Rethinking Price-Fixing Law

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Section 45 of the *Competition Act* prohibits price-fixing and other forms of horizontal agreements among rivals by imposing criminal sanctions on parties to arrangements which "unduly lessen competition." The authors argue that there are policy reasons for rethinking the current price-fixing prohibition.

The authors argue that many horizontal arrangements by *contract* (through agreements among rivals) are similar to horizontal arrangements by *ownership* (through mergers). In the 1986 amendments to the *Competition Act*, Parliament removed merger review from the purview of criminal courts and gave the Competition Tribunal jurisdiction over mergers. The authors propose similar amendments to section 45 of the *Competition Act*, and argue that all horizontal arrangements other than naked price-fixing ought to be subject only to civil review by the Competition Tribunal. Naked price-fixing, they tell us, is always anti-competitive, and should therefore continue to attract criminal penalties and remain within the jurisdiction of criminal courts.

Having outlined the appropriate focus of a criminal prohibition, the authors proceed to frame a criminal price-fixing prohibition that will target only naked price-fixing arrangements without at the same time targeting potentially pro-competitive arrangements. Many horizontal arrangements are pro-competitive (joint ventures, for example), yet may have the ancillary effect of fixing prices. At the same time, arrangements which purport to be pro-competitive may in fact be naked price-fixing arrangements in disguise.

Since price-fixing prohibitions are central features of competition laws all over the world, the authors undertake a comparative review of the price-fixing regimes in the United States, the European Community, the United Kingdom, Germany, Australia and New Zealand to determine the extent to which those jurisdictions have been able to maintain workable distinctions between naked price-fixing arrangements and potentially pro-competitive arrangements.

From the jurisdictions surveyed, the authors conclude that it is impossible to frame a criminal prohibition against naked price-fixing arrangements which will not, in many cases, target pro-competitive arrangements. The authors therefore propose a new focus to a criminal prohibition. Since most naked price-fixing is covert, the authors propose to make covert arrangements the target of the criminal prohibition. That is, the authors propose to distinguish covert arrangements from overt arrangements, rather than distinguishing naked price-fixing from price-fixing which is ancillary to some pro-competitive objective. The authors propose amendments which would confer immediate immunity from criminal sanctions on parties who notify the Bureau of Competition Policy of their arrangements. Notified arrangements would then be subject only to prospective civil review by the Competition Tribunal. Parties to price-fixing arrangements who do not notify their arrangements to the Bureau would remain subject to criminal penalties.

L'article 45 de la *Loi sur la concurrence* interdit la fixation des prix et autres formes d'ententes horizontales entre concurrents en imposant des sanctions criminelles aux parties dont les arrangements ont pour effet de « réduire indûment la concurrence ». Les auteurs proposent une reformulation de cette disposition.

Les auteurs croient que les ententes horizontales par *contrat* (ententes entre concurrents) ressemblent très souvent aux ententes horizontales par *transfert de propriété* (fusionnements). Depuis les modifications à la *Loi sur la concurrence* en 1986, la compétence en matière de fusionnements ne relève plus des tribunaux criminels, mais du Tribunal de la concurrence. Les auteurs proposent une modification semblable pour l'article 45, et prétendent que les ententes horizontales devraient relever du seul ressort du Tribunal de la concurrence. La seule exception serait la fixation de prix non déguisée, qui, selon les auteurs, est toujours anti-concurrentielle, et doit donc comporter des sanctions criminelles.

Ayant ainsi défini la portée d'une disposition criminelle efficace, les auteurs en proposent une pour la fixation de prix qui vise la fixation de prix non déguisée sans atteindre les ententes qui pourraient stimuler la concurrence. Il y a beaucoup d'ententes horizontales qui stimulent la concurrence (par exemple les co-entreprises) mais qui, accessoirement, fixent les prix. Par contre, d'autres ententes qui de prime abord semblent favorables à la concurrence sont en réalité des fixations de prix non déguisées.

La fixation des prix étant interdite de par le monde, les auteurs nous livrent une étude comparative des dispositions sur la fixation des prix — États-Unis, Communauté européenne, Royaume-Uni, Allemagne, Australie, Nouvelle-Zélande — pour déterminer dans quelle mesure ces pays ont réussi à maintenir des distinctions praticables entre la fixation de prix non déguisée et les ententes qui stimulent la concurrence tout en fixant les prix.

Au terme de cette étude comparative, les auteurs concluent qu'il est impossible de formuler une disposition interdisant la fixation des prix sans que celle-ci atteigne dans bien des cas des ententes qui stimulent la concurrence. Ils suggèrent donc une nouvelle approche : une disposition criminelle qui ne viserait que les ententes secrètes de fixation de prix non déguisée, qui sont d'ailleurs les plus courantes. Au lieu de distinguer entre la fixation des prix non déguisée et la fixation des prix accessoire, les auteurs distinguent plutôt les ententes secrètes de celles qui sont publiques. La disposition qu'ils proposent confère une immunité criminelle immédiate aux parties qui avisent le Bureau de la politique concurrence de l'existence de leur entente, celles-ci n'étant sujettes dès lors qu'à un recours civil devant le Tribunal de la concurrence. Les personnes qui n'avisent pas le Bureau de leur entente demeurent passibles de sanctions criminelles.

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Synopsis

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Introduction

There is a consensus among most competition law scholars[1] that laws which prohibit price-fixing and other anti-competitive horizontal arrangements among competitors lie at the core of competition policy.[2] Richard Posner calls the elimination of the formal cartel "the major achievement of American [com-

[1]However, this conclusion is not universally shared. The "New Critics" of antitrust hold that price-fixing should not be prohibited, and they appeal to neo-classical economics and libertarian "laissez-faire" doctrine to support their position. See L.G. Telser, *A Theory of Efficient Cooperation and Competition* (Cambridge: Cambridge University Press, 1987) at 101-29; D.T. Armentano, *Antitrust Policy: The Case for Repeal* (Washington, D.C.: Cato Institute, 1986); F.A. Hayek, *Law, Legislation and Liberty*, vol. 3 (London: Routledge & Kegan Paul, 1979). For rejoinders to the New Critics, see M.E. DeBow, "What's Wrong with Price Fixing: Responding to the New Critics of Antitrust" (1988) 12:2 *Regulation* 44; J.S. Wiley, Jr., "Antitrust and Core Theory" (1987) 54 U. Chic. L.R. 556.

[2]S. 1.1 of the *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*], provides that:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

petition] law,"[3] while Robert Bork writes that "without doubt thousands of cartels have been made less effective and other thousands have never been broached because of the overhanging threat of [the rule against price-fixing]. Its contributions to consumer welfare over the decades have been enormous."[4] The current Canadian prohibition against price-fixing and other horizontal arrangements is set out in paragraph 45(1)(*c*) of the Canadian *Competition Act*, which provides that: "Everyone who conspires, combines, agrees or arranges with another person ... 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 or property ... is guilty of an indictable offence ..." This prohibition, in close to its present form, has been the basis of more than one hundred years of Canadian criminal prosecutions for price-fixing and other forms of horizontal arrangements.[5]

In the past two years, several lower court decisions have cast doubt on the constitutionality of the prohibition by upholding constitutional challenges to both the vagueness of the prohibition (under section 7 of the *Charter*) and the lack of a *mens rea* requirement for the competition-lessening effects of prohibited arrangements (under paragraphs 11(*a*) and 11(*d*) of the *Charter*).[6] While the Supreme Court of Canada has recently upheld the constitutionality of the prohibition,[7] we believe that there are independent policy reasons for rethinking the existing price-fixing provisions.[8] In particular, in this paper we focus on the difficulties of distinguishing, *ex ante*, between horizontal arrangements that, for deterrence reasons, may warrant *per se* criminal prohibitions and those arrangements that may at most warrant civil rule-of-reason review on a case-by-case basis.

In section I, we discuss the underlying theory of competition law and the current Canadian prohibition against price-fixing and other forms of horizontal arrangements. We also describe two disadvantages of the current regime. In sections II, III and IV, we examine American, European, Australian and New Zealand approaches to horizontal arrangements. In section V, we draw on the theoretical analysis of section I and the comparative analyses of sections II through IV to propose a new Canadian approach to price-fixing.

I. The Theory and History of Canadian Price-Fixing Law

A prohibition against price-fixing and other forms of horizontal arrangements is a central component of most competition laws. The United States,[9] the

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[3]*Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976) at 39.

[4]*The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978) at 263.

[5]For a discussion of earlier judicial interpretations of this subsection, see B. Dunlop, D. McQueen & M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 122ff.

[6]*R.* v. *Nova Scotia Pharmaceutical Society* (1991), 108 N.S.R. (2d) 320, 36 C.P.R. (3d) 173 (S.C.A.D.); *L'Association québécoise des pharmaciens propriétaires* v. *Canada (A.G.)*, [1991] R.J.Q. 205 (Sup. Ct.); *Alex Couture Inc.* v. *Canada (A.G.)*, [1990] R.J.Q. 2668, 30 C.P.R. (3d) 486 (Sup. Ct.), rev'd [1991] R.J.Q. 2534, 38 C.P.R. (3d) 293 (C.A.).

[7]*R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 [hereinafter *PANS* cited to S.C.R.].

[8]For an overview of alternative approaches to horizontal arrangements in Canada, see T. Ross, "Proposals for a New Canadian Competition Law on Conspiracy" (1991) 36 Antitrust Bull. 851.

[9]*Sherman Antitrust Act*, 15 U.S.C. §1 (1988) [hereinafter *Sherman Act*].

European Community,[10] Germany,[11] Australia,[12] and New Zealand[13] all have strict prohibitions against many forms of horizontal arrangements.[14] In this section, we review the economics of horizontal arrangements and consider the sorts of arrangements that a prohibition ought to address. We then consider the scope of the term "unduly lessen competition," and discuss the sorts of arrangements that the current Canadian prohibition in fact addresses. For convenience we use the term "arrangement" loosely so that it covers agreements, contracts, understandings, and other conduct actionable under the price-fixing prohibition.

A. The Economics of Horizontal Arrangements

Whether an arrangement ought to attract liability under competition laws depends on the arrangement's ultimate effects on economic welfare.[15] Arrangements which ultimately reduce economic welfare should be prohibited.

Not all horizontal arrangements reduce economic welfare. For example, it is generally accepted that horizontal arrangements effected by *ownership*, through mergers and acquisitions, are capable of producing net welfare increases.[16] The Canadian Parliament adopted this view in 1986 when amendments to the *Competition Act* de-criminalized mergers and placed merger review within the purview of the Canadian Competition Tribunal.[17] Accordingly, it follows that horizontal arrangements effected by *contract*, in the form of agreements among rivals, may often be capable of producing similar welfare increases. In evaluating horizontal arrangements among competitors, it quickly becomes obvious that, with few exceptions, *ex ante* generalizations about the ultimate welfare effects of arrangements are impossible.

At one extreme, naked price-fixing cartels among competitors or potential competitors almost always reduce economic welfare.[18] The cartel charges

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[10]*Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3, art. 85 [hereinafter *Treaty of Rome*].

[11]*Gesetz gegen Wettbewerbsbeschränkungen*, translated in J.J. Marke & N. Samie, eds., *Anti-Trust and Restrictive Business Practices: International, Regional and National Regulation*, vol. 16 (New York: Oceana, 1983) [hereinafter *GWB*].

[12]*Trade Practices Act 1974*, No. 51, s. 45.

[13]*Commerce Act 1986*, No. 5, s. 27.

[14]See Special Committee on International Antitrust, *Report*, 1991 A.B.A. Sec. Antitrust Law, c. 2, app. 1 [hereinafter *A.B.A. Report*].

[15]On the welfare standard generally, see O. Williamson, "Economics as an Antitrust Defense: The Welfare Tradeoffs" (1968) 58 Am. Econ. Rev. 18; Posner, *supra* note 3 at 8-18; Bork, *supra* note 4 at 51-66; Dunlop, McQueen & Trebilcock, *supra* note 5 at 51-71; H. Hovenkamp, *Economics and Federal Antitrust Law* (St. Paul: West, 1985) at 49; L. Schwartz, "The 'Price Standard' or the 'Efficiency Standard': Comments on the Hillsdown Decision" (1992) 13:3 Can. Comp. Pol. Rec. 42; P.S. Crampton, "The Efficiency Exception to Mergers" (1993) 21 Can. Bus. L.J. 371; J.F. Brodley, "The Economic Goals of Antitrust" (1987) 62 N.Y.U. L. Rev. 1020.

[16]W. Baxter, "Substitutes and Complements, and the Contours of the Firm" in F. Mathewson, M. Trebilcock & M. Walker, eds., *The Law and Economics of Competition Policy* (Vancouver: Fraser Institute, 1990) 27. Baxter was formerly head of the Antitrust Division of the U.S. Department of Justice.

[17]The Tribunal is governed by the *Competition Tribunal Act*, R.S.C. 1985 (2d Supp.), c. 19, amending the *Combines Investigation Act*, R.S.C. 1985, c. C-34.

[18]For a general discussion, see D.W. Carlton & J.M. Perloff, *Modern Industrial Organization* (Glenview, Ill.: Harper Collins, 1990) c. 5.

monopoly prices,[19] but unlike some monopolies and many horizontal mergers, the cartel almost never generates offsetting efficiency gains from greater economies of scale, since the scale of the cartel members' production units does not change when the cartel is formed. The cartel's monopoly prices drive consumers from the market, and force consumers to allocate their resources to less preferred forms of consumption.[20]

At the other extreme, partnership agreements among professionals almost always increase economic welfare. Partners may share administrative and overhead costs and provide a broad range of services to clients which professionals working on their own could not offer. The renowned American judge Oliver Wendell Holmes once remarked that if antitrust laws were interpreted so as to prohibit partnership agreements, this "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."[21]

Between the two extremes of price-fixing and partnership agreements, horizontal arrangements among competitors may take a wide variety of forms and produce welfare effects which cannot be determined without extensive case-by-case inquiries into the surrounding circumstances of the arrangements. Joint research ventures, for example, are horizontal arrangements which can often lead to welfare increases. Yet it is impossible to generalize, *ex ante*, about the welfare effects of joint ventures. Some horizontal arrangements which purport to be joint ventures may in fact be naked price-fixing arrangements in disguise.

This analysis suggests that competition laws ought to condemn naked price-fixing arrangements and allow partnership arrangements. Ambiguous arrangements which lie between the two extremes ought to be evaluated on a case-by-case basis.

B. The Law of Horizontal Arrangements in Canada

The Canadian *Competition Act* creates four categories of horizontal arrangements and subjects them to different degrees of scrutiny. The Supreme

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[19]W.G. Shepherd reports that the average price-fixing agreement increases prices by 10-30% (*The Economics of Industrial Organization*, 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1985) at 245). D.F. Greer suggests that many cartels have successfully increased prices by 30-60% (*Industrial Organization and Public Policy* (New York: Macmillan, 1980)).

[20]There is persuasive empirical evidence that price-fixing conspiracies succeed in raising prices for government agencies and utilities (F.M. Westfield, "Regulation and Conspiracy" (1965) 55 Am. Econ. Rev. 425; A.A. Alchian, "Electrical Equipment Collusion: Why and How?" in A.A. Alchian, ed., *Economic Forces at Work* (Indianapolis: Liberty Press, 1977) 259; F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2d ed. (Boston: Houghton Mifflin, 1980) at 224-25).

However, there is an ongoing debate among antitrust scholars on the question whether price-fixing conspiracies raise prices for unregulated for-profit buyers. See C. Newmark, "Does Horizontal Price Fixing Raise Prices? A Look at the Bakers of Washington Case" (1988) 31 J. L. & Econ. 469; D. Dewey, "Information, Entry and Welfare: The Case of Collusion" (1979) 69 Am. Econ. Rev. 587; G.J. Stigler & J.K. Kindahl, *The Behavior of Industrial Prices* (New York: National Bureau of Economic Research, 1970) at 92-93; W.B. Erickson, "Price Fixing Conspiracies: Their Long Term Impact" (1976) 24 J. Ind. Econ. 189; F.M. Fisher, "Statisticians, Econometricians and Adversary Proceedings" (1986) 81 J. Am. Stat. Ass. 277. Whether price-fixing conspiracies in fact raise prices for non-government for-profit buyers is a question on which we express no conclusion at this time.

[21]*Northern Securities Co.* v. *United States*, 193 U.S. 197 at 411 (1904).

Court of Canada considered these categories in *PANS*.[22] After discussing the institutional features of the *Competition Act*, we attempt to articulate the distinction between the categories.

1. The Canadian *Competition Act*: An Overview

Under the *Competition Act*, the Canadian Bureau of Competition Policy investigates violations of the statute. The *Act* is enforced by criminal courts (for some violations), the Canadian Competition Tribunal and private parties. Public enforcement begins when the Bureau initiates an inquiry.[23]

Violations of section 45 (the price-fixing prohibition) and its related provisions attract criminal sanctions.[24] Once the Bureau has begun an inquiry under those sections it may refer the matter to the Attorney General at any time.[25] The Attorney General considers the Bureau's findings and decides whether to prosecute the defendant in a criminal court. Upon conviction, defendants are liable to a maximum penalty of five years' imprisonment, a maximum fine of ten million dollars, or both.[26] In addition to initiating a criminal prosecution, the Attorney General may seek an interim injunction restraining the offending conduct. Courts follow general common law principles in issuing injunctions.[27]

The Canadian Competition Tribunal is empowered to review practices which are set out in Part VIII of the *Act*. Reviewable practices include refusals to deal,[28] consignment selling,[29] exclusive dealing, tied selling, market restriction,[30] abuse of dominant positions,[31] and mergers (horizontal arrangements by ownership).[32] Once the Bureau has begun an inquiry into a reviewable practice, the Director of the Bureau may apply to the Tribunal for a civil cease and desist order restraining the offending conduct or transaction. Price-fixing arrangements and related horizontal arrangements by contract are not reviewable practices under Part VIII; so the Bureau may not refer price-fixing matters to the Tribunal. The Director has complete discretion as to whether a matter should be referred to the Tribunal, and no other person may initiate Tribunal hearings.[33] Tribunal hearings do not concern the Attorney General and do not involve

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[22]*Supra* note 7.

[23]The Bureau may initiate an inquiry of its own initiative (s. 10(1)(*b*)), on the direction of the Minister of Consumer and Corporate Affairs (s. 10(1)(*c*)), or when six Canadian residents submit an application under s. 9.

[24]See Part I.*B*.2-5, below, for a detailed discussion of s. 45.

[25]*Competition Act*, *supra* note 2, s. 23(1).

[26]*Ibid.*, s. 45(1).

[27]S. 33 of the *Act* sets out the principles the court should consider when granting injunctions. These appear to codify the Attorney General's common law right to seek injunctions. See N. Finkelstein & R. Kwinter, "*Competition Act*, R.S.C. 1985, 2nd Supp., C.19 — Section 36 and Claims to Injunctive Relief" (1990) 69 Can. Bar Rev. 298 at 308.

[28]*Competition Act*, *supra* note 2, s. 75.

[29]*Ibid.*, s. 76.

[30]*Ibid.*, s. 77.

[31]*Ibid.*, s. 78.

[32]*Ibid.*, s. 92.

[33]The exception to this is found in s. 86(1), which allows any person to apply to the Tribunal to have it review a specialized agreement.

courts. Panels are composed of between three and five members, at least one of whom must be a Federal Court judge and at least one of whom must be a "lay person."[34]

The *Act* confers a civil right of action[35] on private parties who have suffered losses from either violations of Part VI of the *Act* or violations of Tribunal or court orders made under the *Act*. Courts may award damages equal to the plaintiff's proven loss, along with the plaintiff's cost of investigating and litigating the action. In the absence of contrary evidence, courts will treat a previous criminal conviction under section 45 (or any of its related sections) as evidence of a breach of section 36. We now consider the Canadian approach to price-fixing and other horizontal arrangements under section 45 of the *Act*.

2. The Partial Rule of Reason: Arrangements Which Lessen Competition "Unduly" under Subsection 45(1)

Subsection 45(1) has both an intent requirement and the following substantive components: first, there must be an agreement to which the accused was a party; second, the agreement must, if implemented, have the effect of lessening competition unduly.

a. Intent

Since subsection 45(1) is a criminal prohibition, the Crown must prove that the accused had the requisite intent for each element of the offence. To sustain a conviction, the Crown must prove both (i) the existence of an agreement which, if implemented, would unduly lessen competition, and (ii) that the accused intended to enter into that agreement. Until recently, it was unclear whether the Crown was also required to prove that the accused intended the competition-lessening effects of the agreement. However, the Supreme Court of Canada clarified the intent requirement of subsection 45(1) in the recent *PANS*[36] decision.

In *PANS*, Justice Gonthier, writing for the seven-member panel, declared that the intent requirement of subsection 45(1) consists of two elements: one subjective, and one objective. The subjective element will be satisfied when the Crown proves that the accused had the subjective intention to enter into the impugned agreement and that the accused knew the terms of the agreement. The objective element will be satisfied when the Crown proves that the accused, from the objective standpoint of a "reasonable business person" in the accused's industry, knew or ought to have known that the impugned agreement would, if implemented, lessen competition unduly.[37] We note in passing that subsection

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[34]*Competition Tribunal Act*, *supra* note 17, s. 10(1). "Lay person" is defined in s. 3(3) of that *Act* as someone "knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour."

[35]*Competition Act*, *supra* note 2, s. 36.

[36]*Supra* note 7.

[37]*Ibid.* at 660.

45(2.2) of the *Act*, which only requires the Crown to prove the subjective element of intending to enter into the agreement, must now be interpreted in light of this objective intent requirement.

b. Substantive Elements

When will an arrangement lessen competition unduly? The term "unduly" dates back to the original Canadian competition law which was enacted in 1889.[38] There is no definition of "unduly" in either the current statute or in any of its predecessors, and courts have wrestled with the task of definition for over a hundred years.

The most recent exposition of the term "unduly" comes from the *PANS* decision.[39] Gonthier J. first outlined the scope of the inquiry, and then outlined the content.

Gonthier J. couched his discussion of the scope of the "unduly" inquiry in terms of the American antitrust experience under the *Sherman Act*.[40] As section II of this paper will discuss, American antitrust jurisprudence has developed two sorts of inquiries: rule-of-reason review and *per se* illegal condemnation. When American courts apply rule-of-reason review to a challenged arrangement, they examine all surrounding circumstances of the arrangement to determine whether the arrangement unreasonably restricts competition without generating offsetting efficiency gains. When American courts apply *per se* illegal condemnation to an arrangement, they condemn the arrangement on its face without examining its surrounding circumstances.

Gonthier J. held that the Canadian prohibition

> lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in [paragraph 45(1)(*c*)] leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.[41]

On this reasoning, the "unduly" inquiry of subsection 45(1) allows courts to examine the economic background of the arrangement only to the extent necessary to determine whether the challenged arrangement lessens competition to the point where the lessening is undue. The court cannot consider any offsetting efficiency or welfare gains from the challenged arrangement. Gonthier J. stated that "[c]onsiderations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside the inquiry under [paragraph 45(1)(*c*)]."[42] The factors which courts can consider in this par-

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[38]*Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41.

[39]*Supra* note 7.

[40]*Sherman Act*, *supra* note 9, §§1-7.

[41]*Supra* note 7 at 650.

[42]*Ibid.* at 649-50.

tial rule-of-reason inquiry, according to Gonthier J., are the market power of the parties and the behaviour of the parties.

According to Gonthier J., the level of market power required to trigger subsection 45(1) is "moderate"[43] and includes "the capacity to behave independently of the market, in a passive way."[44] While subsection 45(2) of the *Act* provides that an arrangement may violate subsection 45(1) even if it does not completely or virtually eliminate competition in a market, the 1978 Supreme Court decision in *Aetna Insurance Co.* v. *R.*[45] suggested a relatively high market-power threshold. In *PANS*, Gonthier J.'s remarks[46] imply a considerably lower threshold — lower at any rate, according to the judgment, than the test of "substantial control" of a market which is embodied in the abuse of dominant position provisions.[47]

Gonthier J. presented the following non-exhaustive list of factors to be considered in the market-power inquiry: the number of competitors; barriers to entry; geographical distribution of buyers and sellers; differences in the degree of integration among competitors; product differentiation; countervailing power; and the cross-elasticity of demand for the products.[48] As well, Gonthier J. also suggested that a useful approach in the market-power inquiry might be to determine whether the defendant firm would be able to raise prices on a given product by five per cent over a year without incurring losses. Only firms with significant market power would be able to do this successfully. Gonthier J. derived this approach from the 1984 Merger Guidelines of the U.S. Department of Justice.[49] A similar test is adopted in the 1991 Canadian Merger Enforcement Guidelines.[50] It is significant that Gonthier J. concluded that the analysis of mergers (horizontal integrations by ownership) might properly inform the analysis of arrangements among rivals (horizontal integrations by contract). This approach is consistent with that of William Baxter,[51] and we argue later in this paper that the Competition Tribunal should evaluate horizontal arrangements among rivals under the same criteria that it uses to evaluate mergers.

In addition to market power, Gonthier J. concluded that subsection 45(1) requires "behaviour likely to injure competition."[52] The "behaviour" inquiry considers the nature and scope of the arrangement, and whether the combination of the arrangement and the parties' market power would lessen competition unduly. "Unduly," in this context, "carries a connotation of seriousness."[53]

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[43]*Ibid.* at 654.

[44]*Ibid.*

[45][1978] 1 S.C.R. 731, 75 D.L.R. (3d) 332, 34 C.C.C. (2d) 157 [hereinafter *Aetna Insurance* cited to S.C.R.]. See text accompanying note 64, below.

[46]*Supra* note 7 at 654.

[47]*Competition Act*, *supra* note 2, ss. 78-79.

[48]*Supra* note 7 at 653.

[49]49 Fed. Reg. 26,823.

[50]Director of Investigation and Research, *Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Supply Services Canada, 1991).

[51]*Supra* note 16.

[52]*Supra* note 7 at 656.

[53]*Ibid.* at 657.

3. *Per Se* Illegal Arrangements

Two sorts of arrangements are *per se* illegal in Canada: (i) bid-rigging (provided that the parties seeking the bid have no knowledge of the bid-rigging agreement);[54] and (ii) agreements among banks to set interest rates on loans or deposits.[55] Courts will condemn these arrangements on their face, and will not undertake a partial rule-of-reason inquiry into the surrounding circumstances of these arrangements.

4. *Per Se* Legal Arrangements

Parliament has concluded that the following arrangements are in the public interest, and should be exempt from the prohibition against horizontal arrangements: (i) collective bargaining arrangements and fishing cooperatives;[56] (ii) underwriting agreements;[57] (iii) amateur sports leagues;[58] (iv) specialization agreements;[59] (v) joint ventures;[60] and (vi) export agreements.[61]

5. Rule-of-Reason Arrangements: Subsections 45(3) and 45(4)

Subsection 45(3) of the *Act* declares that horizontal arrangements are exempt from the subsection 45(1) prohibition where they relate only to one or more of the following: (a) the exchange of statistics; (b) the defining of product standards; (c) the exchange of credit information; (d) the definition of terminology used in a trade, industry or profession; (e) cooperation in research and development; (f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media; (g) the sizes or shapes of containers in which an article is packaged; (h) the adoption of the metric system of weights and measures; or (i) measures to protect the environment.

Subsection 45(4) provides that the exemption conferred by subsection 45(3) does not apply when the arrangement has lessened, or is likely to lessen, competition unduly in respect of one of the following: prices; quantity or quality of information; markets or customers; or channels or methods of distribution. The exemption will also be lost if the arrangement is likely to restrict any person from entering a market.

As noted above,[62] Gonthier J. held that subsection 45(1) creates a partial rule-of-reason inquiry for arrangements which unduly lessen competition. However, arrangements which fall under the criteria of subsection 45(3) are subject to subsection 45(4), not subsection 45(1). For subsection 45(4) to stand on its

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[54]*Competition Act, supra* note 2, s. 47.
[55]*Ibid.*, s. 49.
[56]*Ibid.*, s. 4.
[57]*Ibid.*, s. 5.
[58]*Ibid.*, s. 6.
[59]*Ibid.*, s. 86.
[60]*Ibid.*, s. 95.
[61]*Ibid.*, s. 45(6).
[62]See text accompanying note 41, above.

own, it must create a level of scrutiny which differs from the one mandated by subsection 45(1). Since Parliament has determined that arrangements which meet the subsection 45(3) criteria are likely to be in the public interest, it would seem sensible to infer that subsection 45(3)-type arrangements should be subject to a full rule-of-reason review before they are condemned. The subsection 45(4) limit on the subsection 45(3) exemption should therefore be read as requiring courts to engage in a searching inquiry into an arrangement's surrounding circumstances to determine whether a subsection 45(3)-type arrangement actually generates net welfare gains. As the next section will show, this type of inquiry is similar to the American rule-of-reason review to which Gonthier J. referred when he outlined the limits of the subsection 45(1) inquiry.

C. *The Categorization Approach of the* Competition Act

Section 45 of the Canadian *Competition Act* and the recent Supreme Court of Canada decision in *PANS* create four categories of horizontal arrangements and four corresponding levels of review. At one extreme, the *Act* makes arrangements such as bid-rigging agreements *per se* illegal. Courts will condemn those arrangements summarily without inquiring into surrounding circumstances. At the other extreme, the *Act* makes arrangements such as collective bargaining and underwriting agreements *per se* legal. Courts will uphold those arrangements regardless of any competition-lessening effects.

Between these extremes, there are two categories of arrangements to which courts will apply intermediate levels of review on a case-by-case basis. First, arrangements which do not fall under the criteria set out in subsection 45(3) are evaluated under a partial rule of reason. Courts examine the surrounding circumstances of the challenged arrangement only to the extent necessary to determine whether competition has been lessened unduly. Offsetting efficiency gains are not considered. The second intermediate level of review is the full-blown rule-of-reason review. A functional reading of the *PANS* decision suggests that arrangements which fall under the criteria set out in subsection 45(3) are subject to a full-blown rule-of-reason inquiry under subsection 45(4). Courts will examine the surrounding circumstances of those arrangements and consider whether they produce a net reduction in welfare before condemning them under subsection 45(4).

D. *Disadvantages of the Current Regime*

In this paper, we focus on two disadvantages of the current regime. First, the criminal prohibition is both underinclusive and overinclusive. Second, forcing all-purpose criminal courts to undertake complex rule-of-reason inquiries (or partial rule-of- reason inquiries) runs contrary to our notions of the relative institutional competence of criminal courts as compared with a specialized administrative agency.

The current prohibition is underinclusive because it can allow manifestly anti-competitive arrangements to escape condemnation. We believe that some horizontal arrangements, such as naked price-fixing and market-sharing

arrangements, must be deterred with criminal sanctions.[63] But the current prohibition, which requires the Crown to prove on a criminal burden of proof that an arrangement has lessened competition "unduly," can allow price-fixers to escape conviction with the kind of specious arguments that were advanced in *Aetna Insurance*.[64] In *Aetna Insurance*, the Supreme Court of Canada upheld the acquittal of an association of insurance underwriters, representing fifty to seventy per cent of the Nova Scotia insurance market, which had fixed the price of insurance over ten years. The Court declared that the association performed various collateral, socially-useful functions.

At the same time, the current prohibition is overinclusive because it subjects all horizontal arrangements to criminal prohibitions and casts a shadow over many arrangements that may potentially increase welfare. Apart from the obvious price-fixing case, the welfare effects of many horizontal arrangements are ambiguous, and arrangements with ambiguous welfare effects should not be deterred and do not require criminal sanctions.

The ambiguity of many horizontal arrangements leads to the second disadvantage of the current regime. Currently, all-purpose criminal courts evaluate the welfare effects of ambiguous arrangements through complex rule-of-reason inquiries on a criminal burden of proof. We believe that the Competition Tribunal is better equipped to analyse the welfare effects of ambiguous arrangements than criminal courts. The Tribunal has specialized expertise, and evaluates reviewable practices on a civil, rather than criminal, burden of proof. As well, the principal sanctions available to the Tribunal are cease and desist orders — not criminal sanctions.

In 1986, Parliament removed merger review from all-purpose criminal courts and vested it in the Tribunal. We believe that the Tribunal should now assume responsibility for all ambiguous horizontal arrangements which lie outside obvious price-fixing and market-sharing agreements. The thrust of our thinking is reflected in a report of the Law Reform Commission of Canada[65] and in recommendations to the Director of Competition Policy by the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the *Competition Act*. The working group proposes to transfer jurisdiction over many forms of misleading advertising to the Tribunal, and proposes to confine criminal sanctions for misleading advertising to cases of actual fraud or dishonesty.[66]

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[63]See F.R. Warren-Boulton, "Implications of U.S. Experience with Horizontal Mergers and Takeovers for Canadian Competition Policy" in Mathewson, Trebilcock & Walker, eds., *supra* note 16, 345; W.M. Landes, "Optimal Sanctions for Antitrust Violations" (1983) 50 U. Chic. L.R. 652; G. Werden & M. Simon, "Why Price Fixers Should Go to Prison" (1987) 32 Antitrust Bull. 917.

[64]*Supra* note 45.

[65]In *Our Criminal Law* (Ottawa: Information Canada, 1976) at 27, the Commission declared that: "The fact is, criminal law is a blunt and costly instrument ... [; so it] must be an instrument of last resort. It must be used as little as possible. The message must not be diluted by overkill — too many laws and offences and charges and trials and prison sentences."

[66]Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the *Competition Act, Effective and Equitable Enforcement* (Report presented to the Director of Investigation and Research, 31 January 1991) [unpublished].

In section V, we propose a new approach to horizontal arrangements which we believe is responsive to both our underinclusive/overinclusive concerns and our institutional-competence concerns. Briefly, our proposal consists of a criminal prohibition which would be narrowly defined to target only naked price-fixing arrangements of the *Aetna Insurance* variety. We propose that all other horizontal arrangements would, like mergers, fall within the jurisdiction of the Competition Tribunal.

The remaining problem is to draft a criminal prohibition which will target naked price-fixing without at the same time targeting other, potentially pro-competitive, arrangements. In the comparative reviews which follow, we consider how other jurisdictions have addressed the difficulties of distinguishing, *ex ante*, between naked price-fixing arrangements and potentially pro-competitive arrangements.

II. The U.S. Experience

The price-fixing provisions of the Canadian *Competition Act* are detailed and specific, and include definitions of such practices as bid-rigging[67] and exchanges of information.[68] In contrast, the U.S. *Sherman Act* is general and non-specific. Section 1 of the *Sherman Act* condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." With the exception of special legislation which exempts certain practices from the scope of the *Sherman Act*, practices which attract liability under the *Sherman Act* have been defined by over one hundred years of jurisprudence.

The *Sherman Act* governs "every contract," and the U.S. Supreme Court adopted an expansive definition of "every contract" in its first *Sherman Act* decision.[69] In subsequent cases,[70] the Court recognized that an overly broad interpretation of "every contract" would invalidate many ordinary business contracts, including partnership agreements. Ultimately, the Court recognized that the *Sherman Act* was designed to prohibit only unreasonable restraints of trade.[71] The crucial question for modern courts in *Sherman Act* cases is whether the challenged arrangement is "unreasonably restrictive" of competition.[72]

Like Canada, the United States has adopted a categorization approach to horizontal arrangements. There are three categories: *per se* illegal arrangements,

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[67]*Competition Act*, *supra* note 2, s. 47.

[68]*Ibid.*, s. 45(3).

[69]*United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

[70]In *Hopkins* v. *United States*, 171 U.S. 578 at 594 (1898), the U.S. Supreme Court declared that "[t]he effect upon the commerce spoken of must be direct and proximate." The Court also remarked that the *Sherman Act* "must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it" (*ibid.* at 600). See also *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898).

[71]This view was propounded in *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 at 58 (1911), where the Court held that the purpose of the *Sherman Act* is to deem "illegal all contracts or acts which [are] *unreasonably restrictive* of competitive conditions" [emphasis added].

[72]For a recent restatement, see *National Collegiate Athletic Association* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 at 98 (1984) [hereinafter *NCAA*].

rule-of-reason arrangements, and *per se* legal arrangements. *Per se* illegal arrangements, which include naked price-fixing, are thought to be manifestly anti-competitive, and (ideally) courts condemn those arrangements without examining their surrounding circumstances. Rule-of-reason arrangements are thought to be potentially pro-competitive, and courts examine the surrounding circumstances of rule-of-reason arrangements before condemning them.

In this section we trace the evolution of the categories and attempt to articulate the conceptual distinction (such as there is) between *per se* illegal arrangements and rule-of-reason arrangements.

A. *Evolution of the Rule-of-Reason Approach*

Courts look to surrounding circumstances to determine whether an arrangement unreasonably restricts competition. According to Bork,[73] the following dictum is the "quintessential expression of the rule of reason" approach:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[74]

The U.S. rule-of-reason approach consists of essentially two inquiries.[75] Given a horizontal arrangement among competitors, courts first ask if the arrangement harms competition. If the arrangement is found not to harm competition, it is upheld. If the arrangement is found to harm competition, courts proceed to ask whether the anti-competitive arrangement may nonetheless be justified on the basis of offsetting efficiency gains.

1. The Extent to Which an Arrangement Harms Competition

One measure of the harm an arrangement inflicts on competition is the extent to which the arrangement reduces output.[76] Recent American cases have approved the output-reduction measure of unreasonableness.[77] However, as

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[73]*Supra* note 4 at 43.

[74]*Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 at 238 (1918).

[75]P.E. Areeda & D.F. Turner, *Antitrust Law*, vol. 7 (Boston: Little, Brown & Company, 1986) at 371. The authors discuss "two clear directions, and a third as well." The third direction asks: "[i]s the restraint reasonably necessary for the achievement of any such legislative objective?" See generally S. Ross, *Principles of Antitrust Law* (New York: Foundation Press, 1993) c. 4.

[76]This test is not infallible. For example, a price-fixing cartel which practises perfect price discrimination would produce the perfectly competitive level of output, yet the cartel would remain anti-competitive despite the absence of a reduction in output.

[77]In *Broadcast Music Inc.* v. *Columbia Broadcasting Systems*, 441 U.S. 1 at 20 (1979) [hereinafter *Broadcast Music*], the U.S. Supreme Court held that the proper test is whether the practice would "tend to restrict competition and decrease output." See also *NCAA*, *supra* note 72 at 120, where the Court held that a plan to limit the live television broadcast of NCAA college football games was "curtailing output" and was thus unreasonable.

Philip Areeda and Donald Turner note,[78] it is not always easy to measure an arrangement's effect on output. While anti-competitive arrangements will ultimately reduce output, output will also decrease if there are fluctuations in output demand or fluctuations in the supply of inputs. Because of the inherent difficulty of measuring the effects of arrangements on output, courts often treat the market power of parties to an arrangement as a surrogate for the arrangement's output-reducing effects.[79] The greater the parties' market power, so courts reason, the greater the likely output-reducing effects of the arrangement.

There is no consensus among either courts or academics on the degree of market power that parties must possess for courts to conclude that their arrangements reduce output.[80] Lawrence Sullivan suggests that a "truncated or threshold analysis will suffice."[81] Bork argues that market shares which merger standards deem to be presumptively lawful should be presumptively lawful under rule-of-reason review, and the U.S. Department of Justice adopted a similar approach in its Antitrust Guide for International Operations.[82] Philip Areeda and Herbert Hovenkamp remark that courts will often conclude that an arrangement reduces output whenever parties have a "non-trivial" level of market power.[83]

2. Justification: Whether the Arrangement Promotes Pro-Competitive Objectives

Once an arrangement is found to harm competition, the burden shifts to the defendant to justify the arrangement. As stated earlier, the "quintessential rule of reason" declares that "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts."[84] These facts become relevant in the justification inquiry.

During the justification inquiry, courts consider only the extent to which challenged arrangements promote competition,[85] and do not consider other fac-

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[78]*Supra* note 75 at 374-76.

[79]*Federal Trade Commission* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986) [hereinafter *Indiana Dentists*].

[80]See W.M. Landes & R.A. Posner, "Market Power in Antitrust Cases" (1981) 94 Harv. L. Rev. 937; Hovenkamp, *supra* note 15, c. 3; H. Hovenkamp, "The Measurement of Market Power: Policy and Science" in Mathewson, Trebilcock & Walker, eds., *supra* note 16, 43.

[81]*Handbook of Antitrust Law* (St. Paul: West, 1977) at 190-92. See also F.H. Easterbrook, "The Limits of Antitrust" (1984) 63 Tex. L. Rev. 1 at 20; J.D. Briggs & S. Calkins, "Antitrust 1986-87: Power and Access (Part I)" (1987) 32 Antitrust Bull. 275 at 285-300.

[82]*Rothery Storage & Van Co.* v. *Atlas Van Lines Inc.*, 792 F.2d 210 at 229-30 (D.C. Cir. 1986), Bork J. [hereinafter *Rothery Storage*]; Justice Department, International Operations, Antitrust Enforcement Policy (Nov. 10, 1988) (CCH. Supp.) at 42.

[83]*Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 1990 Supp. (Boston: Little, Brown & Company, 1990) at 970-72.

[84]*Supra* note 74.

[85]Although competition is the sole ground on which courts weigh alleged justifications, courts interpret the term "competition" broadly. If the nature of a product is such that it can only be produced through a horizontal arrangement, the arrangement will be upheld. See *Broadcast Music*, *supra* note 77, where the Supreme Court held that a combination which created a central repository of music copyrights and required copyright users to purchase blanket-licences for all copyrights

tors such as the public interest.[86] Once a restraint is shown to possess an efficiency justification, courts ask whether the objectives achieved by the restraint may be achieved while causing less harm to competition. Courts will not excuse a challenged arrangement on the basis of an alleged pro-competitive justification unless they find that the arrangement is reasonably necessary to fulfill the alleged pro-competitive goal. Where the alleged pro-competitive justification is clearly not pro-competitive, courts will dismiss the justification claim summarily.[87]

B. Evolution of the Per Se *Illegal Rule*

Rule-of-reason inquiries into the surrounding circumstances of arrangements can be difficult and time-consuming. The *per se* illegal rule is an evidentiary presumption which, in some cases, allows courts to condemn arrangements without engaging in a full-blown rule-of-reason inquiry.

The *per se* illegal rule originated in the 1897 *Joint Traffic* case, where the U.S. Supreme Court held that arrangements such as price-fixing, which have a "direct and immediate effect ... upon interstate commerce" are invalid.[88] The modern *per se* illegal rule began with *U.S.* v. *Socony-Vacuum Oil Co.*,[89] where the Supreme Court held that "[u]nder the *Sherman Act* a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal *per se*."[90] Once the *Socony-Vacuum* Court concluded that price-fixing, by definition, is an unreasonable restraint of competition, it condemned the arrangement on its face without a rule-of-reason inquiry into surrounding circumstances.

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was pro-competitive. Without the central repository, the market for music broadcast would not function at all. See also *NCAA*, *supra* note 72, where the Court condemned an arrangement because it was not essential to the market for the product. For a discussion of the characteristics of those markets in which horizontal arrangements may be essential for the market to operate, see G. Bittlingmayer, "Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case" (1982) 25 J. L. & Econ. 201.

[86]See *Federal Trade Commission* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 at 422 (1990), where the U.S. Supreme Court refused to "pass upon [*sic*] the social utility or political wisdom of price-fixing agreements." In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) [hereinafter *Society of Engineers*], the Supreme Court struck down an agreement among engineers to collectively refuse to negotiate prices with prospective clients before being retained. The Court rejected the engineers' argument that the agreement was necessary to prevent unscrupulous engineers from cutting costs (and ultimately reducing public safety) to attract clients, and declared that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." See also *Indiana Dentists*, *supra* note 79; Areeda & Turner, *supra* note 75 at 380-81.

There have been some exceptions to the rule against considering other factors in the justification inquiry (see *e.g. Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 at 361 (1933), where the Court upheld an arrangement due to the unfavourable economic conditions of the industry). These cases are generally thought to be anomalous (see *e.g.* Bork, *supra* note 4, c. 2-3; Sullivan, *supra* note 81 at 180-86).

[87]In *NCAA*, *supra* note 72 at 111, for example, the Court cites Areeda in saying that "the rule of reason sometimes can be applied in the twinkling of an eye." See also B. Bock, "An Economist Considers Some Basic Issues of Anti-trust Law in the United States" (1990) 2 E.C.L.R. 52 at 62.

[88]*United States* v. *Joint Traffic Association*, 171 U.S. 505 at 568 (1897).

[89]310 U.S. 150 (1940) [hereinafter *Socony-Vacuum*].

[90]*Ibid.* at 223.

1. The Category of *Per Se* Illegal Arrangements

Since *Socony-Vacuum*, American courts have added to the category of *per se* illegal arrangements[91] both by broadening the scope of the term "price-fixing" and by declaring other sorts of arrangements, such as market-allocation agreements,[92] to be *per se* illegal.

Courts have characterized the following sorts of arrangements as "price-fixing": agreements to fix minimum[93] or maximum[94] prices; agreements to prohibit or interfere with competitive bidding;[95] agreements to eliminate short-term credit;[96] and buyers' agreements to offer particular prices or to limit purchases.[97]

2. The Problem of Characterization

The advantage of the *per se* illegal rule is that it allows courts to condemn naked price-fixing and other manifestly anti-competitive arrangements without a complex rule-of-reason inquiry. The problem with the rule is its inflexibility, since not all arrangements which fix prices are anti-competitive. Bork offers the example of an agreement among independent drug stores to purchase a collective advertisement which lists their products at specified prices. While the agreement fixes prices, it also generates advertising economies of scale.[98] Since the *per se* illegal rule requires the court to condemn price-fixing arrangements without examining surrounding circumstances, the crucial question for the court is whether the drug stores' agreement may be characterized as "price-fixing" within the meaning of the *per se* illegal rule. Yet it is difficult to characterize the agreement as "price-fixing" without examining the surrounding circumstances of the agreement. This has been called the problem of "characterization."[99]

Since *Socony-Vacuum*, American courts have been confronted with many seeming price-fixing arrangements which they have been unable to characterize as "price-fixing" without first examining surrounding circumstances. This has

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[91]For the development of *per se* illegality, see generally Briggs & Calkins, *supra* note 81 at 290-94; Sullivan, *supra* note 81 at 213-16.

[92]Agreements among competitors to divide markets are *per se* illegal. See *United States* v. *Addyston Pipe & Steel*, 175 U.S. 211 (1899) [hereinafter *Addyston Pipe*]; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972). However, in recent years there has been a trend to evaluate market-division agreements on a rule of reason. There is now strong authority for the proposition that defendants must have market power for their market-sharing arrangements to be condemned. See *NCAA*, *supra* note 72; *Rothery Storage*, *supra* note 82; *Polk Brothers Inc.* v. *Forest City Enterprises Inc.*, 776 F.2d 185 (7th Cir. 1985), Easterbrook J. [hereinafter *Polk Brothers*]; *General Leaseways, Inc.* v. *National Truck Leasing Assoc.*, 744 F.2d 588 (7th Cir. 1984), Posner J.

[93]*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) [hereinafter *Goldfarb*].

[94]*Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) [hereinafter *Maricopa County*].

[95]*Society of Engineers*, *supra* note 86; *United States* v. *W.F. Brinkley & Son Construction Co.*, 783 F.2d 1157 (4th Cir. 1986).

[96]*Catalano* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

[97]*National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F.2d 421 (7th Cir. 1975); *Mandeville Island Farms* v. *American Crystal Sugar*, 334 U.S. 219 (1948).

[98]*Supra* note 4 at 437-38.

[99]Baxter, *supra* note 16 at 128.

compelled the U.S. Supreme Court to blur the distinction between *per se* illegal arrangements and arrangements which attract rule-of-reason review.[100] In *NCAA*, the Supreme Court declared that "there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[101] In later cases, the Supreme Court confirmed its movement away from a strict *per se* illegal rule,[102] and circuit courts have followed the Supreme Court's lead.[103]

American courts are now using almost a full rule-of-reason analysis to evaluate arrangements which, at one time, they would have summarily condemned as *per se* illegal.[104] However, in adopting this approach, American courts risk losing the benefits of the *per se* illegal rule. The rule serves no purpose if courts must engage in a rule-of-reason analysis before characterizing an arrangement as *per se* illegal. The problem of characterization suggests that it may not be possible to frame a prohibition against naked price-fixing without at the same time targeting potentially pro-competitive arrangements. Thomas Webb has indeed argued that a straight rule-of-reason approach for all arrangements would be preferable to the *per se* illegal/rule of reason distinction.[105]

The *per se* illegal rule persists despite the difficulty of creating a watertight category of *per se* illegal arrangements. The current approach requires courts to examine whether an alleged price-fixing arrangement is a "naked" restraint or is a restraint which is "ancillary" to some pro-competitive objective.[106] If courts find restraints to be naked, they will characterize the arrangements as *per se* illegal, and condemn them summarily. If, on the other hand, courts find that the restraints can plausibly create integrative efficiencies, they will examine other factors such as the defendant's market power.[107] Paradoxically, the naked/ancillary distinction was first propounded by Justice Taft of the U.S. Supreme Court in the 1898 *Addyston Pipe* case.[108] Bork remarks that "[i]t is both startling and discouraging to realize that, in view of what came later, the *Addyston* opin-

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[100]See L.H. Pasahow, "Erosion of the Per Se Rule: Trends in the Law of Horizontal Restraints" (1987) 2:1 *Antitrust* 22.

[101]*Supra* note 72 at 104.

[102]See *Northwest Wholesale Stationers' Inc.* v. *Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985); *Maricopa County*, *supra* note 94.

[103]*National Bancard Corp.* v. *Visa U.S.A. Inc.*, 779 F.2d 592 (11th Cir. 1986), cert. denied 479 U.S. 923 (1986) [hereinafter *NaBanco*]. See also *Stratmore* v. *Goodbody*, 1986-2 Trade Cas. para. 67 193 (E.D. Ky.), aff'd 866 F.2d 189 (6th Cir. 1989), cert. denied 109 S. Ct. 2065 (1989). Hovenkamp, *supra* note 15 at 128-29, remarks that "determining *when* a practice should be [characterized as *per se* illegal] can be very difficult, and may involve a fair amount of sophisticated economic inquiry."

[104]For an extensive discussion of the shift away from *per se* rules, see J. Halverson, "The Future of Horizontal Restraints Analysis" (1988) 57 Antitrust L.J. 33.

[105]T. Webb, "Fixing the Price Fixing Confusion: A Rule of Reason Approach" (1983) 92 Yale L.J. 706.

[106]*Polk Brothers*, *supra* note 92; *Hennessy Industries* v. *FMC Corp.*, 779 F.2d 402 (7th Cir. 1985); *NaBanco*, *supra* note 103.

[107]P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 1992 Supp. (Boston: Little, Brown & Company, 1992) at 1089-95.

[108]*Supra* note 92.

ion of 1898 may well have been the high-water mark of rational antitrust doctrine."[109]

A recent decision of the U.S. Federal Trade Commission provides a useful summary of the modern American approach to horizontal arrangements:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? ... If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? ... Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry — a *third* inquiry — is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry — there are no likely benefits to offset the threat to competition.[110]

C. *Exemptions from the Antitrust Laws:* Per Se *Legal Arrangements*

The U.S. Congress has concluded that certain arrangements are in the public interest and should be immune from antitrust scrutiny. These arrangements include: (i) collective bargaining agreements;[111] (ii) agricultural cooperatives;[112] (iii) cartel agreements which relate solely to exports;[113] and (iv) certain production agreements among newspapers, provided the Attorney General gives written consent.[114] As well, many regulated industries have been granted a qualified exemption from antitrust liability.[115] Finally, the *Sherman Act* only applies to arrangements which affect "interstate commerce" within the meaning of the American Constitution, although American courts usually conclude that horizontal arrangements affect interstate commerce.[116] Baseball is the only signifi-

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[109]*Supra* note 4 at 30.

[110]*Massachusetts Bd. of Registration in Optometry*, 5 Trade Reg. Rep. ¶22,555 (F.T.C. 1988), quoted in Areeda & Hovenkamp, *supra* note 107 at 1094-95.

[111]*Norris-La Guardia Act*, 29 U.S.C. §§101-115 (1988); *Clayton Act*, 15 U.S.C. §17 (1988); *National Labour Relations Act*, 29 U.S.C. §151 (1988); *Labour Management Relations Act*, 29 U.S.C. §141 (1988).

[112]*Capper-Volstead Act*, 7 U.S.C. §§291-92 (1988); *Clayton Act*, 15 U.S.C. §17 (1988).

[113]*Webb-Pomerene Act*, 15 U.S.C. §§61-66 (1988).

[114]The *Newspaper Preservation Act*, 15 U.S.C. §§1801-04 (1988), provides that failing newspapers may enter into joint-operation agreements with solvent newspapers with the Attorney General's written consent.

[115]Sullivan, *supra* note 81 at 744, lists the following examples of such industries: conventional utility industries, such as water, telephones, gas and electricity; rail, air and much of water and truck transportation, communication and banking; many professions and occupations and even organized exchanges. The insurance industry is subject to regulation by state insurance regulators under the *McCarran-Ferguson Act*, 15 U.S.C. §§1011-15 (1988).

[116]See *e.g. Goldfarb*, *supra* note 93, in which the U.S. Supreme Court held that a state bar association's practice of fixing fees for title examinations violated §1 of the *Sherman Act* because many homesite-purchasers were from out of state; thus there was held to be an effect on interstate commerce. See generally Areeda & Hovenkamp, *supra* note 107 at 269-86.

cant activity which American courts have concluded falls outside the "interstate. commerce" requirement.[117]

D. Institutional Features of the American Regime

Both the U.S. Department of Justice ("DJ") and the Federal Trade Commission ("FTC") investigate antitrust violations. Antitrust laws are enforced by criminal courts, the Federal Trade Commission, and private parties.

The DJ generally initiates prosecutions for antitrust violations. Upon conviction, defendants are liable to fines of up to $350,000 for individuals and up to $10 million for corporations, to imprisonment of up to three years, or to both.[118] The DJ wins or settles the vast majority of its criminal price-fixing prosecutions.[119]

The *Federal Trade Commission Act*[120] empowers the FTC to investigate and challenge "unfair methods of competition."[121] Any individual, partnership, association, corporation or organization may request that the FTC initiate an investigation.[122] The FTC may also undertake an investigation on its own initiative.[123] If, following an investigation, the FTC concludes that a party has been, or is, using any unfair method of competition, it holds a "show cause hearing." At the hearing, the defendants must "show cause," on a balance of probabilities, why the FTC should not issue a cease and desist order against their unfair practices.[124] Once the FTC issues a cease and desist order, any violation of the order subjects defendants to civil penalties.

In the private law context, private plaintiffs have strong incentives to enforce the antitrust laws,[125] and may recover treble damages[126] or obtain injunctive relief[127] for antitrust violations.[128] To recover damages under the antitrust

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[117]*Federal Baseball Club of Baltimore Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

[118]*Antitrust Amendments Act of 1990*, Pub. L. No. 101-588, 104 Stat. 2880 (codified as amended at 15 U.S.C. §1 (1988)), §4(*a*). See generally J.L. Whalley, "Crime and Punishment — Criminal Antitrust Enforcement in the 1990s" (1990) 59 Antitrust L.J. 151 at 158-59.

[119]H.P. Marvel, J.M. Netter & A.M. Robinson, "Price Fixing and Civil Damages: An Economic Analysis" (1988) 40 Stanford L. Rev. 561 at 562.

[120]15 U.S.C. §45(*a*)(2) (1988).

[121]The FTC has jurisdiction over all antitrust statutes; its jurisdiction overlaps with that of the DJ. Since the DJ generally initiates most price-fixing prosecutions, the FTC will generally seek clearance from the DJ before initiating investigations into alleged price-fixing (*The FTC as an Antitrust Enforcement Agency: Its Structure, Powers and Procedures* (1981) 2 A.B.A. Antitrust Sec. Antitrust Law (Monog. 5) at 16).

[122]Federal Trade Commission, 16 C.F.R. §2.2 (1991).

[123]*Ibid.*, §2.1.

[124]*Ibid.*, §5(*a*)(2).

[125]For a useful discussion of the procedural aspects of private actions, see A.D. Neale & D.G. Goyder, *The Antitrust Laws of the United States of America*, 3d ed. (Cambridge: Cambridge University Press, 1980) at 420-28.

[126]*Clayton Act*, 15 U.S.C. §15 (1988).

[127]*Ibid.*, §26.

[128]The treble damages remedy has been heavily criticized for inducing excessive litigation. Over 1,000 private antitrust actions are filed each year in the U.S. (S.C. Salop & L.J. White, "Treble

laws, private plaintiffs must establish both (1) that they have standing to sue, and (2) that they have suffered injury as a result of the antitrust violation. Hovenkamp concludes that customers and competitors of the violator will normally be granted standing, while nonpurchasers, potential competitors and employees of the violator, and stockholders, creditors, landlords and employees of the victims will normally be refused standing.[129] For injunctive relief, plaintiffs need only establish "threatened loss or damage."[130]

III. The European Experience

The three regimes reviewed in this section represent a significant departure from both the Canadian and American regimes. Instead of attempting to frame prohibitions which distinguish naked price-fixing from potentially pro-competitive arrangements, these regimes combine overinclusive prohibitions against all forms of horizontal arrangements with procedural mechanisms for *ex ante* administrative review of potentially pro-competitive arrangements.

A. The European Community Law

In the European Community ("EC"), the basic rules which govern potentially anti-competitive arrangements are set out in Article 85 of the *Treaty of Rome*,[131] which provides that:

> (1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;

Damages Reform: Implications of the Georgetown Project" (1986) 55 Antitrust L.J. 73 at 78). Posner blames treble damages for the "wild and woolly antitrust suits that the private bar has brought — and won" (*supra* note 3 at 228). See also W. Breit & K.G. Elzinga, "Private Antitrust Enforcement: The New Learning" (1985) 28 J. L. & Econ. 405; W. Breit & K.G. Elzinga, "Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages" (1974) 17 J. L. & Econ. 329; K.G. Elzinga & W. Breit, *The Antitrust Penalties: A Study in Law and Economics* (New Haven: Yale University Press, 1976) c. 4; S.W. Salant, "Treble Damages Awards in Private Lawsuits for Price Fixing" (1987) 95 J. Pol. Econ. 1326; F.H. Easterbrook, "Detrebling Antitrust Damages" (1985) 28 J. L. & Econ. 445.

Criticism has not been universal. S.C. Salop & L.J. White argue that the damages multiplier should he at the discretion of the judge, with treble damages being the norm ("Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo. L.J. 1001 at 1051-52). D. Besanko & D.F. Spulber show mathematically that a multiple damages remedy can lead to welfare improvements if the damage multiple is sufficiently large ("Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement" (1990) 80 Am. Econ. Rev. 870). See also H. Hovenkamp, "Treble Damages Reform" (1988) 33 Antitrust Bull. 233.

[129] *Supra* note 15 at 361.

[130] See *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251 at 260-64 (1972); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 at 130-31 (9th Cir. 1973), cert. denied 414 U.S. 1045 (1973). See also Sullivan, *supra* note 81 at 772.

[131] *Supra* note 10.

(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

(3) The provisions of paragraph 1 may, however, be declared inapplicable in case of:
– any agreement or category of agreements between undertakings;
– any decision or category of decisions by associations of undertakings;
– any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; [and]
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. Article 85(1): The General Prohibition

While the prohibition is broad, and extends to all arrangements which "may affect trade between Member States," the European Commission has established a *de minimis* threshold. In the Commission's view, arrangements do not trigger the prohibition unless they have an "appreciable" effect on competition. Arrangements will have "appreciable" effects on competition when they appreciably alter the market position or sales and supply opportunities of third parties. According to the Commission, arrangements will not have an appreciable effect on competition where: (i) the total goods or services affected by the agreement do not represent more that five per cent of total supply; and (ii) where the aggregate annual turnover of the participating enterprises does not exceed 200 million ECU.[132]

2. Article 85(2): Consequences of Violating the Article 85(1) Prohibition

The *Treaty of Rome* provides two consequences of violating the prohibition in article 85(1). First, article 85(2) deems arrangements which violate the prohibition to be categorically unenforceable. Thus, any party to a prohibited arrangement may avoid its contractual obligations by pleading article 85(1).

The second consequence is the risk of administrative action by the Commission. The *Treaty of Rome* empowers the Commission to impose severe fines for intentional or negligent violations of the prohibition.[133] The Commission

[132]See V. Korah, *An Introductory Guide to EEC Competition Law and Practice*, 4th ed. (Oxford: ESC Publishing, 1990) at 43-44.

[133]In 1989, the Commission imposed a fine of ECU 48 million on soda ash manufacturers who had engaged in market sharing ("EC Commission Imposes Largest Fines for Cartel Arrangements in Soda Ash Sector" (1991) 60 Antitrust & Trade Reg. Rep. 14). During 1988, the Commission imposed fines of ECU 23,500,000 and ECU 37,000,000 on price-fixers, and declared that the fines imposed were "low" because the price-fixing scheme had not been profitable (*A.B.A. Report, supra* note 14, app. 1 at 21).

may also issue decisions (termination orders) to parties requiring them to terminate all article 85(1) violations. Failure to comply with decisions will attract substantial fines.

3. Relief from the Prohibition

There are four ways for parties to secure relief from the article 85(1) prohibition. First, the arrangement may not meet the *de minimis* requirement of an "appreciable" effect on competition.[134] Second, the arrangement may qualify for one of the block exemptions the Commission has created for certain types of arrangements.[135] Third, the arrangement may qualify for a negative clearance from the Commission.[136] Fourth, the arrangement may qualify for a Commission exemption from article 85(1) under the criteria set out in article 85(3).

The Commission has published guidelines which allow parties to determine whether their arrangements fall below the *de minimis* requirement or qualify for a block exemption.[137] Parties to arrangements which satisfy either criterion need not take any action to insulate their arrangements from scrutiny. All other arrangements trigger the prohibition unless they qualify for either a negative clearance or a specific exemption. To qualify for a negative clearance or a specific exemption, the parties must first provide the Commission with extensive information about both their business practices and their arrangement by filing a Form A/B.

Filing a Form A/B does three things. First, it renders the arrangement provisionally valid and enforceable in national courts.[138] Second, it renders the arrangement immune from fines as of the date of filing, although one commentator has suggested that notification may not insulate an obvious violation because that would constitute an "abuse" of the notification mechanism.[139] Third, it begins the Commission's administrative review of the arrangement.

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[134]Korah, *supra* note 132 at 43.

[135]Block exemptions have been granted for exclusive dealing agreements (EC, *Commission Regulation (EEC) No 67/67 of 22 March 1967*, O.J. (1967) No 57 at 849); exclusive distribution agreements (EC, *Commission Regulation (EEC) No 1983/83 of 22 June 1983*, O.J. Legislation (1983) No L173 at 1); exclusive purchasing agreements (EC, *Commission Regulation (EEC) No 1984/83 of 22 June 1983*, O.J. Legislation (1983) No L173 at 5); patent licensing agreements (EC, *Commission Regulation (EEC) No 2349/84 of 23 July 1984*, O.J. Legislation (1984) No L219 at 15); motor vehicle distribution and servicing agreements (EC, *Commission Regulation (EEC) No 123/85 of 12 December 1984*, O.J. Legislation (1985) No L15 at 16); research and development agreements (EC, *Commission Regulation (EEC) No 418/85 of 19 December 1984*, O.J. Legislation (1985) No L53 at 5); and air transport agreements (EC, *Commission Regulation (EEC) No 3976/87 of 14 December 1987*, O.J. Legislation (1987) No L374 at 9; EC, *Commission Regulation (EEC) No 2671/88 of 30 August 1988*, O.J. Legislation (1988) No L239 at 9; EC, *Commission Regulation (EEC) No 2672/88 of 30 August 1988*, O.J. Legislation (1988) No L239 at 13; EC, *Commission Regulation (EEC) No 2673/88 of 30 August 1988*, O.J. Legislation (1988) No L239 at 17).

[136]EC, *Council Regulation No 204/62 of 6 February 1962 concerning the implementation of articles 85 and 86 of the Treaty*, O.J. Special Edition (1959-1962) at 87, art. 2 [hereinafter *Council Regulation 17*].

[137]Korah, *supra* note 132.

[138]*Grundig AG* v. *Metro-SB-Grossmärkte GmbH & Co. KG*, [1979] 2 C.M.L.R. 564 at 568.

[139]Korah, *supra* note 132 at 115.

Once the Commission receives the parties' Form A/B, it determines whether their arrangement triggers the prohibition.[140] If the arrangement does not meet one of the conditions necessary to trigger the prohibition, the Commission issues a negative clearance. A negative clearance is a certification by the Commission that, on the basis of the facts in its possession, there are no grounds under articles 85(1) or 86 for action on its part in respect of the arrangement.[141] If the arrangement triggers the prohibition, then it is ineligible for a negative clearance, but may be eligible for an exemption. The Commission grants exemptions based on the efficiency, consumer welfare, and least-restrictive-restraint tests set out in article 85(3).

4. Discussion

While the European regime avoids the American problem of characterization through an overinclusive non-criminal prohibition, the existing *ex ante* authorization regime is cumbersome for both parties and the Commission. The Commission's published criteria for arrangements which either qualify for block exemptions or fall below the *de minimis* threshold allow parties themselves to determine whether their arrangements trigger the prohibition. However, even with published criteria, parties cannot be legally certain that their arrangements will avoid the prohibition unless they have secured negative clearances or exemptions from the Commission. The need for legal certainty has led many parties to routinely seek negative clearances or exemptions.

The negative clearance and exemption mechanism is cumbersome for three reasons. First, the filing of the Form A/B requires parties to provide extensive information which is difficult to compile and often irrelevant. Ivo Van Bael and Jean-François Bellis have charged that the Form requires parties to provide "soul-searching comments, bordering on self incrimination."[142] Second, the backlog of arrangements awaiting clearances and exemptions from the Commission means that parties are often exposed to considerable delays before receiving responses from the Commission. While the EC system was designed to provide parties with legal certainty, parties are in fact exposed to great uncertainty while they await Commission decisions.[143] Third, the large number of negative clearance and exemption applications overloads Commission resources by forcing Commission staff to evaluate often trivial or benign arrangements.

B. U.K. Competition Law

The U.K. regime[144] consists of a prohibition against many forms of horizontal arrangements coupled with an *ex ante* registration and authorization

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[140]*Council Regulation 17*, *supra* note 136, grants to the Commission the power to review arrangements and to issue negative clearances, individual exemptions and block exemptions.

[141]*Council Regulation 17*, *ibid.*, art. 2.

[142]*Competition Law of the EEC* (Oxfordshire: CCH, 1987) ¶1022.

[143]In 1989, 3239 cases were pending before the Commission (*A.B.A. Report*, *supra* note 14, app. 1 at 21). Korah, *supra* note 132 at 116, argues that delays have been a major disincentive to applications for clearances and exemptions. See also I. Forrester & C. Norall, "The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied" (1984) 21 C.M. L. Rev. 11.

[144]The *Restrictive Trade Practices Act 1976* (U.K.), 1976, c. 34 [hereinafter *RTPA*] and the

mechanism. The *Restrictive Trade Practices Act 1976* compels regulatory authorities to review all horizontal arrangements as a precondition to their validity.

1. The Prohibition: "Registrable Agreements"

The U.K. regime creates a category of "registrable" arrangements. Arrangements which meet the "registrable" criteria are unenforceable and subject to administrative cease and desist orders until they have been both registered with the Office of Fair Trading ("OFT") and specifically authorized (as described below). Unlike the EC regime, there are no *de minimis* exceptions or block exemptions available for registrable arrangements.

The U.K. category of registrable arrangements is based on formalistic criteria instead of economic or effects-based criteria. Registrable arrangements include restrictive agreements relating to goods[145] and information agreements relating to goods.[146] While the formalistic definitions of registrable agreements were designed to increase certainty, they are both over and underinclusive. They are overinclusive because they require a large number of arrangements to be registered and evaluated even though many arrangements are clearly benign or have only minimal effects on competition. The provisions are underinclusive because they allow anti-competitive arrangements to be structured in such a way as to circumvent the technical definitions of registrable agreements and hence avoid the prohibition. For example, non-registrable arrangements include agreements which forbid price renegotiation,[147] agreements restricting advertising[148] and an oligopolist price leader's practice of providing its price list to interdependent firms.[149]

The focus of the U.K. prohibition has been heavily criticized[150] for its lack of effects-based criteria.[151] The U.K. Department of Trade and Industry recently proposed that the current definitions be abolished and replaced with a broad effects-based prohibition along the lines of Article 85(1) of the *Treaty of Rome*.[152]

Restrictive Practices Court Act 1976 (U.K.), 1976, c. 33, comprise the current body of statute law concerning anti-competitive combinations within the United Kingdom. See also the *Restrictive Trade Practices (Stock Exchange) Act 1984* (U.K.), 1984, c. 2, which exempted certain agreements related to the stock exchange from the scope of the *RTPA*.

[145]*RTPA*, *ibid.*, s. 6.

[146]*Ibid.*, s. 7.

[147]*Re Blanket Manufacturers' Association's Agreement*, [1959] 2 All E.R. 1 (RPC), aff'd [1959] 2 All E.R. 630 (C.A.).

[148]R. Whish, *Competition Law* (London: Butterworths, 1985) at 303.

[149]S. 7(1) of the *RTPA*, *supra* note 144, provides that information agreements relating to goods are only registrable if two or more parties supply information.

[150]See U.K., H.C., "Review of Restrictive Trade Practices Policy: A Consultative Document" Cmnd 331 (March 1988), c. 2 [hereinafter *Green Paper*]; U.K., H.C., "Opening Markets: New Policy on Restrictive Trade Practices" Cmnd 727 (July 1989), c. 2 [hereinafter *White Paper*]; Whish, *supra* note 148 at 12-24.

[151]*Green Paper*, *ibid.* at 27-28; Whish, *ibid.* at 107.

[152]*White Paper*, *supra* note 150 at 1.

2. Consequences of Violating the Prohibition

There are three consequences of violating the prohibition. First, unregistered registrable arrangements are unenforceable. Second, the Director General ("DG") of the OFT may apply for a court order restraining the parties from performing their obligations under the agreement. Parties are subject to nominal fines if they breach those orders. Third, unlike the EC regime, in the U.K. private parties may initiate private damage actions against parties to unregistered registrable arrangements. However, there has been only one successful private action under the U.K. regime.[153]

The U.K. regime favours administrative cease and desist orders over penalties. The basis on which the U.K. imposes fines seems grounded in a theory of contempt for violating court orders rather than in a theory of deterrence for manifestly anti-competitive behaviour. Even parties who engage in naked price-fixing are only subject to fines if they ignore specific court orders, and even then the fines are nominal: parties who ignore information requests from the OFT, for example, are subject to maximum fines of £400.[154]

3. Relief from the Prohibition: The Effect of Registration

Parties to registrable arrangements are subject to cease and desist orders, and their arrangements are subject to declarations of nullity unless parties have registered the arrangements with the OFT before the arrangement's effective date, and within three months of the arrangement's execution.[155] Registration is the first step in securing relief from the prohibition.

Once the DG receives a registered arrangement, it records the arrangement in a public registry. The DG then has two options. The legislation requires the DG to prosecute every registered arrangement in the Restrictive Practices Court (RPC). However, the legislation also allows the Secretary of State to excuse the DG from his or her duty to prosecute provided that the DG satisfies the Secretary of State that the registered arrangement either (i) is too insignificant to warrant prosecution before the RPC,[156] or (ii) qualifies for a specific exemption order from the Secretary of State.[157]

If the DG concludes that the arrangement will not qualify for either an insignificance declaration or for a specific exemption order from the Secretary of State, it must prosecute the arrangement. In a prosecution, the parties to the arrangement bear the burden of satisfying the RPC that the arrangement qualifies under one of eight gateways while satisfying a tailpiece (public interest)

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[153]U.K., *Annual Report of the Director General of Fair Trading* (London: H.M.S.O., 1979). See also T. Frazer, *Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, Europe and America* (Sussex: Wheatsheaf Books, 1988) at 130.

[154]*RTPA*, *supra* note 144, s. 38(4).

[155]*Ibid.*, s. 24, sch. 2, part 5. Time limits vary depending on the nature of the arrangement.

[156]*Ibid.*, s. 21(2).

[157]The criteria for exemptions are set out in the *RTPA*, *ibid.*, ss. 29, 30, sch. 3.

requirement.[158] Very few arrangements qualify for gateways.[159] The high cost of litigation and the heavy evidentiary burden parties face in the RPC lead most parties to abandon their arrangements before the RPC convenes a hearing.[160]

The unpopularity of RPC prosecutions has resulted in most arrangements being processed through insignificance declarations.[161] Whether arrangements will qualify for insignificance declarations depends on qualitative (as opposed to quantitative) criteria. Joint ventures and business practice codes have qualified for negative clearances.[162] However, it is highly unlikely that a price-fixing arrangement would qualify for a negative clearance, regardless of how trivial its effects might be.[163] In this regard, the term "insignificance" is misleading. The U.K. test for insignificance is not a *de minimis* test like the EC's "appreciable effect on competition" test. Registrable arrangements cannot avoid the prohibition merely because they have only minimal effects on competition.

Arrangements which do not qualify for insignificance declarations may, in the alternative, qualify for a specific exemption. The Secretary of State may grant specific exemptions in respect of the following: arrangements which enhance efficiencies and are important for the national economy;[164] export agreements and intellectual property licensing agreements;[165] and price-control agreements necessary to curb inflation.[166]

Arrangements which qualify for either insignificance declarations or specific exemptions are enforceable and are immune from cease and desist orders once the declarations or exemptions have been issued.

4. Discussion

As the U.K. Department of Trade and Industry itself acknowledges,[167] the present U.K. regime is the worst of all possible worlds. The over-broad prohibition, along with the guilty-until-proven-innocent registration requirement and the lack of either *de minimis* exceptions or block exemptions, force officials at the OFT to review far too wide a swathe of arrangements as a precondition of their validity, and entail a gross misallocation of government resources.

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[158]These are set out in ss. 10 and 19 of the *RTPA*, *ibid.* Gateways include arrangements which do not restrict competition (gateway h) and arrangements which are necessary to ensure that goods or services remain available to the public (gateway b).

[159]Frazer, *supra* note 153 at 130-33, 140.

[160]*Ibid.* at 133.

[161]*Green Paper*, *supra* note 150 at 29-30.

[162]The following arrangements have qualified for insignificance declarations: joint ventures, restrictive covenants on the sale of a business, codes of business practice, recommendations of standard terms by trade associations, and buying groups. See generally *Annual Report of the Director of Fair Trading* (London: H.M.S.O.), for the years 1987 through 1991.

[163]Whish, *supra* note 148 at 131.

[164]*RTPA*, *supra* note 144, s. 29. This exemption is rarely used. Questions which concern an arrangement's importance to the national economy are usually referred to the RPC. See Frazer, *supra* note 153, c. 1.

[165]*RTPA*, *ibid.*, sch. 3.

[166]*Ibid.*, s. 30. See Frazer, *supra* note 153 at 133-39.

[167]*Green Paper*, *supra* note 150.

The backlog of registered arrangements awaiting insignificance declarations or specific exemptions subjects parties to considerable delays since they cannot proceed with their arrangements until they have been specifically authorized. The DG has no discretion to ignore trivial or benign arrangements. At the same time, the regime has only minimal deterrent effects because parties who fail to register registrable arrangements are subject only to cease and desist orders.

The U.K. Department of Trade and Industry has recommended sweeping changes to the regime which address these problems.[168] In addition to a less formalistic prohibition, the Department recommends both a *de minimis* exception for parties with less than £5 million annual turnover (although the *de minimis* exception would not apply to price-fixing agreements),[169] and a system of block exemptions.[170] Parties who qualify under either exception would be excused from registering their arrangements. This would reduce the number of arrangements submitted to the OFT for approval. Finally, the Department has recognized that the current regime has minimal deterrent effects and has recommended that parties who fail to register registrable arrangements be subject to substantial fines.[171] The Department rejects the current regime of making penalties contingent on breaches of cease and desist orders.[172]

C. German Competition Law

The German regime has elements of both the EC regime and the U.K. regime, although we believe it represents an improvement over both.

1. The General Prohibition

Like the EC and the U.K. regimes, German legislation imposes a general and overinclusive prohibition against cartels and concerted actions between potential competitors: "Agreements made for a common purpose by enterprises ... shall be of no effect, in so far as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services."[173] Like the U.K. regime, all arrangements trigger the prohibition, and there are no automatic *de minimis* or block exemptions available. However, as described below, parties to so-called exempt arrangements may avoid penalties by filing notifications of their arrangements with the Federal Cartel Office ("FCO"). Exempt arrangements become legal and enforceable three months after the parties file a notification of the arrangement with the FCO.

2. Consequences of Violating the Prohibition

There are three consequences of violating the prohibition. First, the *GWB* deems all cartels formed in violation of the prohibition to be "non-effective."[174]

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[168]*White Paper*, *supra* note 150 at 1-5.
[169]*Ibid.* at 9.
[170]*Ibid.* at 16-17.
[171]*Ibid.* at 25.
[172]*White Paper*, *ibid.* at 25; *Green Paper*, *supra* note 150 at 25.
[173]*GWB*, *supra* note 11, s. 1(1).
[174]*Ibid.*, s. 38.

Second, participants in illegal cartels commit an administrative offence under the *GWB* which is punishable by heavy fines.[175] Fines may also be imposed for providing false information to the FCO.[176] Third, private parties may bring either private or class actions against parties who execute prohibited arrangements.[177]

3. Relief from the Prohibition

There are two ways for parties to obtain relief from the prohibition. First, the arrangement may qualify for an exemption. Second, the FCO may expressly authorize the arrangement. Under the *GWB*, the following sorts of arrangements are exempt from the prohibition: (i) arrangements which deal with the uniform application of general terms of business, delivery and payment;[178] (ii) arrangements which relate to rebates, so long as the rebates represent genuine consideration;[179] and (iii) arrangements which relate to uniform standards, technical and organizational efficiency, specialization, and rationalization.[180] To secure the benefits of an exemption, parties to exempt arrangements must file notifications of their arrangements with the FCO. Notifications must include information concerning the parties to the arrangement and the nature of the terms of the arrangement. Where suppliers or purchasers may be affected by the arrangement, the notification must establish that all the suppliers and purchasers have been consulted about the arrangement, and comments from the purchasers and suppliers concerning the arrangement must be attached to the notification.

If the notified arrangement qualifies for an exemption, the FCO generally will not object to the arrangement unless it would result in an abuse of the market position brought about by the arrangement.[181] The arrangement will then become legal automatically three months after the notification has been filed with the FCO. If the notified arrangement does not qualify for an exemption, the FCO will object, and the arrangement will remain illegal. Arrangements are therefore immune from sanctions when (i) they qualify for exemption; (ii) appropriate notifications in respect of those arrangements have been filed with the FCO; and (iii) three months (in most cases) have elapsed since the notification was filed with the FCO. Arrangements which do not meet all of these criteria may, however, still be rendered legal if the FCO expressly authorizes the arrangement. The FCO may authorize the following: (i) arrangements which are necessary to promote planned adjustments in the economy;[182] (ii) arrangements which promote efficiencies, rationalization or economies of scale;[183] and (iii)

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[175]In 1988, for example, the FCO imposed fines totalling DM 244 million against a group of cement workers (*A.B.A. Report*, *supra* note 14, app. 1 at 34).

[176]*GWB*, *supra* note 11, ss. 38(1), 38(7). See also s. 38a.

[177]*Ibid.*, s. 35.

[178]*Ibid.*, s. 2.

[179]*Ibid.*, s. 3.

[180]*Ibid.*, ss. 5(1), 5a(1), 5b(1).

[181]*Ibid.*, s. 12(1). However, the FCO has residual powers to declare arrangements to be of no force (s. 12(3)). The exercise of this residual power is appealable (ss. 83, 95).

[182]*Ibid.*, s. 4.

[183]*Ibid.*, s. 5(3).

export promotion agreements which affect domestic commerce.[184] Authorizations are valid for up to three years.[185] The FCO may attach conditions to authorizations to minimize any anti-competitive effects.

The immunity conferred by notification and authorization applies only to arrangements which are either notified to the FCO or expressly authorized by the FCO. Parties lose the immunity if they modify the terms of their arrangement subsequent to notification or authorization.

4. Discussion

The German regime avoids many of the problems that have plagued the EC and U.K. regimes. The overinclusive prohibition ensures that all anti-competitive arrangements are subject to scrutiny. Heavy fines for violations of the prohibition ensure adequate deterrence.

While the prohibition on its own may chill potentially pro-competitive activities, the notification regime allows parties to potentially exempt arrangements to avoid sanctions with certainty by filing notifications of their arrangements with the FCO and waiting for the three-month FCO response period to expire. Although the EC regime also confers immunity from sanctions on parties who notify the Commission of the arrangements, EC immunity is not triggered until parties file a detailed Form A/B. In Germany, parties need only file their actual arrangements and comments from any affected suppliers and purchasers to secure immunity. The German notification requirements are arguably less onerous than the EC Form A/B. Moreover, parties are not subject to the delays that their counterparts suffer in the EC and the U.K. because arrangements become automatically legal within three months after the filing of a notification.

D. Conclusion

Instead of creating categories of arrangements which attract different levels of scrutiny, the EC, U.K. and German regimes subject all horizontal arrangements to overinclusive prohibitions. To ensure that the prohibitions do not deter potentially pro-competitive behaviour, each regime has developed *ex ante* authorization mechanisms which allow parties to insulate their arrangements from the prohibition. A comparison of the three regimes shows that a variety of authorization mechanisms are possible.

In reviewing the advantages and disadvantages of each regime, we have concluded that, to be effective in targeting manifestly anti-competitive arrangements without chilling potentially pro-competitive arrangements, prohibitions and authorization mechanisms should conform to the following "effectiveness criteria."

First, prohibitions must be broad enough to target naked price-fixing. The EC, the U.K. and the German regimes all satisfy this criterion, although the over-technical U.K. prohibition has been criticized for being underinclusive.

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[184]*Ibid.*, ss. 7, 8.
[185]*Ibid.*, ss. 11(3), 11(4).

Second, the authorization mechanism must be effective in reducing the chilling effect of the overinclusive prohibition. Prohibitions deter potentially pro-competitive arrangements. The mere availability of an authorization mechanism may not be sufficient to encourage parties to proceed with potentially competitive arrangements, since parties to arrangements which may trigger the prohibition will be reluctant to proceed with their arrangements if they must submit to cumbersome procedures to protect themselves from sanctions. We believe that in order for an authorization mechanism to effectively reduce the chilling effect of a prohibition, the mechanism must be simple to invoke and must provide legal certainty to the parties.

The U.K. regime has the most cumbersome mechanism of the three regimes. To avoid the prohibition, parties must register arrangements with the Office of Fair Trading and then either defend their arrangements in the Restrictive Practices Court or attempt to negotiate with the Office of Fair Trading and the Secretary of State to obtain either an insignificance declaration or an exemption. In the process, they are subject to extensive delays while the OFT works through its backlog of registered arrangements. While the regime provides legal certainty to the parties — they know their arrangements are illegal until expressly approved — the uncertainty associated with the approval process makes it difficult for parties to determine in advance whether their proposed arrangements will survive scrutiny.

The German regime, on the other hand, has the simplest protection mechanism of the three regimes and may provide parties with the greatest degree of certainty. To secure the benefit of the protection, parties to exempt arrangements need only file notifications of their arrangements with the FCO. Their arrangements become legal automatically three months after the FCO receives the notification. While parties risk the possibility of the FCO objecting to their arrangements after notification, their uncertainty is limited to the three-month period in which the FCO is entitled to object.

The simplicity and certainty of the EC regime lies between the U.K. and the German regimes. While block exemptions and the *de minimis* appreciable-effect criteria allow parties to determine for themselves whether their arrangements are protected, parties cannot be absolutely certain that their arrangements will avoid scrutiny unless they have received a negative clearance or exemption from the Commission. On the other hand, parties who require legal certainty, and parties whose arrangements either do not qualify for a block exemption or fall below the *de minimis* test, must compile the extensive information requested in the Commission's Form A/B and apply for negative clearances or exemptions. They are then subject to considerable delays as the Commission works through its backlog.

Our third criterion for an effective authorization mechanism is that it should promote the most efficient use of the regime's regulatory resources. In each of the three regimes, administrative agencies perform the separate tasks of authorizing arrangements, and investigating and prosecuting violations. The authorization mechanism should not create a misallocation of resources between the three tasks.

The German regime uses its administrative agency most efficiently. By making all arrangements illegal until notified, the German regime provides incentives to parties to notify their arrangements to the FCO. These incentives are strengthened by the heavy fines imposed on parties to prohibited arrangements. Notification gives the FCO an information set on which to evaluate arrangements, and saves investigative resources. At the same time, the agency is not overburdened with issuing clearances for trivial arrangements because notified arrangements which qualify for an exemption become legal automatically by the agency taking no action at all.

The U.K. regime, on the other hand, entails a gross misallocation of resources. While the obligation to register arrangements gives the Office of Fair Trading an information set on which to evaluate arrangements, the incentives to register are weak because the principal sanctions to non-registering parties are cease and desist orders. At the same time, every registered arrangement received by the agency requires administrative officials either to initiate a prosecution before the RPC or to secure a Secretary of State's exemption or insignificance declaration.

The EC regime falls between the two regimes. On the one hand, the *de minimis* exception and block exemptions mean that the Commission does not have to evaluate every arrangement. On the other hand, the need for legal certainty has led many parties to request negative clearances and exemptions, and the backlog of applications taxes Commission resources. Moreover, the lack of a formal requirement to provide information to the Commission means that the Commission must often engage in field investigations to detect violations of the prohibition.

From the European experience, we conclude that regimes which (1) have prohibitions which target naked price-fixing; (2) have authorization mechanisms which are both simple to invoke and legally certain; and (3) make efficient use of regulatory resources, will be effective in targeting naked price-fixing arrangements without deterring potentially pro-competitive arrangements. We refer to these "effectiveness criteria" in section V.

IV. The Australian and New Zealand Experience[186]

A. Overview

The Australian and New Zealand regimes[187] contain elements of both the American and European regimes. Like the American *Sherman Act*, the Australian *Trade Practices Act 1974*[188] and the New Zealand *Commerce Act 1986*[189]

[186]See generally B.G. Donald & J.D. Heydon, *Trade Practices Law*, vol. 1 (Sydney: Law Book, 1978) c. 4; D. Healey, *Australian Trade Practices Law*, 2d ed. (Sydney: CCH Australia, 1993) c. 4-5; R.V. Miller, *Annotated Trade Practices Act*, 9th ed. (Sydney: Law Book, 1988) at 56-90.

[187]In this section we focus on the Australian legislation, but identify any salient differences between the Australian and the New Zealand positions.

[188]*Supra* note 12, ss. 45(1), 45(2).

[189]*Supra* note 13, ss. 27(1), 27(4).

contain a general prohibition against all arrangements which substantially lessen competition. These statutes also have a provision which declares that price-fixing arrangements shall be deemed to substantially lessen competition.[190] The Australian deeming provision, like the American *per se* illegal rule, allows courts to summarily condemn price-fixing arrangements without a complex inquiry into whether the arrangement substantially lessens competition. Like the European regimes, the Australian/New Zealand regimes also provide for *ex ante* authorizations of arrangements through administrative reviews.

B. The General Prohibition: The Australian Approach to Arrangements Which Substantially Lessen Competition

In Australia, the general prohibition against anti-competitive arrangements provides that:

> 45(1) If a provision of a contract
> (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition,
> that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.[191]
> 45(2) A corporation shall not —
> (a) make a contract or arrangement, or arrive at an understanding, if —
> (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
> (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision —
> (ii) has the purpose, or is likely to have the effect, of substantially lessening competition.[192]

Subsection 45(1) renders contracts which substantially lessen competition unenforceable, and subsection 45(2) prohibits corporations from giving effect to contracts which substantially lessen competition.

Australian courts consider the following factors in determining whether an arrangement has the purpose or effect of substantially lessening competition: (1) the degree of market concentration and the number of independent sellers; (2) the height of barriers to entry; (3) the fungibility of products; (4) the degree of "vertical relationships" with customers; and (5) the nature of formal arrangements between sellers which restrict their independence.[193]

C. The Deeming Provision: The Australian Approach to Price-Fixing

The most crucial part of the deeming provision provides that:

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[190]*Trade Practices Act 1974*, *supra* note 12, s. 45(A)(1); *Commerce Act 1986*, *supra* note 13, ss. 30(1)(*a*), 30(1)(*b*).

[191]See *Commerce Act 1986*, *ibid.*, s. 27(4).

[192]S. 27(1) of the New Zealand *Commerce Act 1986*, *ibid.*, prohibits persons from entering "into a contract or arrangement, or [arriving] at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market." S. 27(2) is comparable to s. 45(2)(*b*) of the Australian provision.

[193]*Re Queensland Co-operative Milling Association Ltd.* (1976), 25 F.L.R. 169 at 189 (T.P.T.) [hereinafter *Re QCMA*]. See also Healey, *supra* note 186, ¶305.

> 45A(1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.[194]

Price-fixing is made illegal by the general prohibition against arrangements which substantially lessen competition. The deeming provision deems price-fixing to substantially lessen competition, and saves courts the trouble of determining the actual competitive impact of price-fixing arrangements.

In applying the deeming provision, Australian and New Zealand courts have apparently experienced the same difficulties as American courts have had in applying the American *per se* illegal rule. In at least some cases, Australian courts have been unable to apply the deeming provision to price-fixing arrangements in such a way as to avoid inquiring into the surrounding circumstances of those arrangements.

In one case,[195] the Australian Federal Court declared that the deeming provision was not, in its view

> introduced by Parliament to make arrangements unlawful which affected price by affecting competition. It is fundamental to both [the deeming provision] and [the general prohibition] that the relevant conduct, in purpose or effect, substantially lessens competition or would be likely to do so. If competition is improved by an arrangement, I cannot perceive how it could be characterized as a price-fixing arrangement within the ambit of [the deeming provision].[196]

In this passage, the court declared that an arrangement cannot be characterized as "price-fixing" within the meaning of the deeming provision unless it in fact substantially lessens competition. But this approach to the deeming provision frustrates the purpose of the provision, which is to allow courts to condemn price-fixing arrangements without first determining whether they substantially lessen competition.[197]

D. Ex Ante *Authorization*[198]

1. Substantive Tests

The Australian Trade Practices Commission ("ATPC") and the New Zealand Commerce Commission ("NZCC") are empowered to authorize certain

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[194]*Trade Practices Act 1974*, *supra* note 12. See also *Commerce Act 1986*, *supra* note 13, ss. 30(1)(*a*), 30(1)(*b*).

[195]*Radio 2UE Sydney Pty. Ltd.* v. *Stereo F.M. Pty. Ltd.* (1982), 62 F.L.R. 437.

[196]*Ibid.* at 448.

[197]While the passage quoted was a lower court judgment, the judgment was upheld on appeal. The appeal court did not comment on the passage, but the passage is widely quoted (see Healey, *supra* note 186, ¶455; Miller, *supra* note 186 at 67).

[198]See generally Healey, *ibid.*, ¶¶1201-92.

conduct which would otherwise trigger the general prohibition. An authorization insulates an arrangement from both administrative penalties and private actions.

The ATPC may authorize any arrangement which substantially lessens competition, except price-fixing arrangements among fewer than 50 persons.[199] Such price-fixing arrangements are thought to be incapable of generating offsetting efficiency gains. The NZCC, by comparison, may authorize any arrangement.[200]

The substantive tests for authorization are similar to the EC article 85(3) exemption criteria.[201] Arrangements will be authorized when they create efficiency gains which outweigh any lessening of competition as long as those gains cannot be achieved by less restrictive restraints on competition.[202]

2. Procedure

To secure authorizations, parties must submit requests to the appropriate regulatory authority. The ATPC has four months in which to deny the application for authorization. Otherwise, the legislation deems the ATPC to have granted the authorization.[203] There is no time limit for denials in the New Zealand regime.

Unlike the German or EC regimes, the mere act of applying for an authorization does not affect the legality (or illegality) of an arrangement. Arrangements which are the subject of an authorization application remain open to both prosecution and private actions until an authorization has been affirmatively granted (or, in Australia, until four months have passed since the application was submitted to the ATPC).

E. Enforcement

The ATPC and the NZCC investigate and prosecute arrangements which violate the general prohibition. Violations are administrative offences, and while they do not attract criminal penalties, they can attract both substantial fines and subsequent private damages actions.[204] Both the ATPC and the NZCC may seek

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[199]*Trade Practices Act 1974*, *supra* note 12, s. 88(3)(*b*).

[200]*Commerce Act 1986*, *supra* note 13, s. 58.

[201]See Part III.A, above.

[202]*Trade Practices Act 1974*, *supra* note 12, s. 90(7); *Commerce Act 1986*, *supra* note 13, s. 61(6). The legislation requires the administrative agencies to be satisfied that the arrangement would be likely to result in a benefit to the public which will outweigh the detriment to the public constituted by any lessening of competition. See *Re QCMA*, *supra* note 193 at 180-89; Miller, *supra* note 186 at 302. See also Healey, *supra* note 186, ¶1229.

[203]*Trade Practices Act 1974*, *ibid.*, s. 90(10).

[204]The Australian Federal Court may impose fines of up to A$50,000 for individual defendants and up to A$250,000 for convicted corporate defendants (*Trade Practices Act 1974*, *ibid.*, ss. 76(1)(*a*)-(*f*)). The Australian government has announced proposals to increase fines to A$500,000 for individuals and A$10 million for corporations (H.R. Spier & B. Baxt, "Australian Newsletter" (1991) 12:3 C.C.P.R. 26 at 27). The New Zealand High Court may impose fines of up to NZ$500,000 for individuals and up to NZ$5,000,000 for corporate defendants (*Commerce Act 1986*, *supra* note 13, ss. 80(1)(*a*)-(*f*)).

injunctions restraining breaches, attempted breaches or the counselling of breaches.[205] Both fines and injunctions are imposed on a civil balance of probabilities standard of proof.[206]

Private plaintiffs may seek either actual damages or injunctions for breaches of the prohibition. Like the Canadian regime,[207] a conviction in a proceeding initiated by the Trade Practices Commission is *prima facie* evidence of a breach of the *Act*.[208] However, since a damages award is contingent on proof of a breach of the *Act*, private plaintiffs may not initiate proceedings in relation to conduct which has been authorized by the ATPC.

V. Implications for Canada

A. *Lessons from the Comparative Experience*

We undertook the comparative reviews to determine the extent to which other jurisdictions have been able to maintain workable distinctions between naked price-fixing and potentially pro-competitive arrangements. The jurisdictions surveyed disclose a striking commonality of approach towards naked price-fixing arrangements. In every jurisdiction they are subject to a *per se* prohibition, but greater diversity of practice exists in terms of both the substance of absolute and qualified exemptions with respect to other kinds of horizontal arrangements, and the procedures by which those absolute or qualified exemptions are established.

The United States has attempted to maintain a distinction between pure price-fixing (which is *per se* illegal) and other forms of horizontal arrangements (which attract rule-of-reason review) for much longer than any other jurisdiction, yet a watertight distinction between the two categories of arrangements has proved elusive. That is, in many contexts, the exercise of characterizing an arrangement as a price-fixing arrangement requires a full review of the terms and context of the arrangement much like a rule-of-reason review in other cases. While American courts now try to distinguish "naked" price-fixing from price-fixing arrangements that are ancillary to a pro-competitive objective, this line is not sharp or stable, and it has shifted over time as courts have been confronted with new arrangements or have re-evaluated their views on previous classes of arrangements. Well-known cases such as *Broadcast Music*,[209] *NCAA*,[210] and *Maricopa County*[211] amply demonstrate the difficulties of drawing this line. Australian courts, in recognizing the same distinction, appear to have encountered similar difficulties.

Canada's current categorization approach to horizontal arrangements is vulnerable to the same problems that have plagued the American *per se* illegal/

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[205]*Trade Practices Act 1974*, *ibid.*, ss. 80(1)(*a*)-(*j*); *Commerce Act 1986*, *ibid.*, s. 81.

[206]*Heating Centre Pty. Ltd.* v. *Trade Practices Commission* (1986), 65 A.L.R. 429 at 435 (Fed. Ct. Gen. Div.).

[207]*Competition Act*, *supra* note 2, s. 36(2).

[208]*Trade Practices Act 1974*, *supra* note 12, s. 83.

[209]*Supra* note 77.

[210]*Supra* note 72.

[211]*Supra* note 94.

rule of reason distinction. Webb's call for the abolition of the American *per se* illegal category in favour of straight rule-of-reason analysis applies with equal force to the Canadian regime.[212]

From the jurisdictions surveyed, we conclude that a *per se* criminal prohibition for naked price-fixing cannot be formulated with complete precision, and will unavoidably target potentially pro-competitive arrangements. Even arrangements which appear to lessen competition "unduly" may generate offsetting efficiencies which produce net welfare gains. Yet, as we argued in the introduction, a broadly-cast criminal prohibition which would require criminal courts to engage in complex rule-of-reason analyses for all horizontal arrangements rightly offends both widely-held notions of due process with respect to criminal liability and notions of the relative institutional competence of criminal courts as compared to specialized administrative agencies.

We believe that the way around the impasse is to redefine the focus of a criminal prohibition. A criminal prohibition should target only naked price-fixing arrangements. What are the characteristics of such arrangements? Obviously, naked price-fixing arrangements lessen competition. However, a second distinguishing characteristic of such arrangements is that they are generally covert. As Warren-Boulton notes in the U.S. context:

> [T]he overwhelming number of price-fixing, bid-rigging, and market allocation cases are brought against relatively small, owner-managed firms with limited assets that might be exposed to damage claims. These firms tend to operate in local or regional markets where concentration and barriers to entry are low. In such markets, implicit collusion or dominant firm behaviour is neither likely nor treatable by structural policies. In the absence of substantial barriers to entry, customers and/or potential competitors would simply enter if they knew that supra-competitive prices were being charged. Most bid-rigging and price-fixing cases are thus essentially *simple frauds*, where customers or suppliers are deceived into believing that their suppliers or customers are competing with each other.[213]

We propose a criminal prohibition which focuses on the *covertness* of horizontal arrangements. Rather than targeting "naked" price-fixing arrangements (as distinguished from price-fixing arrangements which are ancillary to pro-competitive objectives), we believe that a criminal prohibition should target *covert* (as distinguished from *overt)* price-fixing arrangements. In this respect, the American naked/ancillary distinction is highly misleading. Most "naked" price-fixing arrangements are in fact covert, and anything but overt, obvious or shameless. We believe that the covert/overt distinction reflects both the U.S. experience and the Canadian prosecutorial experience under the *Competition Act* and its predecessors.

Following Warren-Boulton, we conceive of a criminal prohibition against price-fixing as being essentially an *anti-fraud* statute directed at covert but explicit forms of price-fixing. Having identified covert price-fixing as the appropriate focus of a criminal prohibition, we believe that it would be inappropriate to remit covert price-fixing arrangements to rule-of-reason review by the

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[212] *Supra* note 105.

[213] *Supra* note 63 at 346.

Competition Tribunal. The principal sanction available to the Tribunal is merely a prospective cease and desist order. Yet apprehension rates for covert forms of naked price-fixing are typically quite low — U.S. Department of Justice officials estimate no higher than ten per cent[214] — and to abandon criminal sanctions would seriously undermine socially desirable deterrence objectives.

In light of the foregoing analysis, we proceed to elaborate our proposal for redesigning the price-fixing provisions of the *Competition Act*.

B. Proposed Reform of the Competition Act

Our proposal draws in large part on two sources: (1) Section 45A of the Australian *Trade Practices Act 1974*, which deems price-fixing arrangements to be *per se* violations of the general prohibition against horizontal arrangements that substantially lessen competition; and (2) legal practice under article 85 of the *Treaty of Rome*, where notification of an arrangement confers immunity from subsequent fines (although not from cease and desist orders, breaches of which can lead to fines).

1. The Proposed Criminal Prohibition

(A) Everyone who enters into a contract, agreement or understanding with a competitor or potential competitor, a provision of which has or is likely to have the effect of fixing, controlling or maintaining the price for goods or services supplied or acquired, or to be supplied or acquired, by the parties to the contract, agreement or understanding, and who knew, or ought reasonably to have known, that the contract, agreement, or understanding has, or would be likely to have, the effect of fixing, controlling or maintaining the price of such goods or services
is guilty of an indictable offence.

(B) (1) In this section,
"arrangement" means the contract, agreement or understanding which forms the basis for the prosecution under subsection (A);
"Bureau" means the Canadian Bureau of Competition Policy
"notification" means a written statement which discloses each of the following:
(i) the full terms of the arrangement;
(ii) the names of all parties to the arrangement;
(iii) the fact that the accused is or was a party to the arrangement;
(iv) the nature of the accused's rights and obligations under the arrangement;
(v) the date of execution of the arrangement; and
(vi) the date, or other triggering event, at which the arrangement takes effect.

(2) In a proceeding under subsection (A), the court shall not convict the accused if the accused has filed a notification with the Bureau either prior to the time at which the arrangement takes effect, or within 30 days of the execution of the arrangement, whichever is earlier.

(C) In a proceeding under subsection (A), the court shall not convict the accused if:
(1) the court is satisfied that the accused, in good faith, made all reasonable

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[214]C.F. Rule, "Report from Official Washington: 60 Minutes with Charles F. Rule, Assistant Attorney-General, Antitrust Division" (Address to the American Bar Association, Section of Antitrust Law, 36th Annual Spring Meeting, 22-24 March 1988) (1988) 57 Antitrust L.J. 257 at 265.

attempts to comply with the provisions of subsection (B), part (2); and
(2) the court is satisfied that the accused has, within a reasonable time, complied with any demands for particulars the Bureau may have issued in connection with a notification.

(D) The Crown shall have the onus of proving that a notification satisfying the conditions prescribed in clauses (B) and (C) was not filed by the accused.

Our proposal requires some explanation. The core prohibition removes any reference to "unduly lessening competition." Instead, it merely requires courts to look at the price effects or likely price effects of a horizontal arrangement. The intent requirement pertains only to the actual or likely price effects of an agreement, and it incorporates an objective element. It is therefore consistent with the subjective and objective intent elements of the current prohibition which the Supreme Court of Canada upheld in *PANS*.

While more precise than the current provisions, our prohibition, on its face, is over-broad because it completely disregards the distinction between "naked" and ancillary price-fixing restrictions. Greater precision comes at the cost of undesirable over-breadth. However, we believe that our proposed notification procedure is fully responsive to the over-breadth concern. By the mere act of filing a notification with the Bureau, under clause (B) of our prohibition, parties to horizontal arrangements with potential price effects are granted immediate and permanent immunity from criminal liability. The optional notification mechanism gives parties to arrangements which might otherwise violate clause (A) a unilateral entitlement to avoid criminal liability.

The immunity from criminal prosecution will obviously no longer obtain if the parties significantly modify the arrangement described in the notification. If the parties are prosecuted, it will be up to the court to determine whether the arrangement described in the indictment is the same as that described in the notification.

The central rationale for our proposal is that the covert forms of price-fixing to which Warren-Boulton refers become self-defeating through the act of filing a notification before the arrangement is acted upon. Notification renders arrangements which might otherwise have been *covert* now *overt*.[215] The benefit of notification is already recognized in the bid-rigging offence contained in section 47 of the *Act*: Liability for bid-rigging is expressly made conditional on the bid-rigging agreement not being known to the party soliciting the bids. Like bid-rigging, the efficacy of price-fixing depends critically on concealment. But, under our proposal, if concealment occurs (*i.e.* the parties do not file a notification) the Crown can properly prosecute under clause (A), and it can probably secure convictions more easily than under the present less precise legal standards. On the other hand, horizontal arrangements that may have positive welfare effects can easily escape the risk of criminal sanctions by the election of the parties themselves.

In addition to conferring benefits on third parties, notification also confers benefits on the Bureau. Notification gives the Director of the Bureau an infor-

[215] *Supra* note 63 at 346.

mation set on which to evaluate arrangements. If the Director considers the notified arrangement to be ambiguous, he or she may ask the parties to provide relevant particulars. Failure to comply, in good faith, with Bureau demands for particulars vitiates the immunity conferred by notification. If the Director considers the notified arrangement to be anti-competitive, he or she may pursue a civil review proceeding before the Competition Tribunal, as detailed below.[216]

The Bureau's current "whistle-blowing" policy[217] recognizes that voluntary notification confers benefits on the Bureau. Under this policy, the Bureau offers immunity from criminal sanctions to parties who notify the Bureau of violations of the *Act*, provided that the notifying parties are the first among the violators to notify the Bureau of the violation. The Bureau then has evidence with which to prosecute the other violators. The "whistle-blowing" policy applies to notifications which are received *after* violations and anti-competitive effects have occurred, and it restricts criminal immunity to the first notifying party. In contrast, our proposed notification defence applies to notifications received *before* violations and anti-competitive effects have occurred, and it confers criminal immunity on all parties to a notified arrangement, but not necessarily immunity from civil review.

We cannot emphasize too strongly that the notification regime we propose is *not* a registration or authorization procedure. To empower the Director to review notifications and to decide whether to accept, reject or propose modifications to the underlying agreement as a precondition of the parties' immunity from criminal prosecution would impose heavy burdens on both the parties and the Bureau. Conferring such powers on the Director risks creating the same paper nightmare that has bedevilled both the European Commission, with negative clearance and exemption applications under article 85 of the *Treaty of Rome*, and the Office of Fair Trading in the United Kingdom under the *Restrictive Trade Practices Act*. Under both regimes, parties are subjected to enormous delays and great uncertainty pending the administrative review of often trivial or benign arrangements by official agencies.

We believe that our proposal avoids the bureaucratic mire of a registration or authorization system, while at the same time focusing criminal deterrents on precisely that class of transactions where they are most warranted. We also believe that our proposal meets the "effectiveness criteria" which we derived from our review of European authorization regimes.[218] First, our proposed criminal prohibition clearly targets naked price-fixing. Second, our proposed prohibition will not deter potential pro-competitive behaviour because our notification regime is simple to invoke, since parties need only file their arrangements, and it provides legal certainty to parties. Parties receive immediate and absolute immunity from criminal sanctions upon filing an appropriate notification with the Bureau. Third, our proposed regime makes efficient use of the enforcement

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[216]See Part V.*B*.2, below.

[217]See J.F. Clifford & A.N. Campbell, "Antitrust/Competition Law" (1992) 15 Can. Law Newsletter 8 at 12, in which reference is made to comments made by H.I. Wetston in "Notes for an Address" (Address to the Canadian Corporate Counsel Association, Calgary, 19 August 1991).

[218]See Part III.*D*, above.

resources of the Bureau. Criminal sanctions give parties strong incentives to notify arrangements to the Bureau, and notified arrangements give the Bureau an information set on which to evaluate arrangements for possible civil review before the Tribunal. Unlike the EC and U.K. regimes, the Bureau is not burdened with the task of evaluating arrangements as a precondition to parties' immunity from criminal sanctions. As well, the Bureau is not burdened with having to expressly approve trivial arrangements because, like the German regime, notified arrangements become legal by the Bureau taking no action at all.

2. The Proposed Civil Review Procedure

Our proposed criminal prohibition would constitute the sole route for the criminal prosecution of horizontal arrangements, and criminal prosecutions would be limited to parties who had not notified their arrangements to the Bureau. We recommend that the criminal prohibition be complemented with a civil review mechanism which would entail vesting in the Competition Tribunal a power of civil review. We propose that Part VIII of the present *Act*, concerning reviewable practices, be amended to make it a reviewable practice for competitors or potential competitors to enter into any contract, agreement, arrangement or understanding with each other that "substantially lessens competition." The "substantially lessens competition" test should be the same test which the Tribunal currently applies to mergers (which are horizontal integration by ownership) under section 92 of the *Competition Act*.

Under our proposal, the Director will be able to challenge anti-competitive horizontal arrangements more easily than under the current criminal prohibition. Under the current provisions, the Director must prove, on a criminal burden of proof before an all-purpose criminal court, that the arrangement lessens competition "unduly." Under our proposal, the Director may successfully challenge a notified anti-competitive arrangement by proving, on a civil burden of proof before the Tribunal, that the arrangement substantially lessens competition.

Our proposal is also consistent with our understanding of the relative institutional competence of all-purpose criminal courts as compared to specialized tribunals. In the areas of monopolies and mergers, for example, Parliament has accepted that it is inappropriate to ask criminal courts to engage in a complicated rule-of-reason or welfare analysis. Parliament specifically created the Competition Tribunal to engage in those analyses.

When the Tribunal evaluates the extent to which a challenged arrangement lessens competition, we believe that it should undertake an inquiry along the lines of a rule-of-reason review. In particular, it would seem sensible to require the Tribunal to consider the provisions of Part V of the *Act*, which address trade associations, export agreements, sports leagues, professional bodies and other sub-classes of horizontal arrangements. These provisions now qualify the current subsection 45(1) criminal prohibition against horizontal arrangements. The provisions in Part V should be transferred to Part VIII of the *Act* to provide guidance to the Tribunal when it undertakes rule-of-reason reviews of horizontal arrangements. We also believe that the Tribunal should use this framework

for evaluating joint research ventures[219] and specialization agreements.[220] In particular, it is not clear to us why specialization agreements should require special registration with the Tribunal as provided by the current *Act*.

3. Proposed Collateral Revisions to the *Competition Act*

We recommend that an efficiency defence be made part of the provisions for civil review proceedings of horizontal arrangements. This would be consistent with section 96 of the *Competition Act* (which provides such a defence in the case of mergers), and with article 85(3) of the *Treaty of Rome*. Moreover, such a defence would place horizontal integration by ownership and horizontal integration by contract on a similar legal footing.[221] We acknowledge that the recent decision of the Canadian Competition Tribunal in *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.*[222] has created considerable uncertainty as to whether the existing section 96 efficiency defence embodies a consumer welfare or a total welfare standard. We favour the latter standard.[223]

We also believe that procedural innovations adopted in the 1986 amendments to the *Competition Act*, which created the new merger regime, should be adopted for horizontal arrangements, and indeed all reviewable practices, that follow the civil review route. In particular, the ability of the Director to seek and obtain an interim order from the Tribunal, immediately following notification of a horizontal arrangement to which he or she takes objection, is indispensable in the general framework that we have outlined. Substantial sanctions for breaches of either interim or final orders of the Tribunal are also essential to deter non-compliance.[224] As well, advance-ruling certificates for mergers under section 102, consent orders under section 105 and interim orders under section 100 or section 104 seem equally appropriate in the case of reviewable practices, as do advisory opinions and undertakings, although advisory opinions and undertakings are not at present formally recognized in the *Act*, despite being common practices.

It is also important that parties not be exposed to multiple proceedings by, for example, the Director initiating Tribunal review proceedings after an unsuccessful criminal prosecution, or (less realistically) the converse. Thus, an election provision like the combination of section 45.1, subsection 79(7) and section 98, which addresses this type of problem in the context of abuse of dominant position and mergers, would need to be included in the revisions.

Once the Bureau receives notification of an arrangement, the Director should be subject to a limitation period within which to file an application with

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[219]*Competition Act*, *supra* note 2, s. 95.

[220]*Ibid.*, s. 86.

[221]See Baxter, *supra* note 16.

[222](1992), 41 C.P.R. (3d) 289 (Comp. Trib.).

[223]See Schwartz, *supra* note 15; Crampton, *supra* note 15.

[224]The Tribunal's contempt powers have now been affirmed by the Supreme Court of Canada in *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 42 C.P.R. (3d) 353.

the Tribunal if he or she objects to the arrangement. The German *GWB*, for example, imposes a limitation period of three months from the filing of the notification. Of course, this limitation period should not be binding on the Director if parties subsequently modify their arrangement. As well, any significant modification will vitiate the criminal immunity conferred by the initial notification unless the parties subsequently notify the Bureau of the modified arrangement.

We also propose two amendments to section 36 of the *Competition Act*, which governs private actions. First, section 36 should render unenforceable all arrangements which violate the criminal prohibition. Australia, New Zealand, the EC, the United Kingdom and Germany have similar provisions. Second, section 36 should preclude private civil actions for damages in respect of arrangements for which valid notifications have been filed under our proposed notification mechanism. There are three reasons why such private actions should be precluded in those cases. First, if a notification has been filed before the arrangement has been implemented, it will be rare that third parties will be able to prove damages. Second, as a matter of relative institutional competence, we believe that the Competition Tribunal is better able to evaluate the welfare effects of these arrangements than civil courts. Third, if notification confers immediate immunity from private civil suits as well as criminal prosecutions, the incentives to notify will be further strengthened. This will further broaden the Director's information base, and will facilitate applications to the Tribunal in appropriate cases.

Finally, some transitional provision would also need to be made for arrangements already in place at the time of proclamation of the new legislative scheme. Perhaps parties could be given up to three months from proclamation to notify the Director in order to qualify for immunity from criminal liability.

Conclusion

The recent constitutional challenges[225] to the validity of the price-fixing provisions of the Canadian *Competition Act*, while ultimately unsuccessful, point to substantive deficiencies in the existing provisions and warrant a reconsideration of these provisions on policy rather than constitutional grounds. The current provisions attempt to categorize horizontal arrangements. Our comparative review demonstrates the elusiveness of a watertight distinction between pure price-fixing arrangements and potentially pro-competitive arrangements, and suggests little prospect of a tightly focused criminal prohibition. Yet a broadly-cast criminal prohibition that requires rule-of-reason review by courts will in many cases deter potentially pro-competitive behaviour as well as offend notions of criminal due process and relative institutional competence.

Our proposals instead envisage a two-track process for reviewing the legality of horizontal arrangements: a criminal law *per se* prohibition of price-fixing and a civil rule-of-reason review of other horizontal arrangements by the Competition Tribunal.

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[225]See Introduction, above.

Despite our best efforts to confine the scope of the *per se* criminal prohibition to naked price-fixing, we recognize that in many instances our proposed prohibition will be over-broad: We seek to solve this problem not through further attempts at more precise substantive elaboration, but rather by creating incentives for parties to horizontal arrangements to self-select or channel themselves into the appropriate legal track. By providing automatic criminal and civil immunity to parties who have, in a timely fashion, notificd the Bureau of their arrangements, only covert arrangements among competitors are likely to be left in the criminal law track. Horizontal arrangements which have been notified to the Bureau will be subject to civil rule-of-reason review administered by the Competition Tribunal at the instance of the Director. The adoption of these proposals will retain criminal sanctions for those arrangements where they are most warranted (*i.e.* covert arrangements), while providing the Director with a much more complete information set for reviewing other, potentially procompetitive, horizontal arrangements.