The Bureau of Competition Policy's Compliance Approach

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The Bureau of Competition Policy's current methods of achieving compliance with the provisions of the *Competition Act* are examined in this paper. The compliance approach is premised on the notion that the majority of business people will respect the *Act* if they understand how it applies to their business conduct and affairs. To assist in illustrating where the Bureau's program of compliance is headed, a number of the new compliance initiatives, such as the enforcement guidelines and the immunity program, are presented and analyzed.

Cet article examine les méthodes présentement employées par le Bureau de la politique de concurrence pour faire respecter la *Loi sur la concurrence*. L'approche du Bureau prend comme point de départ l'idée que la plupart des gens d'affaire respecteront la *Loi* s'ils comprennent comment elle s'applique à leur entreprise. À titre d'exemples de cette approche, l'auteur examine, entre autres, les lignes directrices publiées par le Bureau et le programme d'immunité.

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Synopsis

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Introduction

Since the *Competition Act*[1] was passed in 1986, the Bureau of Competition Policy (the Bureau) has undertaken to provide business with greater awareness and increased certainty about the application of the provisions of the *Act*. The *Act*'s purpose clause serves as a cornerstone in setting the goals and objectives of this compliance approach: promoting the efficiency and adaptability of the

[1]*Competition Act*, R.S.C. 1985, c. C-34, as am. by R.S.C. 1985 (1st Supp.), c. 27, ss. 187, 189, R.S.C. 1985 (2d Supp.), c. 19, Part II, R.S.C. 1985 (3d Supp.), c. 34, s. 8, R.S.C. 1985 (4th Supp.), c. 1, s. 11, R.S.C. 1985 (4th Supp.), c. 10, s. 18, S.C. 1990, c. 37, ss. 29-32, S.C. 1991, c. 45, ss. 547-550, S.C. 1991, c. 46, ss. 590-594, S.C. 1991, c. 47, ss. 714-717, S.C. 1992, c. 1, ss. 44-46, 145, S.C. 1992, c. 14, s. 1, S.C. 1993, c. 34, ss. 50-51 [hereinafter the *Act*].

Canadian economy and providing consumers with competitive prices and product choices.[2]

This paper reviews the Bureau's current methods of achieving compliance with the provisions of the *Act*. A number of the compliance initiatives, such as the enforcement guidelines and the immunity program, will be presented and analyzed to assist in illustrating where the Bureau's program of compliance is headed.

I. The *Competition Act* and the Director of Investigation and Research

The *Act* is an important component of the federal government's marketplace framework policies. As such, competition policy has a central role to play in strengthening the Canadian economy and helping it to adapt to the challenges of an emerging world economic order. The scope of application of the *Act* is very broad and covers virtually all sectors of business activity. As a result, those charged with administering the *Act* continuously strive to focus enforcement activities in a manner which best promotes a competitive marketplace and, as a direct consequence, a productive economy.

The Director of Investigation and Research ("the Director") is an independent statutory official appointed by order-in-council and charged under the *Act* with responsibility for the administration and enforcement of competition law in Canada.[3]

II. What is Compliance and Why is Compliance Used?

One of the rationales behind using a compliance approach is the notion that the majority of business people will respect the *Act* if they understand how it applies to their business conduct and affairs. This approach necessitates educating people as to the goals and objectives of the *Act* so that they are aware of its provisions. With such an approach, compliance can be an effective method of case resolution which allows for the attainment of the objectives of the *Act* without resorting to formal proceedings in each and every case. A further rationale for enhancing the scope of compliance alternatives is that a policy aimed at increasing the use of negotiated settlements assists the Director in ensuring the most efficient use of limited financial and human resources. In particular, such an approach allows for the concentration of resources in areas which are of greater significance from a competition standpoint or in areas which are of more pressing concern. However, we shall continue to recommend prosecution or seek an order from the Tribunal in contested cases where we conclude that a negotiated settlement is not appropriate or achievable.

III. How is Compliance Achieved?

As mentioned earlier, compliance with the *Act* can best be achieved when business persons and their counsel have a sound understanding of its provisions.

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[2]*Ibid.*, s. 1.1.
[3]*Ibid.*, ss. 7, 10.

A great deal of emphasis is therefore placed on communication and education to foster a better understanding of the *Act* and its application. In 1989, the Director of Investigation and Research released an Information Bulletin entitled *Program of Compliance*.[4] This Bulletin outlined four principal components of the Bureau's compliance approach:

- encouraging compliance with the *Act* generally through a program of communication and education;
- facilitating compliance with the *Act* in specific instances through advisory opinions, information contacts and advance ruling certificates;
- monitoring compliance with the *Act*; and
- responding to possible violations of the *Act* and reviewable matters through a variety of instruments to resolve cases.[5]

In order to achieve the education and communication component of the Bureau's compliance approach, tools such as the enforcement guidelines have been developed. Such guidelines assist business people and the legal community in their interpretation of several provisions of the *Act*. In addition, an immunity policy has been developed and implemented.

Speaking engagements on a number of topics relating to the *Act* are undertaken by the Director and senior staff throughout the year. On request, Bureau staff conduct seminars for businesses and associations on topics of particular interest to them. The Bureau also makes various publications and other material available to businesses and the public in general. Examples of these publications include the various enforcement guidelines, the Bid-rigging pamphlet[6] and the Director of Investigation and Research's Annual Report. Press releases and background material outlining the assessment and resolution of certain cases are issued to assist in keeping the public informed and aware of Bureau activities.

Another development worth noting was the establishment in August of 1992 of a National Competition Law Section within the Canadian Bar Association ("CBA"). The establishment of this section will enable the Bureau to consult more effectively with lawyers experienced in competition issues and also to permit a higher level of involvement of the CBA in matters before government generally. While this development does not mark a new direction in compliance, the value of the section's creation to the Bureau is considerable.

The general education and communication program of the Director is supplemented by advisory opinions and information contacts which are designed to facilitate compliance with the *Act* in particular situations. Advance Ruling Certificates are also available for parties to a proposed merger who wish assurance

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[4]The Bulletin was recently updated but the underlying principles remain unchanged. See Director of Investigation and Research — *Competition Act, Compliance Bulletin* (Ottawa: Consumer and Corporate Affairs Canada, 1993).

[5]Director of Investigation and Research — *Competition Act, Program of Compliance* (Information Bulletin No. 3) (Ottawa: Consumer and Corporate Affairs Canada, June 1989) at 4.

[6]Director of Investigation and Research — *Competition Act, Bid-rigging* (Ottawa: Consumer and Corporate Affairs Canada, 1992).

that it will not give rise to proceedings under the merger provisions of the *Act*. Advance notification is necessary when mergers exceed two thresholds.[7]

In dealing with possible contraventions of the *Act*, the Director has a number of instruments, both formal and informal, available to assist him. These instruments include investigative visits, undertakings, orders on consent and contested proceedings. These instruments will be reviewed later in this paper.

A. Enforcement Guidelines

Enforcement guidelines form the heart of the educational side of the Bureau's program of compliance. The guidelines are an indispensable tool aimed at establishing a sound understanding of the *Act* among the legal profession, the business community and the general public. They also assist in ensuring internal consistency with respect to the application of the *Act*.

Of course, guidelines cannot be a binding statement of how discretion will be exercised in all situations because the specific standards set out in any set of guidelines must be applied to a broad range of possible factual circumstances. Guidance regarding specific situations may therefore be requested from the Bureau through its Program of Advisory Opinions. The Bureau makes every effort to apply the standards of its enforcement guidelines reasonably to the particular facts and circumstances of such situations.

Enforcement guidelines are also not intended to limit the discretion of the Attorney General in the prosecution of criminal matters under the *Act*. Nor are they intended to be a substitute for the advice of legal counsel. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal.

Since April 1991, when the *Merger Enforcement Guidelines*[8] were released, the Bureau has produced three other sets of guidelines: *Misleading Advertising Guidelines*[9] (September 1991), *Predatory Pricing Enforcement Guidelines*[10] (May 1992) and *Price Discrimination Enforcement Guidelines*[11] (September 1992).

1. Guideline Consultation Process

Production of the guidelines, with the exception of the *Misleading Advertising Guidelines*, involved an extensive consultation process. The target audi-

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[7]The conditions under which a party is required to notify the Director and the information requirements in such circumstances are described in more detail in the Merger Prenotification Information Kit.

[8]Director of Investigation and Research — *Competition Act, Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Consumer and Corporate Affairs Canada, 1991) [hereinafter MEGs].

[9]Director of Investigation and Research — *Competition Act, Misleading Advertising Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1991).

[10]Director of Investigation and Research — *Competition Act, Predatory Pricing Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992) [hereinafter PPEGs].

[11]Director of Investigation and Research — *Competition Act, Price Discrimination Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992) [hereinafter PDEGs].

ences of the guidelines as well as other interested parties were invited to participate in this consultation process: business people, lawyers, representatives of trade associations, consumer groups, academics and members of the Bureau. Foreign antitrust authorities were also invited to review and comment on draft versions of the various guidelines. Competition law lawyers, industrial organization economists and other merger experts are primarily the target audience for the MEGs. In the case of the PPEGs, an advertisement was placed in major newspapers and trade journals informing people of the opportunity to become involved in the consultation process about to get underway. The response from this endeavor has led to the creation of a Bureau consultation list which will be helpful for future initiatives. An internal group was also established to provide input and feedback on the drafts. By involving the stakeholders in the development of the guidelines it becomes possible to achieve greater adherence to the end product.

The *Misleading Advertising Guidelines* (September 91) were a revision and update of earlier guidelines. These Guidelines fulfill a need expressed by the members of the business community to have a concise and readily accessible set of guidelines to assist them in interpreting and applying the misleading advertising and deceptive marketing provisions of the *Act*. Jurisprudence, advisory opinions, back issues of the *Misleading Advertising Bulletin*[12] and other well-established policy statements of the Marketing Practices Branch were drawn upon for these guidelines. The other important consideration with regard to the misleading advertising and deceptive marketing practices provisions of the *Act* is that they comprise only a portion of the relevant law in Canada. Most provinces and other federal departments and agencies also administer legislation dealing with advertising and marketing practices. However, the *Misleading Advertising Guidelines* do not attempt to provide information on this other legislation.

2. *Merger Enforcement Guidelines*

At present, the Bureau has almost two years of experience with the *Merger Enforcement Guidelines* ("MEGs"). All indications point to their widespread use and application. We believe a great deal of the success of the MEGs is due to the responsive and open consultations that took place with the business and legal communities as part of their development.

Prior to drafting the MEGs, an examination and analysis of merger guidelines from various countries including the United States and the European Economic Community was undertaken. This examination resulted in the decision to take a balanced position between flexibility and detail in preparing Canada's merger guidelines. The MEGs were not intended to be rigid to the point of being overly prescriptive. The final product was intended to enable flexibility and yet also provide significant guidance with regard to what the Bureau looked for in reviewing mergers. Another important decision, adopted early in the process,

[12]The *Misleading Advertising Bulletin* is produced quarterly (Ottawa: Consumer and Corporate Affairs Canada).

involved defining the target audience as competition law lawyers, industrial organization economists and other merger experts. The MEGs were thus intended for those who needed to provide advice regarding merger review under the *Act* or occasionally prepare Bureau filings.

A merger guidelines committee was set up within the Bureau and drafting commenced in April 1990. By October 1990 an initial draft was circulated to interested parties, including other federal departments, provincial governments, a broad range of practitioners, trade associations and consultants. Numerous verbal comments were received along with approximately fifty written briefs. The comments were analyzed and changes were made where appropriate. A revised draft version was then made available for additional comment and review.

The last opportunities for commenting on the proposed merger guidelines occurred when the Director, the Senior Deputy Director of Investigation and Research and the key drafter conducted various meetings across the country with members of law firms and investment companies. Shortly afterwards the guidelines were finalized and the MEGs were subsequently released in April 1991.

In the preface to the MEGs, the Director sets out the four key goals that the guidelines were designed to achieve:

- First, they promote a better understanding of the Director's merger enforcement policy.
- Second, they provide a single unifying framework for evaluating the likely impact of mergers on competition in Canada.
- Third, they facilitate business planning by articulating to the business community, legal profession, and other interested parties, the approach used by the Bureau of Competition Policy in reviewing merger transactions.
- Fourth, the Guidelines are flexible enough to apply in diverse market conditions.[13]

Internally, the MEGs have greatly contributed to the promotion of more rigorous and consistent assessments. In terms of the business community, we believe that a better understanding of our enforcement policy has resulted. We know that it has improved the submissions we receive from parties to mergers. These submissions now deal more incisively with information that is relevant to speedy and thorough assessments. The timeliness of merger review has improved because business people and their counsel have a much better appreciation of what the Bureau will require for examination purposes and this information is generally included at the outset.

3. *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines*

The *Predatory Pricing Enforcement Guidelines* ("PPEGs") and *Price Discrimination Enforcement Guidelines* ("PDEGs") were produced concurrently,

[13]*Merger Enforcement Guidelines*, *supra* note 8, Preface.

following the MEGs. As a prelude to the actual drafting of both the PPEGs and the PDEGs, discussion papers were prepared. These were sent to a wide cross-section of parties who had expressed an interest in being part of the consultation process. Interested parties were invited to supply comments. The Director also distributed a press release concurrently so that as broad a scope as possible was reached.

Draft guidelines were produced upon review, analysis and discussion of the input received through this first stage of the consultation process. The draft guidelines were then the subject of another round of consultation. Further revisions followed the reception of the responses to the draft guidelines.

The final version benefited from the consultative process and now better reflects certain realities of the affected interests; such as the use of international volume purchasing agreements by companies with global operations. The guidelines provide a useful guide to how the predatory pricing and price discrimination subsections are interpreted and applied by the Bureau in light of the economic underpinnings of the provisions of the *Act*.

B. Advisory Opinions

As mentioned earlier, one of the key ways in which the Director promotes and facilitates compliance is by providing advisory opinions to those who wish to avoid coming into conflict with the *Act*. The Director invites company officials, lawyers, and others to request an opinion on whether the implementation of a proposed business plan or practice would be consistent with the *Act*. Opinions take into account previous jurisprudence, previous opinions and stated policies of the Director, especially those set out in the published Enforcement Guidelines. In providing an opinion, the Director is not seeking to regulate business conduct or to reach a final decision on the legality of the proposal. Rather, based on the information made available, the Director advises the parties whether or not the proposal, if implemented, would cause an inquiry to be initiated as required by paragraph 10(1)(*b*) or if a transaction is subject to pre-notification.[14] Those who seek an opinion are not bound by the advice provided and remain free to adopt the plan or practice in question on the understanding that the matter may be tested before the Competition Tribunal or the courts. Similarly, an opinion cannot bind the current or a future Director since, in many instances, the Director is restricted in terms of access to the information required to reach a final decision. Additionally, should the details of the proposed plan differ, when implemented, from the plan presented to the Director, or should conditions change in a way that would alter the impact of the proposed plan on the market, the matter could be subject to further examination.

Advisory opinions may be provided orally or in writing. Oral opinions can generally be provided relatively quickly. Written opinions may take considerably longer to prepare, depending on the complexity of the issues involved and the resources available at the time.

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[14]*Competition Act*, *supra* note 1, s. 10(1)(*b*).

Advisory opinions are of particular utility to business with respect to less well-known provisions of the *Act* such as the export exemption to the conspiracy provisions or for highly technical matters such as the merger pre-notification requirements.

C. Information Contacts

An information contact (letter or visit) may be undertaken when the Director believes some questionable conduct is occurring and that the parties responsible for the conduct may be unaware that it contravenes a particular provision of the *Act* . Persons contacted are not under any obligation to justify their conduct or even to discuss the matter with the Director. However, most choose to take advantage of the opportunity to do so. Following an information contact, the Director may decide to continue an examination, monitor the conduct in question for a reasonable period of time or close the file. The experience has been that, if voluntary compliance is undertaken to correct the alleged offence discussed at the information visit, future complaints are less likely to arise. This alternative enforcement response represents a substantial cost saving to the Bureau, which is important given the Bureau's limited resources.

D. Advance Ruling Certificates

Individuals who are planning a merger may wish to seek some assurance from the Director that the transaction they are contemplating will not pose any significant competition issues. Under section 102,[15] the Director has discretion to issue an advance ruling certificate when satisfied by a party or parties to a proposed merger that there would not be sufficient grounds on which to apply to the Competition Tribunal under section 92 for a remedial order. This certificate is binding on the Director.[16] If the Director decides not to issue a certificate for a proposed merger, a non-binding advisory opinion on the proposed merger may nevertheless be provided.[17]

E. Monitoring

Mergers which do not pose any competition issues proceed unchallenged; but where the effect on competition is less than clear, the Director may decide to monitor the actual effects of a merger during the three-year period within which a completed merger may be challenged. Proceeding in this fashion allows the merger to continue; at the same time, the Director maintains the ability to monitor the actual effects of the merger on the market and to respond quickly should circumstances arise that would warrant remedial steps in relation to the merger.

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[15]*Ibid.*, s. 102.

[16]*Ibid.*, s. 103.

[17]More detailed information on advance ruling certificates may be found in Director of Investigation and Research — *Competition Act, Advance Ruling Certificates* (Information Bulletin No. 2) (Ottawa: Consumer and Corporate Affairs Canada, December 1988).

IV. Responding to Situatious of Non-Compliance

In dealing with possible contraventions of the *Act*, there are a number of instruments, both formal and informal, available to assist the Director in resolving the matter. These instruments include investigative visits, undertakings, orders on consent and contested proceedings.

A. Investigative Visits

At any stage of an inquiry the Director may contact a person alleged to be involved in anticompetitive conduct in order to obtain information. If the information obtained persuades the Director that further inquiry is not justified, the inquiry will be discontinued. The Director may also choose to resolve certain cases after an investigative visit, where further inquiry is not warranted because of voluntary corrective action. Cases of lesser economic consequence and those involving certain vertical restraints of trade in which correction of the practice can be readily verified are the types of cases that normally can be resolved with these investigative visits.

B. Undertakings

The *Act* does not provide expressly for undertakings. The legal foundation for the Director's acceptance of undertakings flows out of subsection 22(1), which gives the Director the discretion to discontinue an inquiry if the matter does not justify further inquiry.[18]

The Director has discretion over the course of an inquiry into alleged criminal misconduct until such time as the matter is determined to warrant a criminal charge and referred to the Attorney General under section 23. However, because of the potentially serious nature of the alleged criminal offences involved, any decision to accept undertakings in criminal matters involves, as a matter of practice, a consultation by the Director with counsel for the Attorney General.

Undertakings have been accepted by the Director since the 1960s. They are particularly appropriate in civil matters under Part VIII of the *Act*, in light of the fact that Tribunal orders are remedial rather than punitive of past conduct, and a commitment to correct the challenged conduct by a party under inquiry thereby effectively removes the basis for application to the Tribunal.

Undertakings are designed to remedy or overcome the anticompetitive effects or potential anticompetitive effects of a particular course of action. Once undertakings have been given and are complied with, the Director may either discontinue the inquiry or continue to monitor conduct in the affected markets for a reasonable period of time.

Undertakings are also an increasingly common means of resolving cases under the misleading advertising and deceptive marketing provisions of the *Act*. Typically, in these types of matters, the undertaking will include terms such as:

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[18]See *Canada (A.G.)* v. *Alex Couture Inc.*, [1991] R.J.Q. 2534 at 2568, 83 D.L.R. (4th) 577 at 621, 38 C.P.R. (3d) 293 at 338 (C.A.), confirming the validity of the Director using undertakings.

- an undertaking to publish, within thirty days of the signature of the undertaking, a corrective notice; and
- an undertaking to inform in writing all of the party's dealers, sales representatives, sales employees, etc. of the contents of the undertaking within thirty days of its signature.

Consider the following misleading advertising example, involving Air Canada, which was resolved through an undertaking, in lieu of prosecution. In promoting its frequent flyer plan, Air Canada represented in its "Aeroplan Travel Rewards Chart" that the award category "JA2" provided three free economy class tickets with the redemption of 60,000 "aeromiles." Investigation revealed that restrictions were placed on members' ability to redeem "aeromiles" for tickets under the "JA2" category in a manner which was inconsistent with the general impression conveyed by the chart. In one case, a member would have required the unnecessary expenditure of 10,000 "aeromiles" in order to receive the three free economy class tickets represented in the award category "JA2."

Air Canada undertook to reimburse all eligible customers who had suffered losses in redeeming their "aeromiles" by providing them with "aeromile" credits, in addition to the usual terms. In this case, the alternative resolution saved the time and cost of prosecution and may even have provided for a better resolution from the perspective of consumers, fifty-six of whom received reimbursement.

C. Consent Orders

1. Criminal

The Director, when referring a potential offence, may recommend that the Attorney General seek a prohibition order on consent under subsection 34(2) of the *Act*. This is not a new procedure and has, in fact, been used to resolve numerous matters pursued under the provisions of the *Act* and the predecessor *Combines Investigation Act*. The Director supports the increased use of such orders in a wider range of situations as a means of providing effective and timely remedies for certain types of conduct.

When a Court issues an order under subsection 34(2), the parties do not plead guilty, do not stand convicted, and no fine or other sentence is imposed. Nor are such proceedings proof of a violation of the *Act* for purposes of actions for recovery of damages under section 36. This procedure also avoids the costs of protracted litigation.

In circumstances where the Director is of the view that it is appropriate to seek a conviction and fine in addition to a prohibition order, a recommendation will be made that the Attorney General proceed under subsection 34(1).

Whether the Director will recommend proceeding under either subsection 34(1) or 34(2) will depend on the facts in each case and on an assessment of the

factors. Orders of the court under subsection 34(1) or 34(2) may be issued with or without the consent of the parties.

The final decision to seek a prohibition order as a means to resolve a case is at the discretion of the Attorney General. Representatives of the Attorney General normally consult the Director concerning such matters as the appropriate terms of a proposed order. Ultimately it is for the court to decide whether, or on what terms, a proposed order should be imposed in the circumstances of a particular case.

2. Civil

Section 105 of the *Act* authorizes the granting of consent orders by the Competition Tribunal in matters reviewable by the Tribunal under Part VIII of the *Act*. The scope of orders available for civil matters is potentially more flexible than in criminal cases, since the Tribunal is not restricted to an order for cessation of the conduct. Issuance of a consent order is ultimately at the discretion of the Tribunal. The Director supports broader use of section 105 orders, wherever circumstances warrant, to achieve effective, timely and less costly case resolution. Section 105 is drafted in very broad terms; and in the case of consent orders pertaining to mergers, reference should also be made to the consent order provisions of paragraphs 92(1)(*e*) and 92(1)(*f*).

An example of the effectiveness and timeliness achieved through the use of an order on consent by the Competition Tribunal involved Asea Brown Boveri Inc. ("ABB").[19] This was an application by the Director under sections 92 and 105 concerning the proposed acquisition by ABB of certain assets and property comprising the electrical transmission and distribution business of Westinghouse Canada Inc. (and its wholly-owned subsidiary Transelectrix Technology Inc.). On February 13, 1989 the Director announced that an application would be filed with the Competition Tribunal with regard to the above-mentioned matter.

Discussions with ABB continued, and on April 26, 1989, the Director announced he had applied to the Tribunal for an order on consent. Provided certain conditions were met, the filed consent application would allow the acquisition to proceed. This action was innovative in that it was the first time a conditional order was sought by the Director. This was also the first time a situation requiring possible divestiture was approached through the seeking of an order from the Tribunal.

The Competition Tribunal hearing on the draft order was held on June 15, 1989, just fifty days after the consent application was filed. The order was issued by the Tribunal that same day. The speedy resolution of this matter serves as an example of how efficiently the consent proceeding process can operate. It should be noted that the speed with which consent order proceedings advance

[19] *Canada (Director of Investigation and Research)* v. *Asea Brown Boveri Inc.* (1989), 27 C.P.R. (3d) 65 (Comp. Trib.).

appears to be influenced to a certain extent by the nature of the industry and on how the merger will impact on third parties.[20]

3. Contested Proceedings

The Director may refer matters involving alleged criminal offences to the Attorney General with a recommendation to apply for a prohibition order under subsection 34(2) or to institute a criminal prosecution. In appropriate cases, the Director may recommend that proceedings be instituted against individuals as well as companies. Normally, counsel for the Attorney General consults with the Director to determine the fine, prison sentence or prohibition order which should be sought upon a conviction.

In cases involving reviewable matters, the Director may apply to the Tribunal for a remedial order. Any person who would be subject to the order sought may contest the application. Provincial Attorneys General are entitled to intervene in certain proceedings before the Tribunal, and other persons may be permitted to intervene.

In determining the most appropriate means by which to resolve cases, the Director will examine the merits on a case-by-case basis and consider which means of resolution is most consistent with the objectives of the *Act*. Conspiracy, bid-rigging, and the abuse of dominant position are viewed by the Director as matters that should normally be addressed through prosecution or an order of the courts or Tribunal. With respect to mergers, a fix-it-first compliance approach is preferred by the Director, whereby, prior to closing, the transaction is restructured so as to alleviate competition concerns. In the event that certain features of the transaction cannot be remedied until after the transaction is completed, the Director may apply to the Tribunal for a consent order or accept undertakings.

4. Immunity Program

The immunity program is another new direction for the program of compliance. The Bureau, in conjunction with the Attorney General, is continuing to develop a policy to encourage the reporting of conspiracy or bid-rigging activities in exchange for immunity from prosecution. The incorporation of such a policy as part of the overall compliance approach reflects the reality that such offences are covert and often difficult to discover or prove absent the cooperation of persons who may themselves be involved in the offence. The significance of the immunity policy in contributing towards effective law enforcement must also be viewed in the context of factors such as the superior value of oral, as opposed to documentary, evidence in the proof of conspiracy cases, the trend towards higher fines for corporations convicted under the conspiracy provisions, and the increased exposure of individual corporate executives to prosecution in suitable cases.

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[20]For an example of a more lengthy process, see *Canada (Director of Investigation and Research)* v. *Imperial Oil Ltd.* (6 February 1990), CT-89/3 (Comp. Trib.) [unreported].

Given the respective roles of the Director and the Attorney General in enforcing the *Act*, it should be stressed that the final determination as to whether immunity should be appropriate is one that rests with the Attorney General. However, the recommendations of the Director, as the official responsible for the overall enforcement of the *Act*, have historically been given careful and serious consideration. A variety of factors are considered in determining whether an immunity agreement would be in the public interest.[21]

The effectiveness of the immunity policy is illustrated by a recent application heard by the Federal Court of Canada in the matter of *R.* v. *Abbott Laboratories*.[22] On November 3, 1992, the Federal Court issued a consent prohibition order against Abbott as part of an immunity agreement in which Abbott provided information concerning conspiracy and bid-rigging activities in the biological insecticide industry. Abbott agreed to a number of stringent conditions in exchange for immunity from prosecution, including full and frank disclosure of important information within the knowledge of the company, full cooperation in the investigation, and the provision of restitution to affected purchasers. This case is of particular significance because it represents the first instance in which a corporation has voluntarily come forward to reveal its participation in serious anti-competitive conduct prior to its detection, and has provided its cooperation in the investigation of the offence. The Bureau believes that, in particular, this type of voluntary cooperation at the corporate level will increase the risk of detection of these types of offences and deter such conduct in the future.

In cases involving requests for immunity, information is normally obtained from informants under oath, in the presence of counsel. In addition to recording the facts, such a practice is used to provide a true record of the atmosphere and tone of questioning and the fact that the participation of the party involved is voluntary.

Conclusion

A dynamic and adaptable compliance program which serves the goals of Canada's competition policy has evolved since the passage of the *Act* in 1986. The use of compliance initiatives other than enforcement methods primarily focused on the imposition of criminal penalties, enables the Director to bring about corrective action in a timely, effective, fair and efficient manner. It also serves to foster continuing compliance on the part of the members of the business community whose activities have been, or may at some point, be called into question.

New directions in compliance initiatives include:

- creation of the enforcement guidelines with an extensive consultation process leading up to their development;

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[21]These factors are described in H.I. Wetston, "Notes for an Address" (Address to the Canadian Corporate Counsel Association, Calgary, 19 August 1991). Some of the factors considered include the value and importance of the evidence, disclosure prior to the detection of the offence by the Bureau and the role of the firm in the conduct in question.

[22](3 November 1992), T-2663-92 (F.C.T.D.).

- the effective and timely use of consent orders; and
- the development and use, in conjunction with the Attorney General, of a policy to encourage the reporting of conspiracy or bid-rigging activities in exchange for immunity from prosecution.

Canada needs a flexible and effective competition policy that can facilitate the needs of business while at the same time preserving the important elements of competition in our industries. The Bureau's compliance approach has proven to be an extremely vital element in achieving this objective.