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Global Forum on Competition

THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICY

Contribution from Canada

-- Session IV --

This contribution is submitted jointly by the Competition Bureau and the Office of Consumer Affairs under session IV of the Global Forum on Competition to be held on 21 and 22 February.

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICY

-- Canada --

1. Competition and Consumer Policy Landscape in Canada

The Canadian institutional landscape responsible for competition and consumer issues reflects the uniqueness of the Canadian political system. Consumer protection and policy is, in practice, a shared responsibility between the Canadian federal and provincial governments as the Canadian Constitution does not specifically assign consumer affairs to either level of government.

Under their constitutional power to regulate property and civil rights, Canadian provincial and territorial governments administer and enforce statutes that create a wide variety of rights and remedies for consumers. Examples of their work include the legislation of contractual matters associated with the terms and conditions of the sale of goods and services (such as guarantees and licensing of vendors) and certain sectoral issues (such as building codes and electrical safety). Most provinces also have statutes regarding unfair business practices and misleading marketing¹.

Complementing provincial consumer protection statutes, the Canadian federal government has responsibility over consumer issues that are a consequence of its various jurisdictional powers, including broad marketplace rules such as peace, order and good government; trade and commerce; criminal law; currency; banking; and weights and measures². In practice, a variety of federal government departments are therefore responsible for consumer protection issues that are a consequence of their more general powers to regulate certain industries (such as transportation, telecommunications and banking), and for a large number of health and safety issues (such as food, general consumer products, new vehicles and inter-provincial transportation services).

Under the *Department of Industry Act*, the Minister of Industry has a role in promoting and protecting consumer interest throughout Canada. The Office of Consumer Affairs (OCA) responds to these responsibilities by helping to build trust in the marketplace so that consumers can both protect themselves and be able to confidently and knowledgeably drive demand for innovative products and services at competitive prices. It prepares various tools that consumers can use to make informed purchasing decisions; expands marketplace consumer protection by encouraging the development of voluntary codes and standards; helps consumer organisations to build their capacity so that they are better able to contribute to the development of public policy; and facilitates the harmonisation of consumer protection legislation and regulations between provinces and territories. In this regard, the OCA co-chairs the Consumer

¹ Please see the Industry Canada website, OCA – Canada’s Consumer Legislation at: <http://www.ic.gc.ca/epic/site/oca-bc.nsf/en/ca02240e.html>.

² Jenkin, M. “Federal-Provincial Cooperation: The Role of Ministers and Officials in Consumer Protection Policy”, presentation at Mount Allison University, February 8, 2006.

Measures Committee (CMC)³, which is a forum providing for open dialogue between the federal, provincial and territorial governments in the area of consumer protection.

The Competition Bureau (Bureau), on the other hand, is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* and the three standard-based acts, which include: the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The *Competition Act's* purpose clause states that the Act serves:

...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 recognising 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.

The reference to consumers in the purpose clause of the *Competition Act* reflects Parliament's appreciation that a properly functioning marketplace requires not only enforcement against market power abuses, but also transparency in information provided to consumers to promote well informed purchasing decisions. Hence, consumer and competition policy are mutually reinforcing and the Bureau operates with this premise while carrying out its law enforcement duties. This portion of the Bureau's mandate is administered by the Fair Business Practices Branch (FBPB).

The Bureau therefore focuses not only on traditional antitrust issues such as cartels and abuse of dominance and their downstream effects on prices (which ultimately affect consumers) but also investigates false or misleading representations and deceptive marketing practices to ensure that consumers are not confronted with deceptive price and product information when making purchasing choices. The Bureau is further responsible for the accuracy of information on packaging and labels and performance claims regarding the efficacy of product and services.

As such, while the Bureau aims to protect the integrity of information in the marketplace to ensure both a level playing field for competitors and adequate information for consumers, the OCA strives to offer consumers various tools to enable them to make informed purchasing decisions.

Lastly, there are additional networks in Canada that deal with consumer issues, including organisations such as the Better Business Bureau and the Canadian Anti-Fraud Call Center (previously known as Phone Busters)⁴. There are also several consumer groups in Canada, including the Consumers Council of Canada, the Consumers' Association of Canada, the Public Interest Advocacy Centre, Option consommateurs and l'Union des consommateurs⁵. However, the Canadian consumer movement is smaller and less well resourced relative to many other OECD countries.

³ Further information on the CMC can be found at the CMC Web site at: <http://cmcweb.ca/epic/site/cmc-cmc.nsf/en/home>.

⁴ Please see the Canadian Better Business Bureau Web site at: <http://www.cbccc.ca/> and the Canadian Anti-Fraud Call Centre Web site at: <http://www.antifraudcentre.ca>.

⁵ For links to Canadian consumer association Web sites, please visit the Consumers' Association of Canada Web site at: <http://www.consumer.ca/1655>.

2. How Competition and Consumer Policy Interact in Canada

In Canada, over time, there have been varying degrees of interaction among the agencies that have jurisdiction over competition and consumer protection issues. Most notably, coordination has occurred in the area of public education, where it is recognised that increasing the public's awareness of competition and consumer policy helps to create consumers who are demanding, knowledgeable, and better equipped to make informed purchasing decisions. As a result, various partnerships and initiatives have been developed. For example, the Bureau chairs the Fraud Prevention Forum, which undertakes an extensive campaign every year to educate the public about how to recognise, report and stop fraud; while the OCA, through the CMC, serves to improve the marketplace for Canadian consumers by working to harmonise laws, regulations and practices and taking actions that raise public awareness⁶.

Within the Bureau itself, it is also important to examine the links between competition law enforcement and consumer policy. While the Bureau is not a consumer protection agency *per se*, a secondary effect of its enforcement efforts – more particularly surrounding truth in advertising – is to benefit consumers. For example, when the Bureau assesses marketplace issues dealing with false and misleading advertising, it does so by conducting a rigorous analysis of the extent and gravity of deceptive conduct to determine priorities and only undertakes to intervene where competition or consumers experience significant harm. The Bureau considers the more general impression created by representations made to the public and assesses whether or not the representations were materially false or misleading, therefore leading consumers to purchase a certain product or service. In essence, competition could be negatively affected if a representation which is deemed false or misleading leads a consumer to buy a particular product instead of buying from a competitor who is playing by the rules and being transparent. Misleading advertising and deceptive marketing practices victimise consumers but also harm competitors who suffer losses as consumers increase their demand for the misleading product. Absent the consumer deception, the advertiser would have been required to compete vigorously, spurring innovation, greater efficiencies and more competitive prices.

In recent years, the FBPB has been aggressively investigating those involved in mass marketing fraud (MMF) as it is an economic crime and one that victimises consumers, businesses, governments, NGOs and charities. MMF is defined as fraud or deception committed over mass communications using the telephone, mail or the Internet. Of particular concern to the Bureau is that vulnerable consumers and businesses are specifically targeted by MMF, negatively impacting commerce and the proper functioning of the economy.

3. Benefits and Drawbacks to the Competition and Consumer Policy Landscape in Canada

The Bureau's mandate to deal with both traditional antitrust issues as well as enabling informed consumer choice allows it to have a comprehensive approach to maintaining an effective competition regime, through advocacy and compliance initiatives, public education programs and enforcement actions. The Bureau is able to draw upon in-house expertise on both consumer and competition issues and there is a cross-pollination of knowledge between different Bureau branches. With the appropriate expertise, the Bureau is able to develop and conduct effective consumer education and outreach programs, which inform the public about its mandate and deliverables. Competition advocacy initiatives also serve to enhance business and consumer awareness of Bureau work and promote understanding and compliance. Finally, with respect to enforcement, the cross-pollination of expertise between Bureau branches has helped achieve desirable market and consumer outcomes when cases are pursued or when fraudulent behaviour in the marketplace is challenged.

⁶ Industry Canada - Office of Consumer Affairs, "Work Plan 2007-2009", p.3.

Although there are clear benefits to the Bureau's agency model, generally, the layering and fragmentation of consumer protection responsibility in Canada can be problematic as there may be some confusion among consumers as to which level of government and which agency has jurisdiction over consumer protection issues. Further, jurisdictions have different departmental mandates and structures, perspectives on issue prioritisation, and resource levels. When combined, these challenges can result in long time frames required to resolve various consumer issues⁷.

To confront the challenging competition and consumer policy landscape in Canada, there is a need for coordination between all levels of government and agencies involved in consumer protection issues. In the case of provincial responsibilities, harmonisation is an important issue given the level of inter-provincial commerce. At the federal level, co-operation on education and outreach will continue to be a priority given the number of agencies with responsibility for consumer protection. To facilitate coordination between the provincial and territorial governments and the federal government, the Bureau will continue to develop key partnerships such as the Toronto Strategic Partnership⁸.

As well, the CMC will undoubtedly remain an important partner of the OCA in undertaking consumer policy development, conducting analysis, and supporting and harmonising appropriate legislation and regulatory initiatives.

Further, the Bureau also has a role to play in ensuring that regulations are pro-competitive. Specifically, section 125 (1) of the *Competition Act* gives the Commissioner of Competition the right to intervene where issues developed by another federal board, commission or tribunal affect competition. In the case of deregulation or re-regulation, the Bureau has the ability to protect consumers by promoting healthy competition.

4. Sectors or Products where Increased International Cooperation between Competition Authorities and Consumer Representatives would be Beneficial

Recent technological advances and rapid economic globalisation have provided businesses and consumers with larger markets and greater choice. However, these conditions have enhanced the ability for criminals to use borders to their advantage and deception is now crossing international boundaries. Investigations are becoming increasingly complex, demonstrating a need for fast and effective cooperation among enforcement agencies. A focus for increased international cooperation between competition authorities and consumer representatives exists in areas where deceptive cross-border scams are becoming increasingly prevalent, such as in the area of e-commerce. In this regard, the Bureau, along with its international counterparts, have recently participated in joint Internet sweeps to expose Web sites with deceptive health claims. Cooperation among agencies on issues such as health claims could provide an international response to cross-boundary anti-competitive and misleading activity. Such cooperation should be enhanced as it serves to create a predictable environment for businesses and consumers entering into cross-border activity and protects vulnerable consumers and businesses from deceptive conduct.

⁷ Jenkin, M. "Federal-Provincial Cooperation: The Role of Ministers and Officials in Consumer Protection Policy", presentation at Mount Allison University, February 8, 2006.

⁸ Toronto Strategic Partnership Members include: the Competition Bureau, the Ontario Provincial Police, the Toronto Police Service, York Regional Police, the RCMP, Ontario's Ministry of Government Services, the U.S. Federal Trade Commission, the United States Postal Inspection Service and the UK's Office of Fair Trading

5. Areas where the International Convergence of Competition and Consumer Policy could be enhanced

International convergence could be enhanced in the area of competition and consumer advocacy. More particularly, a dialogue should be commenced to enhance the convergence of education, outreach and, in particular, enforcement. All three tools are necessary to create a level playing field for global competitors and in staying ahead of the fraudsters who bilk consumers and businesses to the tune of millions of dollars by using borders to their advantage.

Greater similarity in standard tests for determining competitive effects and penalties such as extradition would also promote greater compliance among businesses operating trans-nationally and would prevent perpetrators from hiding behind national borders. Greater convergence in the area of e-commerce is also suggested given the growing prevalence of this type of borderless commerce.

In conjunction with the OECD *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*, the Committee on Consumer Policy could begin to look at whether the EU Enforcement Cooperation Regulation model could be extended beyond Europe to allow enforcers around the world to take on cross-border scams. It would also be useful to build greater consensus on appropriate consumer protection principles more broadly, so that consumers may know, no matter what the jurisdiction involved, what to expect in terms of protection.