Scott. From "Canadian Amendments Face Further Consultations", *Antitrust & Trade Regulation*, vol. 86, Number 2139, January 23, 2004.

## Appendix “A”

### **Practical Guidelines regarding Communications between Competitors**

- Communicate a clear message to all personnel that full compliance with competition laws is a top priority.
- Communications between representatives of competitors should be avoided unless they concern a customer-supplier relationship, other legitimate business ventures, lawful trade association activities, or other legal and proper activities.
- Do not have any communications with competitors regarding prices, costs, business practices or the conduct of business with suppliers, customers and/or about marketing efforts. All communication with competitors regarding such information should be reported to in-house counsel.
- Establish a compliance policy program that includes a competition law component and designate a compliance officer to oversee implementation and execution. The compliance policy should inform personnel of permissible and potentially criminal conduct.
- Establish an open door policy for compliance: in-house counsel should be consulted prior to any discussion of actions which could raise competition risks.
- Communicate a clear message that anti-competitive behaviour can be established from an informal verbal or implied understanding and that no written contract or express agreement is required.
- Communications with competitors should be considered in light of how they may be perceived, and not just how they are intended. All letters, memoranda and e-mail written in connection with business activities should be written clearly so that they cannot be misinterpreted.
- In regard to strategic alliances,
  - Clearly set out the pro-competitive purpose for the strategic alliance.
  - Consider whether the participants, acting together, would likely be viewed as having market power.
  - Limit the agreement to the specific subject of the alliance, so that competition among the participants is otherwise preserved.
  - Where information is to be exchanged, use an independent third party to gather information and disseminate only aggregated data to the participants.

- Don't enter into strategic alliances covertly (the terms may be confidential, but the existence of the agreement generally should not be kept a secret).
- Competition laws apply to trade associations because they are comprised of individual competitors working together. Ensure that the compliance program includes a clear policy regarding participation in trade associations. Pay particular attention to the following:
  - All written trade association materials should be reviewed by in-house counsel prior to attending any meetings;
  - Do not attend private "off the record" meetings with competitors;
  - Do not participate in discussions with competitors which involve: prices or pricing policies, terms of sale, warranties or contract provisions, divisions of geographic regions or customers, specific R&D, sales or marketing plans, or any company's confidential product, development or production strategies, complaints to or about individual firms or competitors or other actions that might tend to hinder a competitor from competing fully in any market; or discussions about whether to purchase from certain suppliers or sell to certain customers; or data concerning fees, prices, production, sales, bids, costs, salaries, credit, or other practices, unless the data in question is exchanged and disclosed pursuant to a well-considered plan that has been approved by counsel;
  - Participants should leave the meeting and seek legal counsel's advice if it is questionable as to whether the meeting may be construed to have raised any competition issues;
  - Conduct at social events should follow the same standards as regular meetings;
  - Be aware that membership policies may allude to competition issues to the extent they unreasonably limit access to information or exclude would-be participants without sound justification.
- Consider technology solutions: email monitoring and tracking server software to identify inappropriate communications with competitors.
- Consider whether it is appropriate to request a written opinion from the Commissioner on proposed conduct. A written opinion provided under Section 124.1 of the Act is binding on the Commissioner.
- Ensure personnel are kept current regarding developments in competition law.
- Consult with competition counsel.