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Canada Takes Steps Toward Conspiracy Reform

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Canada will soon proclaim into law a series of controversial amendments to the Competition Act (the “Act”).¹ Barely is the ink dry, and the Commissioner of Competition (the “Commissioner”) is embarking on a quest to make significant changes to the Act’s conspiracy offense.² Among the proposals for change are:

- P adoption of U.S.-style per se rules; and
- P consideration of an European Union-like notification regime.

Although the proposals are radical, the rationale for change and potential outcomes remain uncertain.

Proposals for reform of Canada’s conspiracy law are not new. Indeed, for years various commentators have argued that the law is over-inclusive because it makes unlawful arrangements that may be efficiency-enhancing. Others have argued that the law is not stringent enough because pricing agreements are unlawful only if they have an adverse effect on competition. Still others believe that the present law is effective and can be improved without throwing the baby out with the bath water.³

In an attempt to understand the roots of the current proposals for reform, this article presents a brief overview of the current law, looks back over recent years at some of the more vocal calls for reform that have caught the attention of, and influenced the Commissioner, and concludes with thoughts on appropriate incremental changes.

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THE CURRENT LAW

The statutory scheme

Section 45 of the Act is a criminal prohibition against everyone who conspires, combines, agrees, or arranges with another person to restrain or injure competition unduly.⁴ It is sufficiently broad to encompass conspiracies agreed to outside Canada that have serious competitive effects in Canada. Unlike in the United States, conspiracies in Canada are not per se illegal. Nor are they defensible by rule of reason. The seriousness of an allegedly illegal conspiracy is determined by a so-called “partial rule of reason” analysis. Unlawful conspiracies are criminal offenses; there is no civil equivalent.

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To prove a conspiracy, the Crown (i.e., the prosecutor of the offense) must establish beyond a reasonable doubt the existence of the requisite *actus reus* (illegal act) and *mens rea* (guilty mind). Existence of a conspiracy may be inferred from circumstantial evidence, with or without direct evidence of communication among the parties to the agreement, although existence of the agreement must be proved beyond a reasonable doubt.⁵

The Crown must establish that the agreement did or could have had an “undue” effect on competition. But it is not necessary for the Crown to prove that the conspiracy, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties to the conspiracy to do so.⁶ It also is not necessary to prove that the alleged conspirators intended that the agreement would have an undue effect on competition.⁷ Persons found guilty of conspiracy are liable on conviction to five years imprisonment or a fine of Cdn \$10 million, or both. The Act does not provide for treble damages claims. Rather, private parties may recover only their actual loss or damage suffered as the result of the criminal behavior.⁸

Recent judicial interpretation

Traditionally, Canada’s conspiracy law has been plagued with uncertainty about the degree of proof required to establish an offense. This led to incremen-

tal, clarifying amendments in 1986, and before.⁹ The most recent Supreme Court of Canada decision to consider the provision, *R.v. Nova Scotia Pharmaceutical Society (PANS)*,¹⁰ initially was thought to clarify and make the law more certain, but application of the principles enunciated by the Court has proven otherwise.

In *PANS*, the accused pharmacy society, associations of pharmacists, and pharmacy operators were charged with two counts of conspiracy. The Nova Scotia Pharmaceutical Society negotiated agreements on behalf of its member pharmacies with providers of direct-pay prescription insurance plans. As part of the negotiations, the Society obtained agreements from insurers on province-wide maximum dispensing fees that could be charged by individual pharmacies. It used the threat of termination of acceptance of individual insurers direct-pay cards by the pharmacies to ensure that each insurer agreed to the same maximum dispensing fee. The Society also sought to negotiate a uniform contract for all pharmacies and a “master contract” between each insurer and the Society.

In its unanimous decision, the Supreme Court of Canada made clear that to prove an unlawful conspiracy the Crown must establish the existence of an agreement to which the accused is a party and that the agreement, if implemented, would likely prevent or lessen competition unduly. The Court said that “unduly” means “of seriousness or significance,”¹¹ and may be established through the analysis of market structure and the behavior of the accused. This analysis was described by the Court as a “partial rule of reason inquiry into the seriousness of the competitive effects of the agreement,”¹² without a presumption of unreasonableness. The analysis is only a “partial rule of reason” inquiry because private gains by the parties to the agreement or of counter-balancing efficiency gains that might accrue to the public are not to be considered.

Following definition of markets, an analysis of the market structure, and determination of the market power of the accused, an accused’s behavior is examined. The most important element of this part of a court’s inquiry is the object of the agreement. Because Section 45 of the Act does not create a per se offense, undueness will exist only if the accused is found to have some market power and to have engaged in some behavior likely to injure competition.¹³ While the Court stopped short of reading a per se offense into Section 45,¹⁴ it did comment: “A particularly injurious behavior may also trigger liability even if market power is not so considerable.”¹⁵ Likewise, if the market power of the accused is great, the marketplace effects of the agreement need not be so strong.

Proof of the *actus reus* of a conspiracy offense is only the first step. Because conspiracy is a criminal offense, the Crown must also prove both objective and subjective fault elements of the offense. The subjective fault element will be established if the Crown shows that the accused intended to enter into the agreement and had knowledge of the agreement. Once this is established, it ordinarily is reasonable to infer that the accused intended to carry out the terms of the agreement.¹⁶

To prove the objective fault element, the Crown must show that the evidence, viewed objectively (i.e., by a reasonable business person), proves beyond a reasonable doubt that the accused was aware or ought to have been aware that the agreement would result in an undue restraint on competition. The Court stated:

This surely does not impose too high a burden on the Crown. Section [45] requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it unduly. Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be the undue lessening of competition. Thus in proving the *actus reus* that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.¹⁷

The Supreme Court ultimately ordered that the accused in *PANS* be re-tried on the conspiracy charge so that the trial judge could take into account the Court's guidance on the interpretation of Section 45. At that trial, the accused were acquitted on the basis that they were not aware, or could not reasonably have foreseen, that their conduct would have the effect of lessening competition unduly.¹⁸

CALLS FOR REFORM

Warner and Trebilcock

PANS was a constitutional challenge to the validity of Section 45. The trial court found that Section 45(1)(c) was unconstitutional,¹⁹ although this was overturned on appeal (and the Supreme Court of Canada confirmed the constitutional validity). The constitutional uncertainty about the conspiracy provision led P. Warner and M. Trebilcock to rethink the conspiracy law prior

to the Supreme Court’s decision. They concluded: “The current prohibition is under-inclusive because it can allow manifestly anti-competitive arrangements to escape condemnation At the same time, the current prohibition is over-inclusive because it subjects all horizontal arrangements to criminal prohibitions and casts a shadow over many arrangements that may potentially increase welfare.”²⁰

Warner and Trebilcock suggested that the law be replaced with a dual-track proposal that drew on certain elements of regimes in place in the United States, Australia, and Europe: A criminal law per se prohibition of price fixing and, for all other arrangements, a civil rule of reason review by the Competition Tribunal.²¹

The proposal was unique for several reasons. First, rather than distinguishing between naked and ancillary arrangements, the Warner/Trebilcock per se criminal prohibition distinguished between overt and covert arrangements. Only covert agreements were to be prohibited.²² Since they recognized that by ignoring the naked/ancillary distinction their prohibition was over-broad, Warner and Trebilcock proposed a notification regime to give parties an entitlement, and a strong incentive, to avoid criminal liability.²³ Their rationale was that covert collusion becomes self-defeating by filing a notification and, similar to the Canadian Competition Bureau’s (the “Bureau”) immunity program, provides the Bureau an information set to evaluate agreements.

The second aspect of their proposal was for the criminal prohibition to be complemented by a civil reviewable practice provision. Under that regime, agreements would be measured against a “substantial prevention or lessening of competition” test (the “SLC Test”) used elsewhere in the Act for reviewable matters (e.g., mergers, abuse of dominant position, etc.). These agreements could be reviewed by the Competition Tribunal, and enforcement of them prohibited upon application by the Commissioner. Finally, an efficiency defense, similar to the Section 96 efficiency defense for mergers, was recommended.

Out of concern that the Canadian conspiracy regime did not properly take account of economically-efficient cooperation among firms and that the criminal law risks chilled some efficiency-enhancing business arrangements ... Kennish and Ross made a case for a new law.

Kennish and Ross

The 1990s witnessed greater interaction between horizontal competitors through strategic alliances of various forms. Legal counsel often were called upon to assess the legality of these alliances under the conspiracy rules. Out of concern that the Canadian conspiracy regime did not properly take account of economically-efficient cooperation among firms and that the criminal law risks chilled some efficiency-enhancing business arrangements, in 1997, T. Kennish and T. W. Ross made a case for a new law that took into consideration the newfound economic importance of strategic alliances.²⁴

Essentially, Kennish and Ross proposed that agreements not to compete (i.e., “naked” restraints) be made per se illegal by removing the reference to “unduly” and by explicitly stating that Section 45 only applies to naked restraints.²⁵ Non-naked agreements (i.e., those which do not have, as their sole or predominant purpose, an agreement not to compete or those which include a restraint on competition which is merely ancillary and reasonably necessary to a larger agreement) would be made subject to Competition Tribunal scrutiny, using the SLC Test.²⁶ Kennish and Ross also proposed amending Section 45 to ensure procompetitive arrangements entered into by parties to a merger would be dealt with under the merger system and not Section 45.²⁷

The Warner/Trebilcock proposals and Kennish/Ross proposals sparked modest debate amongst antitrust practitioners. But, with the Commissioner busy dealing with a number of other proposals for amendments to the Act, it seemed unlikely that Section 45 would receive any attention until Bill C-472 was introduced.

ATTEMPT AT REFORM

In late 1999 and early 2000, four private members’ bills were introduced in Parliament and referred to the House of Commons Standing Committee on Industry.²⁸ Each bill proposed significant revisions to different parts of the Act, and together they represented major change. The Commissioner stated that the Minister of Industry agreed with the principles behind the Bills and was considering rolling them into a single government bill.²⁹

Bill C-472³⁰ proposed significant changes to Section 45, drawing heavily on the proposed amendments of Kennish and Ross. Essentially, it had four key components:

- (1) a per se criminal prohibition of certain statute-listed agreements;³¹

- (2) a notification system that could result in criminal immunity;³²
- (3) a new civil law provision applying a rule of reason standard and the SLC Test to deal with all other agreements;³³ and
- (4) an “advance clearance” provision for agreements in the civil track, similar to the advance ruling certificates available in for mergers context.³⁴

Bill C-472 (and the other three private members’ bills) died on the Order Paper with the calling of a Federal election. However, the Commissioner subjected each of the bills to a round of public consultation through the Public Policy Forum (the “Forum”).³⁵ In its final report, the Forum stated: “There was general agreement that the existing conspiracy provisions need to be modernized. However, because section 45 is one of the cornerstones of the *Competition Act*, and because of the complexity of the issues, participants felt that more discussion was needed.”³⁶ Specific comments on Bill C-472 were varied. The Forum noted that support for a criminal/civil two-track approach was widely supported but that there was an uneasiness about moving to a strict per se criminal provision. Because of the Forum’s recommendation for more discussion, consultation and analysis, reform proposals were back-burnered while other, less controversial amendments were made to the Act.

CURRENT REFORM PROPOSALS

To respond to the Forum’s recommendation of further analysis, the Commissioner sponsored three reports on Section 45 amendments, each of which was released in late 2001.³⁷ The reports add to the landscape already populated by private members bills and academic articles calling for reform, but offer little new thinking. Each advocates a uniform view: that the conspiracy provision be replaced by a two-tier system (a criminal per se prohibition and a civil review provision) and a clearance/notification system (the nature of the system proposed varied slightly in each report).

At a recent conference at which the Commissioner-sponsored reports were presented, the Commissioner stated: “Clearly section 45 is going to be the centrepiece of the next round of amendments.”³⁸ In his view, the law requires amendment because (1) “[i]n contested cases involving hard core cartel behavior, section 45 does not work,” and (2) “section 45 also has the potential to place a chill on pro-competitive collaborations among competitors.”³⁹

REFORM NOT JUSTIFIED

But, is Canada's conspiracy law really in need of amendment? This section explores and tests the most often heard rationales for change.

The law is under-inclusive

The Commissioner and others have stated variously that the law is under-inclusive; that it does adequately capture hard-core cartels. A record of few winning cases brought by the Commissioner and his predecessors is cited as evidence of this fact. This is a hollow argument for several reasons.

First, the Canadian reality is that few hard-core conspiracy cases are litigated. In recent years, the Commissioner has had great success winning cases under plea agreements made in order to avoid costly litigation.⁴⁰ The litigated cases are ones in which defendants believed that the Commissioner's case was not justified, and the fact that the accused was acquitted seems to support that position (to say nothing about how the performance of any particular witness or counsel might have affected the outcome). Indeed, it is rare that cases are lost because the "undueness" element of the offense cannot be proven.

Second, statistics cited in support of contentions that the law is uncertain— and thus is unable to capture naked restraints— often include cases that were decided prior to important clarifying amendments to the law made in 1986. Using more relevant time frames, the Commissioner in fact has had an outstanding success rate.⁴¹

What is more relevant to the argument is whether the Commissioner has been unable to bring cases against accused involved in hard-core behavior such as price fixing because he did not think the activity was contrary to the law. The Commissioner has not indicated that this has been the case.

The law is over-inclusive

The Commissioner and others also have argued that the current law is over-inclusive in that it prohibits arrangements that are procompetitive (e.g., strategic alliances). This creates a "chill" against entering into those arrangements because of potential criminal liability.

This argument seems more theoretical than real. In any arrangement involving horizontal competitors, counsel will be consulted about whether the arrangement might give rise to anticompetitive effects that could lead to liability under the Act. Such advice would be sought whether the matter raises issues

under the conspiracy law or the proposed new civil regime. Indeed, counsel would still be consulted under any new regime, and uncertainty (if it exists) would continue in respect of any matter within or close-to any newly defined per se offense.

If counsel or the parties are truly concerned about criminal liability, an advisory opinion about the arrangement could be sought under the Commissioner’s Advisory Opinion Program. This should remove any chill. More importantly, in all the years that reform of the law has been discussed, there has not been a call for reform from the business community by reason of the law being uncertain and creating a disincentive to enter into horizontal arrangements. Indeed, if uncertainty in the law had created a chill, it would seem that corporate Canada would have been advocates for change. Instead, they are silent.

There is a real risk that the proposed “dual-track system” would create significant characterization issues because matters would have to be defined as being per se criminal or subject to the civil rule of reason.

The law does not recognize efficiencies

The PANS Court made clear that the Section 45 “partial rule of reason” approach does not take account of efficiencies. Efficiencies are relevant to a proper assessment of competitive effects of any nonhard-core arrangement involving horizontal competitors. The law could (and should) be amended to recognize efficiencies in the assessment of such arrangements.⁴²

In the absence of clear and justifiable reasons, Canada’s conspiracy law should not be changed fundamentally. There is a real risk that the proposed “dual-track system” would create significant characterization issues because matters would have to be defined as being per se criminal or subject to the civil rule of reason. The U.S. experience has shown that this characterization is not easy as there are no bright lines between per se and rule of reason cases. Nor is the characterization static. The U.S. law has shown flexibility to evolve and change such that today there are many fewer categories of per se offenses than in earlier years. Codifying a strict distinction between the two regimes would make the Canadian law much less flexible.⁴³

Importing a notification scheme into the law also seems misguided. Indeed, European regulators are moving away from systems that Canadian law enforcers are being encouraged to follow— i.e., European Union notification.⁴⁴

Section 45 is the cornerstone of Canada’s antitrust laws. Proposals for reform risk creating uncertainty in the law without appropriate justification. There simply is not sufficient reason to make fundamental changes.

NOTES

1. Competition Act, R.S.C. 1985, c. C-34. Amendments to the Act were passed by the Federal House of Commons in December 2001, and currently are before the Senate. *An Act to Amend the Competition Act and the Competition Tribunal Act*, Bill C-23, 1st Sess., 37th Parliament (2001). Among other things, those amendments introduce private rights of action before the Competition Tribunal in respect of certain reviewable practices (e.g., refusal to deal, exclusive dealing, etc.).

2. In October 2001, the Commissioner stated: “Clearly, section 45 is going to be the centre-piece of the next round of amendments.” See Konrad von Finckenstein, *Remarks to 2001 Invitational Forum on Competition Law: Section 45 of the Competition Act* (Oct. 12, 2001), available at <http://strategis.ic.gc.ca/SSG/ct02285e.html>.

3. B. Facey & D. Assaf, *Innovation, Growth and Prosperity: A Framework for Amending Canada’s Conspiracy Laws*, 20:4 Canadian Competition Record 61 (Winter 2001-02) [hereinafter *Facey & Assaf*].

4. Section 45(1) of the Competition Act, *supra* note 1, provides:

Every one who conspires, combines, agrees or arranges with another person:

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the

manufacture or production of a product or to enhance unreasonably the price thereof,

- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

5. Competition Act § 45(2.1).

6. *Id.* § 45(2).

7. *Id.* § 45(2.2).

8. *Id.* § 36(1).

9. Competition Act, R.S.C. 1985, c.19, as amended (2d Supp.), §§ 18-45.

10. [1992] 2 S.C.R. 606; 43 C.P.R. (3d) 1 (1992).

11. 43 C.P.R. (3d) at 29.

12. *Id.* at 37.

13. *Id.* at 36.

14. The Court stated: “The possibility of per se rules allows for a presumption of unreasonableness (Canadian law does not offer this possibility, since the word ‘undue’ appears as

part of [section 45]).” 43 C.P.R. (3d) at 35.

15. *Id.* at 37.

16. *Id.* at 38.

17. *Id.* at 39.

18. R. v. Nova Scotia Pharm. Soc’y, (1993) C.P.R. (3d) 289 (N.S.S.C.T.D).

19. R. v. Nova Scotia Pharm. Soc’y, (1990) C.P.R. (3d) 259 (N.S.S.C.T.D).

20. P. Warner & M. Trebilcock, *Rethinking Price-Fixing Law*, 38 McGill L.J. 679, 690-691 (1993) [hereinafter *Warner & Trebilcock*].

21. *Warner & Trebilcock, supra* note 20, at 717. The Competition Tribunal is a specialized, quasi-judicial body that adjudicates reviewable matters under the Act (e.g., mergers, abuse of dominant position, etc.).

22. It was their belief that the covert/overt distinction better reflected the experience of Canadian prosecutors than the naked/ancillary distinction used in other jurisdictions.

23. Notification would have to be made before the agreement takes effect or within 30 days of execution of the agreement. Simple notification would result in automatic criminal immunity, thereby avoiding the delay and administrative burden of the system.

24. T. Kennish & T.W. Ross, *Toward a New Canadian Approach to Agreements Between Competitors*, 28 Canadian Bus. J. 22 (1997) [hereinafter *Kennish & Ross*].

25. Kennish and Ross conceded that removing “unduly” could result in the law being over-inclusive. As an alternative, they proposed retaining the “unduly” qualifier but tempering it by introduction of a market share threshold.

26. Notably, consideration of agreement efficiencies would be permitted. Even agreements under criminal review could be converted to review under the civil track if the parties argue successfully that the inherent efficiencies of the agreement do not make the agreement per se illegal.

27. Provided (1) the arrangement is integral to the merger; and (2) the merger is not a “sham.”

28. *An Act to Amend the Competition Act* (abuse of dominant position), Bill C-402, 2d Sess., 36th Parliament, 1999 (first reading, Dec. 13, 1999); *An Act to Amend the Competition Act* (game of chance), Bill C-438, 2d Sess., 36th Parliament, 1999-2000 (first reading, Feb. 25, 2000); *An Act to Amend the Competition Act* (international mutual assistance and references) and the *Competition Tribunal Act* (references), Bill C-471, 2d Sess., 36th Parliament (first reading, Apr. 6, 2000); *An Act to Amend the Competition Act* (conspiracy agreements and right to make private applications), the *Competition Tribunal Act* (costs and summary dispositions) and the *Criminal Code as a Consequence*, Bill C-472, 2d Sess., 36th Parliament, 1999-2000, subsections 1 & 7 (Bill C-472 died on the Order Paper with the dissolution of Parliament on October 22, 2000).

29. W.T. Stanbury, *Reforming the Conspiracy Provisions of the Competition Act: An Analysis of Bill C-472 and New Proposals*, Canadian Competition Record 63, at 64 (Spring/Summer 2000).

30. Bill C-472, *supra* note 28.

31. The prohibited agreements were those between current competitors that:

- (1) fixed prices in any fashion;
- (2) allocated any markets, territories, customers or sales among competitors;
- (3) boycotted a competitor or a competitor’s suppliers or customers; or
- (4) restricted supply by any means.

Bill C-472 would have also had the following exceptions to per se prohibition: (1) agreements where the parties had less than 25% of the relevant market; and (2) certain export cartels.

The *mens rea* element, in accordance with *PANS*, was a “double intent” standard; subjective and object intent was required to be shown.

32. Notification could be made at any time, not just prior to entering an arrangement.

33. This would have been included through the introduction of a new section 79.1. The remedies available were the conventional remedies for violation of a civil reviewable practice.

34. This would have been included through the introduction of a new section 79.2. This process would be available to parties involved in proposed strategic alliances.

35. Canadian Competition Bureau, News Release, *Public Consultation on Legislative Changes to the Competition Act and the Competition Tribunal Act* (Apr. 17, 2000), available at <http://strategis.ic.gc.ca/SSG/ct01741e.html>.

36. Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*, Final Report Submitted to the Commissioner of Competition, Ottawa, at 28 (Dec. 20, 2000).

37. Davit D. Akman, Adam F. Fanaki & Robert S. Russell, *Legislative Framework for Amending Section 45 of the Competition Act* (Apr. 11, 2001); Al Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond* (Aug. 2001); McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (Aug. 2001). These papers are available at <http://strategis.ic.gc.ca/SSG/ct02277e.html>.

38. See *supra* note 2.

39. *Id.* at 9.

40. Since 1990, companies have been fined more than \$160 million for their Canadian involvement in conspiracies. For instance, F. Hoffmann-La Roche Ltd. of Switzerland received the largest fine ever imposed in Canada when it was fined \$50.9 million for its part in the vitamins conspiracy. Canadian Competition Bureau, News Release, *Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies* (Sept. 22, 1999), available at <http://strategis.ic.gc.ca/SSG/ct01581e.html>.

In addition, penalties levied against individual executives have recently increased. Four

individuals have been imprisoned in Canada for their role in various conspiracies, and fines have become substantial (e.g., a commercial waste disposal executive was fined \$550,000). See News Releases and Media Advisories, Media Room, Competition Bureau, available at <http://strategis.ic.gc.ca/SSG/ct01256e.html>.

41. For the period 1993 to October 2001, two acquittals, one discharge, and 28 convictions. See *Facey & Assaf*, *supra* note 3, at 63.

42. For example, an efficiencies defense similar to that found in Section 96 of the Act could be added to Section 45, but made applicable only to arrangements other than those involving price or market allocations.

43. Any new criminal offense would have to be defined to catch only conduct that is unambiguously anticompetitive. This would be a very difficult drafting challenge. McMillan Binch, *Submission to the Public Policy Forum Regarding Proposals to Amend the Competition Act Contained in Bills C-471 and C-472* 1, at 31. As Warner and Trebilcock, *supra* note 20, point out: "It is difficult to characterize the agreement as 'price-fixing' without examining the surrounding circumstances. This has been called the problem of 'characterization.'" See also McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (Aug. 2001).

44. After years of using a notification system, the European Commission [hereinafter EC] is proposing abolishment of the notification and exemption system. This proposal reflects wide agreement that the existing notification system is dilatory and bureaucratic and that the EC should reallocate its resources. Henriette Tielemans, Charles Lister & James R. Atwood, *Proposed Reforms of EC Competition Law*, *Antitrust Magazine*, vol. 15, no. 1, at 65 (Fall 2000). See also White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty by the European Commission, Commission Programme No. 99/027, Brussels (Apr. 28, 1999). Once again, in theory, the concept seems appealing, but notification/clearance systems will only be useful if they are neither cumbersome for

business nor overwhelming for the Bureau.
See McMillan Binch, *supra* note 43, at 38. ?