

Major Changes to the Competition Act (Canada) and the Competition Bureau's Enforcement Policies

Paul Crampton

Overview

On March 12, 2009, major amendments to Canada's Competition Act¹ (Act) received Royal Assent as part of the passage of the Budget Implementation Act, 2009.² Most of those amendments are now in force, although the amendments relating to agreements between competitors will not come into force until March 12, 2010.

The highlights of the amendments are as follows:³

- The former criminal provisions dealing with price discrimination, promotional allowances, and predatory pricing have been repealed.
- The former criminal price maintenance provision has been replaced with a new civil "reviewable practice" provision.
- The existing criminal conspiracy provisions will be replaced on March 12, 2010, with (i) a per se criminal offense for hard-core cartel agreements between competitors that provides for maximum sanctions of fourteen years imprisonment (up from five years) and \$25 million in fines (up from \$10 million); and (ii) a civil provision to deal with other types of agreements between competitors that prevent or lessen competition substantially, or are likely to do so.
- The former merger review process regime has been replaced with a new U.S.-style, two-stage regime; the "size of transaction" threshold for notification has been increased from \$50 million to \$70 million (with annual adjustments to reflect inflation); and the period of time within which an application can be made to the Tribunal following the substantial completion of a merger has been reduced from three years to one year.
- The Competition Tribunal (Tribunal) has been granted a new power to impose an administrative monetary penalty (AMP) up to a maximum of \$10 million (\$15 million for subsequent orders) under the civil abuse of dominance provisions of the Act.
- There are now higher maximum fines, prison terms, and AMPs for criminal and civil deceptive marketing practices and misleading advertising.

¹ R.S.C., ch. C-34 (1985).

² 2009 S.C., ch. 2 (Can.). This legislation also included significant amendments to the Investment Canada Act. R.S.C., ch. 28 (1985). Those amendments, which are beyond the scope of this article, include the creation of a new national security regime; a substantial increase in the monetary review threshold for acquisitions of control of a Canadian business (other than a cultural business) by a non-Canadian; the elimination of the (lower) threshold applicable to transactions in the transportation, financial services, and uranium sectors; new prescribed timelines for the issuance of written opinions; and a new requirement for the Minister to issue "reasons" in prescribed circumstances. Some of the amendments to the ICA (e.g., relating to the new thresholds for review) will not come into force until a date fixed by the Governor-in-Council. However, the new national security review regime is now in force.

³ Other amendments include a broadening of the bid-rigging provisions to include arrangements to withdraw bids or tenders and the repeal of the special abuse of dominance provisions applicable to the airline sector.

The repeal of the price discrimination, promotional allowance, and predatory pricing provisions, and the replacement of the criminal provisions governing price maintenance with a new civil standard, will provide businesses with considerably more flexibility in structuring their pricing and distribution strategies and practices. However, to the extent that dominant firms will now face significant financial penalties if a practice is found to be anticompetitive and likely to prevent or lessen competition substantially, they will need to more carefully assess the underlying rationale for their pricing and other practices and how they may affect the market.

The new per se criminal provisions applicable to hard-core cartel agreements create significantly increased exposure for engaging in such conduct and remove the requirement to establish that such conduct has prevented or lessened competition unduly, or is likely to do so. These provisions should lead firms to be much more vigilant in adopting serious and effective compliance programs. They also should lead firms contemplating legitimate conduct that may unavoidably or unintentionally raise issues under the new per se provisions to carefully consider how to restructure their plans to reduce the increased risk that will exist as of March 12, 2010.

With respect to mergers, the amendments do not change the substantive provisions of the Act. However, they may require companies contemplating notifiable transactions to adapt their closing conditions and they will require merging parties to prepare for substantially increased filing requirements where there is a material risk of the issuance of a “supplementary information request” (SIR, which is similar to a U.S. Second Request). They also will require parties to such transactions to build into their transaction timelines much more time for the completion of the Bureau’s merger review process.

Regarding deceptive marketing practices, the amendments increase the maximum prison term under the criminal misleading advertising provisions to fourteen years (from five years) and increase the maximum AMPs for corporations under the civil provisions to \$10 million—\$15 million for each subsequent violation (up from \$100,000 and \$200,000, respectively). For individuals, the maximum AMPs have been increased to \$750,000—\$1 million for each subsequent violation (up from \$50,000 and \$100,000, respectively).

After providing a brief background to these amendments, I discuss the repeal of the criminal pricing practices and the new civil provision dealing with price maintenance. I then address the new two-track approach to agreements between competitors and the Draft Competitor Collaboration Guidelines released by the Bureau for public comment on May 8, 2009.⁴ Next, I discuss the amendments to the merger review process, together with the proposed amendments to the Notifiable Transactions Regulations⁵ and the draft guidelines issued by the Bureau, “The Revised Merger Review Process.”⁶ Finally, I briefly address the new power to impose administrative monetary penalties under the abuse of dominance provisions and the increased penalties for deceptive marketing practices.

⁴ Competition Bureau Canada, Draft Competitor Collaboration Guidelines (May 8, 2009) [hereinafter Draft CC Guidelines], available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03051.html>.

⁵ Regulations Amending the Notifiable Transactions Regulations, 143 CANADA GAZETTE (No. 14), Apr. 4, 2009, available at <http://www.gazette.gc.ca/rp-pr/p1/2009/2009-04-04/html/reg2-eng.html>.

⁶ Competition Bureau Canada, Enforcement Guidelines—The Revised Merger Review Process, Draft for Public Consultation (Mar. 24, 2009) [hereinafter Draft Process Guidelines], available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02986.html>.

As a result of these amendments, non-dominant businesses now will be free to negotiate different deals with different customers and generally grant or offer discounts, rebates, allowances, and other advantages as they see fit.

Background

Over the course of the last decade there have been two full-blown reviews of the Act,⁷ numerous attempts to amend the Act, a number of relatively minor amendments to the Act, recommendations by the Organization for Economic Cooperation and Development to strengthen the conspiracy and abuse of dominance provisions of the Act,⁸ at least three independent reports that have recommended a dual civil/criminal approach to horizontal agreements,⁹ and an independent report that recommended repeal of the criminal pricing practices.¹⁰ This culminated in Bill C-19,¹¹ introduced by the former Liberal government in 2004, which proposed many of the same reforms that recently were given Royal Assent and are discussed in this article. However, Bill C-19 died on the Order Paper when Parliament was dissolved on November 29, 2005.

In July 2007, the Conservative government announced the establishment of the Competition Policy Review Panel (Panel) and gave it a mandate to review Canada's competition and foreign investment policies, and to develop recommendations on how to make Canada more globally competitive. In June 2008, the Panel issued its final report¹² recommending essentially all of the changes that are discussed in this article.

Repeal of the Criminal Pricing Practices

Price Discrimination and Promotional Allowances. The repeal of the criminal price discrimination and promotional allowances provisions, formerly in paragraph 50(1)(a) and section 51 of the Act, respectively, was widely welcomed and uncontroversial. As a result of these amendments, non-dominant businesses now will be free to negotiate different deals with different customers and generally grant or offer discounts, rebates, allowances, and other advantages as they see fit. However, dominant firms still will have to be careful not to engage in any practices that could be

⁷ See HOUSE OF COMMONS CANADA, A PLAN TO MODERNIZE CANADA'S COMPETITION REGIME—REPORT OF THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY (Apr. 2002), available at <http://cmte.parl.gc.ca/Content/HOC/committee/371/inst/reports/rp1032077/indurp08/indurp08-e.pdf>; COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN—FINAL REPORT (June 2008) [hereinafter Wilson Report], available at http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00040e.html. These reviews were motivated by different considerations but shared the common concern about whether the Act needed to be modernized to assist Canadian industries to become more competitive.

⁸ OECD, CANADA—MAINTAINING LEADERSHIP THROUGH INNOVATION 91–92 (2002), available at http://www.oecd.org/LongAbstract/0,3425,en_2649_39863329_2510102_1_1_1_1,00.html; OECD, CANADA—REPORT ON COMPETITION LAW AND INSTITUTIONS 3–6 (2004), available at <http://www.oecd.org/dataoecd/51/17/34425393.pdf>. These recommendations were made as part of the OECD's regular peer review program.

⁹ Konrad von Finckenstein, Commissioner of Competition, Competition Bureau Canada, Section 45 at the Crossroads, Remarks to 2001 Invitational Forum on Competition Law (Oct. 12, 2001), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01187.html>. These reports were motivated by a perception within the Bureau that the existing conspiracy provisions in the Act were too difficult to enforce on the criminal burden of proof ("beyond a reasonable doubt").

¹⁰ J. ANTHONY VANDUZER & GILLES PAQUET, COMPETITION BUREAU CANADA, ANTI-COMPETITIVE PRICING PRACTICES AND THE COMPETITION ACT—THEORY, LAW AND PRACTICE (Oct. 22, 1999), available at <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01770.html>. This report was commissioned after a general perception began to emerge that many of the former criminal pricing provisions in the Act were antiquated and no longer suitable for the Canadian economy.

¹¹ Bill C-19, An Act to amend the Competition Act and to make consequential amendments to other Acts, 1st Session, 38th Parl. 2004, available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=2333899&file=4>.

¹² Wilson Report, *supra* note 7.

found to have an anticompetitive purpose¹³ and to be likely to prevent or lessen competition substantially. To the extent that promotional allowances and conventional forms of price discrimination are not likely to have such an anticompetitive purpose or effect, these types of practices should no longer raise a concern, even for dominant firms.

Resale Price Maintenance. The amendments replace the former criminal provision in section 61 of the Act with a new civil provision in section 76 of the Act. The former provision made vertical and horizontal price maintenance per se illegal, subject to only very limited statutory defenses and exemptions. As with the repeal of paragraph 50(1)(a) and section 51, the repeal of section 61 was widely welcomed and uncontroversial. Going forward, businesses will no longer need to be concerned about the non-trivial risk that previously existed (with respect to a range of vertical pricing practices and even certain horizontal conduct) of a Bureau investigation that could lead to criminal charges being recommended. As with the other decriminalized practices, businesses also no longer need to be concerned about the possibility of a private action under section 36 of the Act—something that can be initiated only with respect to alleged contraventions of the criminal provisions of the Act.

Instead, businesses will simply have to consider whether any contemplated pricing initiatives fall within the scope of the new civil provisions in section 76 of the Act,¹⁴ including the new requirement that the conduct have or be likely to have “an adverse effect on competition in a market.” If so, they then will have to take into account the possibility that they may be prohibited by the Tribunal (on the application of the Commissioner of Competition or a person who is directly affected by the conduct) from continuing such conduct or be required to accept another person as a customer within a specified period of time on usual trade terms. The Tribunal has no power to award monetary damages, impose a monetary penalty, or issue any other type of order under section 76.

Given that the phrase “adverse effect on competition in a market” has been interpreted by the Tribunal to mean an effect that creates, enhances, or preserves market power, firms with a market share below 35 percent can be fairly comfortable that the risk of being subjected to an order by the Tribunal is quite low.¹⁵ Above this threshold, firms will have to assess the extent to which they are likely to be able to (i) demonstrate that any adverse impact on intrabrand competition that may be associated with any form of resale price maintenance that they are contemplating likely will be offset by a procompetitive impact on interbrand competition, or (ii) establish the elements of one or more of the statutory defenses set forth in the new section 76.

Going forward,
businesses will no
longer need to be
concerned about the
non-trivial risk that
previously existed
(with respect to a range
of vertical pricing
practices and even
certain horizontal
conduct) of a Bureau
investigation that
could lead to criminal
charges being
recommended.

¹³ Conduct will not be found to be “anti-competitive” within the meaning of paragraph 79(1)(b) of the Act unless it has an exclusionary, disciplinary, or predatory purpose, based on an objective test established by the jurisprudence that essentially focuses on the reasonably foreseeable impact of the conduct on one or more competitors. *See, e.g.,* Comm’r of Competition v. Canada Pipe Co., [2006] F.C.A. 233, at ¶ 72.

¹⁴ With the exception of the narrowing of the provisions to apply only to resale price maintenance, the language of the new civil provision closely tracks the former criminal provisions, including with respect to the definition of the three types of price maintenance conduct and the various statutory defenses.

¹⁵ The Bureau has adopted a 35 percent market share safe harbor for the assessment of market power in various enforcement guidelines. *See, e.g.,* Competition Bureau Canada, Predatory Pricing Enforcement Guidelines § 3.3 (2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02713.html>; Competition Bureau Canada, Merger Enforcement Guidelines § 4.12 (2004), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html>.

Predatory Pricing. In contrast to the foregoing, the repeal of the criminal predatory pricing provisions formerly in paragraph 50(1)(c) of the Act is not likely to have much practical effect. The Bureau has for many years reviewed predatory pricing primarily under the abuse of dominance provisions of the Act and has not pursued predatory pricing criminally for decades.¹⁶

Agreements Between Competitors: New Two-Track Approach

The establishment of a dual-track approach to agreements between competitors is arguably the most significant change brought about by the recent amendments. Under this approach, three specifically defined categories of agreements will be subject to a strict per se criminal prohibition under section 45 of the Act while all other types of agreements between competitors will be subject to review under a new non-criminal framework in section 90.1.

In recognition of the fact that some existing agreements may contravene the new criminal prohibition, the amendments provide for a one-year transition period (ending on March 12, 2010) during which the existing provisions in section 45 will continue in force. In the meantime, any party to an agreement or arrangement entered into before March 12, 2009, can apply for an advisory opinion under section 124.1 of the Act regarding the potential applicability of the new criminal and civil provisions to the agreement, without having to pay the usual fee. Given the potential civil and criminal liability risks associated with the issuance of an adverse advisory opinion, however, parties may determine that it is better to self-assess their compliance with the revised law than to risk exposing themselves to an investigation or a civil action under section 36 of the Act.¹⁷

The New Criminal Track. The new criminal prohibition in subsection 45(1) of the Act will apply to agreements between competitors:

- (a) to fix, maintain, increase, or control the price for the supply of [a product in respect of which the agreeing parties are competitors];
- (b) to allocate sales, territories, customers, or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen, or eliminate the production or supply of the product.

The maximum penalties for participating in such agreements will increase to \$25 million and fourteen years of imprisonment, from the current limits of \$10 million and five years of imprisonment.

The Draft CC Guidelines attempt to provide comfort that enforcement activity under the new per se provisions in section 45 of the Act will be limited to hard core cartel conduct. In this regard, they state: "The amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute naked restraints on competition

¹⁶ See Predatory Pricing Enforcement Guidelines, *supra* note 15, ii-iv, § 2.2.1; see also Michael Sullivan, Acting Ass't Deputy Comm'r of Competition, Competition Bureau Canada, Draft Enforcement Guidelines on Illegal Trade Practices: Unreasonably Low Pricing Policies: The Way Ahead, Remarks Before Competition in Difficult Times Conference (Nov. 12, 2002), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01757.html>. Note that the prospect of private enforcement of the criminal predatory pricing provisions does not appear to have had much of a chilling effect on businesses.

¹⁷ The amendments did not change the provisions in section 36 of the Act, which allow any person who has suffered loss or damage as a result of any conduct that is contrary to the criminal provisions of the Act to sue for and recover single damages "together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section." However, to the extent that some of the conduct that formally could be pursued under section 45 of the Act now has been decriminalized, section 36 would no longer be available in respect of such conduct.

(restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture).”¹⁸

A reasonable interpretation of this statement is that the Bureau considers section 45 to be confined to agreements which have as their object one or more of the things described in paragraphs 45(1)(a), (b), or (c), and that agreements which have a different object do not fall within the scope of section 45, even if they incidentally have an effect described in section 45 or contain a restrictive provision that otherwise would be caught by section 45.¹⁹ Of course, private plaintiffs can be expected to take a very broad view of the scope of the new criminal provision and a court may well disagree with positions taken in the Draft CC Guidelines. It likely will take several cases and a number of years before the courts provide significant clarity.

On its face, the standard articulated in the above-quoted statement from the Draft CC Guidelines appears to be less strict than the standard set forth in the ancillary restraints defense, discussed in Part IV(B)(e)(i) below. Notwithstanding the significant effort that has been made in the Draft CC Guidelines to clarify the meaning of these standards and the approach that the Bureau intends to adopt with respect to various types of agreements, uncertainty remains regarding both the interpretation that will be given to the “implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture” standard set forth in the Draft CC Guidelines as well as the standard that is set forth in the ancillary restraints defense.

Accordingly, parties to agreements that may restrict pricing, sales, territories, customers, markets, or output should exercise caution and familiarize themselves with the Draft CC Guidelines before implementing their agreement. And given the significantly increased risk associated with the shift to a *per se* approach and the increases in maximum fines and jail terms in section 45, compliance programs under the Act should be revisited and reinforced, particularly in industries that are experiencing difficulties as a result of the current economic downturn.²⁰

MEANING OF THE TERM “COMPETITOR.” A “competitor” is defined in the amended subsection 45(8) as including “a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything” described in paragraphs 45(1) (a) to (c). It is not yet clear how this test will be applied. However, this element of the new offense in subsection 45(1) will have to be established on the criminal burden of proof, namely, “beyond a reasonable doubt.” This may make it difficult for the prosecution to establish that the test is met by two persons who do not actually compete, but who are merely *potential* competitors.

The Draft CC Guidelines note that “where parties compete only with respect to products that are not subject to the agreement, this is not sufficient to establish that the parties are competitors for the purposes of section 45.”²¹ That document adds that “the Bureau does not consider a supplier of a customer to be a competitor of a customer in respect of the product being supplied.”²² This is intended to make it clear that the Bureau will not pursue dual-distribution or franchise

¹⁸ Draft Process Guidelines, *supra* note 6, at i, § 1.3.

¹⁹ See Melanie L. Aitken, Interim Comm’r of Competition, Competition Bureau Canada, Speaking Notes for an Address, Canadian Bar Ass’n Competition Law 2009 Spring Forum (May 12, 2009), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>.

²⁰ These difficulties may prompt rivals or employees to succumb to the temptation to pursue cooperative solutions that violate section 45. See Draft CC Guidelines, *supra* note 4, at 40 (within Example 3).

²¹ *Id.* § 2.3(a).

²² *Id.* § 2.3(c).

agreements under section 45, so long as they are “between a single supplier and a single distributor” or between a franchisor and a franchisee, provided that the supplier/franchisor has not been requested or coerced to act by other distributors/franchisees.²³

Significantly, the Draft CC Guidelines state:

[T]he Bureau may not engage in a detailed definition of the relevant market [and will generally conclude that the parties are in competition with each other where they] are offering, or contemplating the offer of, the same or otherwise competing goods or services in the same or otherwise competing regions.²⁴

PRICE FIXING. The term “price” is defined in subsection 45(8) to include “any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.” Regarding the meaning of the words “fix, maintain, increase or control the price for the supply of the product” in paragraph 45(1)(a), the Draft CC Guidelines state:²⁵

In the Bureau's view, this [language] includes agreements to fix prices at a predetermined level, to eliminate or reduce discounts, to increase prices, to reduce the rate or amount by which prices are lowered, to eliminate or reduce promotional allowances and to eliminate or reduce price concessions or other price-related advantages provided to customers. For paragraph 45(1)(a) to be applicable, the agreement need not establish an actual price for the relevant goods or services. Rather, this section also prohibits agreements between competitors on methods of establishing prices or other indirect forms of agreements to fix or increase the price paid by customers. Such price-fixing agreements could include agreements between competitors to use a common price list in their negotiations with customers, agreements to apply specific price differentials between grades of products, agreements to apply a pricing formula or scale and agreements not to sell products below cost. In addition, the Bureau interprets paragraph 45(1)(a) as applying to agreements between competitors on a component of a price, such as a surcharge or credit terms.

Importantly, the Draft CC Guidelines confirm that section 45 does not apply to joint purchasing agreements.²⁶

In the hypothetical illustrative examples section of the Draft CC Guidelines, it is suggested that output exchange and swap agreements (such as those commonly used in the petroleum sector) will be assessed under the new civil provision in section 90.1 of the Act, rather than under section 45.²⁷ However, the Draft CC Guidelines do not provide much guidance regarding other types of arrangements that could raise issues under paragraph 45(1)(a), including cooperative advertising or other forms of co-marketing agreements, IP licensing agreements, airline code-sharing agreements, lending syndicates, and the joint underwriting of insurance. In the section of the Draft CC Guidelines dealing with the new civil provision in section 90.1 of the Act, the Draft CC Guidelines caution that information exchange agreements “which assist competitors in monitoring each other's prices or conduct otherwise consistent with the existence of an agreement may be sufficient to prove that an agreement was concluded between the parties for the purpose of subsection 45(1) of the Act.”²⁸

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* § 2.4(a).

²⁶ *Id.*

²⁷ *Id.* at 47–49 (within Examples 10 and 11).

²⁸ *Id.* § 3.7.

MARKET, CUSTOMER, SALES, AND TERRITORIAL ALLOCATION. On their face, the words “allocate sales, territories, customers or markets for the production or supply of the product” are fairly straightforward. According to the Draft CC Guidelines, “[t]he prohibition in paragraph 45(1)(b) applies to agreements to not compete with respect to direct sales to distributors, resellers or customers, as well as agreements entered into by suppliers to not compete in respect of indirect sales that are made through distributors or resellers.”²⁹ As noted above, the Bureau has confirmed in the Draft CC Guidelines that it does not intend to apply this provision to dual distribution agreements.³⁰

OUTPUT RESTRICTIONS. Paragraph 45(1)(c) applies to all agreements “to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.” In the Bureau’s view, in addition to garden-variety output agreements, this language captures agreements that reduce the quantity of products supplied to specific customers or groups of customers as well as agreements to permanently or temporarily close manufacturing facilities.³¹

The Draft CC Guidelines are not particularly helpful regarding agreements that typically would not be considered to constitute hard-core cartel conduct but which could raise issues under this provision, such as standard-setting agreements and JV agreements that place restrictions on the production or supply of products to be produced by the JV.

STATUTORY DEFENSES AND EXEMPTIONS.

1. Ancillary Restraints. To deal with agreements that only incidentally fix prices or otherwise fall within the scope of one of the three categories of agreements described above, a new “ancillary restraints” defense has been included in subsection 45(4). This defense would apply where a party to an impugned agreement can establish, on the balance of probabilities, that the agreement (i) is ancillary to a broader or separate agreement or arrangement that includes the same parties, and (ii) is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement. In addition, it would have to be established that the broader or separate agreement, considered alone, does not itself fall within the scope of any of the three aforementioned categories. The Draft CC Guidelines state that “the broader or separate agreement must include all of the parties to the agreement containing the ancillary restraint.”³² It may be noted that agreements meeting the requirements of this defense might still be reviewed under the new civil provision in section 90.1, discussed below.

Regarding the requirement that the restraint must be “directly related to, and reasonably necessary for giving effect to the objective of [a] broader or separate agreement or arrangement,” the Draft CC Guidelines note that “it is not adequate merely to establish that the participants would not enter into the broader agreement in the absence of the challenged restraint.”³³ In addition, “[w]here there are significantly less restrictive alternatives available to the parties, the parties must demonstrate why such alternatives were infeasible or inadequate.”³⁴ In this regard, “[i]f the par-

To deal with agreements that only incidentally fix prices or otherwise fall within the scope of one of the three categories of agreements described above, a new “ancillary restraints” defense has been included in subsection 45(4).

²⁹ *Id.* § 2.4(b).

³⁰ *See also id.*

³¹ *Id.* § 2.4(c).

³² *Id.* § 2.5(b). The Draft CC Guidelines add that the “Bureau interprets ‘ancillary’ to mean that the restraint is a part of an agreement or is a separate agreement that is functionally incidental or subordinate to the main objective of some broader agreement.” *Id.*

³³ *Id.* § 2.5(c).

³⁴ *Id.*

ties could have achieved an equivalent or comparable arrangement through practical, less restrictive means that were reasonably available to the parties at the time when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary.”³⁵ These means include provisions of lesser duration, narrower product scope, or narrower geographic scope. However, “the Bureau will not ‘second guess’ the parties with reference to some other restraint that may have been less restrictive in some insignificant way” or that may be “theoretically less restrictive . . . [but] not practical given the business circumstances.”³⁶

The Draft CC Guidelines attempt to further reduce the ambiguity inherent in the language of the ancillary restraints defense by stating that the following types of restraints will not be assessed under section 45:³⁷

- Garden-variety non-compete clauses that are used in employment agreements and asset/share purchase agreements.
- Non-compete provisions between the parent undertakings and a joint venture, where such provisions apply only to the products, services, and territories covered by the joint venture agreement.³⁸
- Agreements between competitors to charge a common price in a blanket license agreement for artistic works.
- Provisions in merger agreements that require the vendor to abstain from making material changes to its business pending consummation of the merger.

In addition, the Draft CC Guidelines state that the following types of conduct will not be pursued under the new section 45:

- Bid rigging, which will be assessed under the specific bid-rigging provision in section 47 (which only applies in particular circumstances)³⁹ or under the new civil provision in section 90.1.⁴⁰
- Mergers—transactions falling within the definition of a “merger” in section 91 of the Act will be assessed under the merger provisions in section 92.⁴¹
- Conduct that the Bureau communicates to the parties will be reviewed under section 90.1, provided there is no material change in circumstances.⁴²

Notwithstanding the efforts made in the Draft CC Guidelines to reduce the uncertainty inherent in the language of the ancillary restraints defense, uncertainty remains.⁴³

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* § 2.5.

³⁸ However, the part of the Draft CC Guidelines dealing with the new civil provision in section 90.1 of the Act addresses restraints of this type (and others) that may be imposed in joint production agreements. This suggests that the Bureau may not contemplate pursuing restrictive provisions in JV agreements under section 45. *Id.* § 3.9(c). Unfortunately, the part of the Draft CC Guidelines dealing with ancillary restraints is silent with respect to territorial or other restrictions that may be imposed by the parents of the JV upon the joint venture itself.

³⁹ For example, section 47 does not apply to any agreement that is made known to the person calling for or requesting bids or tenders, at or before the time when any bid or tender is made by any person who is a party to the agreement. Among other things, this “out” allows for consortia to submit bids in response to calls for tenders.

⁴⁰ Draft CC Guidelines, *supra* note 4, § 1.2 (d). *Cf. supra* note 3.

⁴¹ *Id.* § 1.2 (a).

⁴² *Id.* § 1.3. However, the converse does not apply. If the Bureau refers a matter to the Director of Public Prosecutions (DPP) for prosecution and the DPP declines to prosecute, the Draft CC Guidelines state that “the Bureau may choose to re-evaluate whether the agreement should be subject to a remedy under the civil provisions in Part VIII of the Act.” *Id.*

⁴³ *See, e.g., supra* text following note 27.

2. Agreements Between Affiliates. Paragraph 45(6)(a) provides an exception for agreements that are “entered into only by companies each of which is, in respect of every one of the others, an affiliate.”

The term affiliate is defined in subsection 2(2) of the Act. For corporations, one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled (in the de jure sense) by the same person. If two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other.

While the provisions in subsection 2(2) dealing with the definition of control address partnerships and sole proprietorships, the exemption in paragraph 45(6)(a) is limited to corporations. Therefore, significant caution needs to be exercised when considering agreements involving one or more non-corporate entities, such as agreements between two or more partnerships within a private equity group. The Bureau appears to recognize the significant potential practical difficulties that may result from this limitation in paragraph 45(6)(a). In this regard, the Draft CC Guidelines state that “the Bureau will consider the nature of any common control or corporate relationship between [other entities such as partnerships or trusts, or between individuals] when determining whether referral of an agreement for prosecution is appropriate.”⁴⁴

3. Regulated Conduct. Another new defense, set forth in subsection 45(7) of the Act, states that “the rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defense to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under” the new prohibition. The Draft CC Guidelines state that this “clarifies that the removal of the term ‘unduly’ from section 45 and other changes implemented through the 2009 amendments do not impact upon the availability of the regulated conduct defense.”⁴⁵ This statement was specifically directed at the Supreme Court of Canada’s 2003 decision in *Garland v. Consumers’ Gas Co.*,⁴⁶ which can be read as suggesting that the regulated conduct defense cannot be invoked in respect of prohibitions (such as those set forth in the amended section 45) which make it per se illegal to enter into certain types of agreements, and which do not contain any “lessening of competition,” “public interest” or other test that would provide “leeway” to a court. The Draft CC Guidelines further note that the Bureau will continue to apply the approach to regulated conduct set forth in its Technical Bulletin on “Regulated” Conduct.⁴⁷

4. Other Defenses and Exemptions. The amended section 45 also contains an exemption for agreements between federal financial institutions that are described in subsection 49(1) of the Act⁴⁸ and a defense for export agreements. In addition, the general exceptions in sections 4 (collective bargaining), 4.1 (travel agents), 5 (underwriters) and 6 (amateur sport) of the Act continue to exist.

⁴⁴ *Id.*

⁴⁵ *Id.* § 2.6(d).

⁴⁶ *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 629, available at <http://csc.lexum.umontreal.ca/en/2004/2004scc25/2004scc25.html>.

⁴⁷ Draft CC Guidelines, *supra* note 4, § 2.6(d).

⁴⁸ There remains some uncertainty about whether the amended section 45 applies to agreements between federal financial institutions that are described in subsection 49(2) of the Act.

**[S]ignificant caution
needs to be exercised
when considering
agreements involving
one or more non-
corporate entities,
such as agreements
between two or more
partnerships within a
private equity group.**

The New Civil Track. Agreements between competitors that do not fall within one of the three narrowly circumscribed categories of agreement defined in the new criminal prohibition will no longer be subject to criminal liability. Instead, they will be reviewable only under a new civil provision in Section 90.1 of the Act that would require the Commissioner to demonstrate, on the balance of probabilities, that the agreement “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.” Where this can be established, the Tribunal’s powers will be limited to (i) prohibiting any person, whether or not a party to the agreement or arrangement, from doing anything under the agreement or arrangement; or (ii) requiring any person, whether or not a party to the agreement or arrangement, with the consent of that person and the Commissioner, to take any other action. The Tribunal will not be able to impose any monetary penalty or any other relief.

Significantly, this new civil provision would contain essentially the same non-exhaustive list of assessment criteria, the same prohibition on making a finding solely on the basis of evidence of concentration or market share, and the same exceptions for transactions among affiliates and for gains in efficiency as currently exist in the merger provisions of the Act. Presumably, this is intended to establish a symmetric approach to mergers, strategic alliances, and other forms of cooperation between competitors, without in any way biasing the regulatory framework in favor of a particular form of cooperation. In addition, the new civil provision contains essentially the same exception for “export agreements” as exists in the existing section 45. The term “competitor” is defined in essentially the same terms in the new civil provision as in the new criminal provision.

Consistent with the symmetric approach taken by the Act to mergers and other forms of cooperation between competitors, the Draft CC Guidelines set forth an analytical framework that is very similar to, and often incorporates by reference, the framework set forth in the Bureau’s Merger Enforcement Guidelines.⁴⁹ This includes the adoption of the same key test of whether an arrangement is likely to create, maintain, or enhance the ability of the parties to exercise market power, and the adoption of the same market share (35 percent) and concentration (CR4 of 65 percent, and 10 percent for the parties to the arrangement) safe harbors.⁵⁰

The Draft CC Guidelines then provide guidance on the following six “common forms of agreements between competitors”: commercialization agreements, information sharing agreements, research and development agreements, joint production agreements, joint purchasing agreements, and non-compete agreements.⁵¹

Vertical and Other Agreements. The existing wording of the basic conspiracy provisions in section 45 of the Act is not confined to agreements between competitors. It extends to agreements, arrangements, conspiracies, and combinations between any two or more persons. As noted above, the new dual-track approach will be confined to agreements, arrangements, or conspiracies between competitors. Therefore, other types of agreements (e.g., vertical agreements between suppliers and customers, or benchmarking agreements between parties who are not in a vertical or competitive relationship) will no longer be subject to review under the Act unless they fall within the scope of another provision, such as the provisions relating to tied selling, exclusive dealing, market restriction, or abuse of dominance.⁵²

⁴⁹ Merger Enforcement Guidelines, *supra* note 15.

⁵⁰ Draft CC Guidelines, *supra* note 4, § 3.4(a) and (b).

⁵¹ *Id.* §§ 3.6–3.11.

⁵² This is confirmed in the Draft CC Guidelines. *Id.* § 1.1(c).

The New U.S.-Style Merger Review Process

The adoption of a U.S.-style two-stage merger review process is perhaps the most controversial of the recent amendments to the Act.

The move to a two-stage merger review process reflects the Panel's recommendation that the former premerger review regime in the Act be aligned more closely with the process under the U.S. Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). To effect the Panel's recommendation, the amendments establish an initial waiting period of thirty days following which the parties can close their transaction, provided that the Commissioner has not unilaterally exercised her discretion to extend the waiting period by issuing a notice (SIR) requiring the notifying party "to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction." If a SIR is issued, the waiting period is extended to thirty days after the submission of the responses to the SIR and a certificate stating that the information supplied is, to the best of the certifying person's knowledge and belief, "correct and complete in all material respects." Upon the expiration of this second waiting period, the merging parties are free to close their transaction unless the Commissioner obtains a temporary, interim, or permanent order to prevent or delay the closing.

Senior Bureau officials have stated repeatedly that SIRs will only be sought in respect of a "very few" transactions per year.⁵³ It would be prudent to expect that a SIR will be sought in respect of any transaction that is likely to be classified as "very complex" under the Bureau's non-binding service standards policy, which currently is under review and may be streamlined from the existing three categories ("non-complex," "complex," and "very complex") to two categories, to reflect the two-stage framework of the new regime.

At this early stage, it would be prudent to expect that the total time required by the Bureau to review transactions in respect of which a SIR is issued may be somewhat greater than the current maximum five-month non-binding period applicable to "very complex" transactions under the Bureau's current service standards.

To minimize the potential that a SIR may be issued, the Draft Process Guidelines strongly encourage merging parties to engage in early consultations with the Bureau.⁵⁴ Parties also would be well advised to provide detailed voluntary submissions that include persuasive objective support for important positions being taken in those submissions, in accordance with well-established practice in Canada.

The information to be submitted in the initial notification will be "prescribed" in amendments to the Notifiable Transactions Regulations. Proposed amendments to those regulations were published for public comment on April 4, 2009.⁵⁵ Among other things, those amendments propose to eliminate the former long-form notification requirements and expand the former short-form notification requirements (which now become the new initial notification requirements) to include (i) copies of the legal documents, or the most recent drafts of unexecuted documents, that are to

The move to a two-stage merger review process reflects the Panel's recommendation that the former premerger review regime in the Act be aligned more closely with the process under the U.S. Hart-Scott-Rodino Antitrust Improvements Act.

⁵³ Aitken, *supra* note 19. This seems to mean approximately four to six transactions per year, although the author understands that there have already been four SIRs issued in the first three months since the amendments were proclaimed into force. *See, e.g.*, Hansard, Proceedings of the Standing Committee on National Finance, Wednesday Mar. 11, 2009, available at http://www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/fin-e/03evb-e.htm?Language=E&Parl=40&Ses=2&comm_id=13 (Collette Downie, a former Deputy Commissioner of Competition, stated: "The expectation is that, on average, about four to six transactions [per year] will be affected by [the SIR] process."). *Cf.* Draft Process Guidelines, *supra* note 6, at 4.

⁵⁴ Draft Process Guidelines, *supra* note 6, at 4–5, 8.

⁵⁵ Regulations Amending the Notifiable Transactions Regulations, *supra* note 5.

be used to implement the proposed transaction, and (ii) documents that currently are described in item 4(c) of the HSR Act form.⁵⁶

As to the content of SIRs, the Act simply states that they “shall specify the particular additional information or classes of additional information that are to be supplied.” Given the Bureau’s resource limitations and its familiarity with the U.S. experience, it is not expected that the scope of SIRs will be as extensive as those typically issued in the United States. The Draft Process Guidelines support this view. Among other things, they state that the “Bureau is committed to minimizing the parties’ burden in complying with a [SIR] by narrowing the issues and/or the requirements for additional data and records to the extent reasonably possible.”⁵⁷ To this end, they identify various “steps, evaluative factors, and challenge mechanisms that, subject to certain exceptions, will be followed in all cases.”⁵⁸ They also commit to “communicat[ing] initial substantive evaluations of the issues identified” as soon as possible within the initial thirty-day review period.⁵⁹

In addition, the Draft Process Guidelines encourage pre-issuance dialogue to explore how the SIR can reasonably be narrowed before its issuance and to discuss the likely date of its issuance, the anticipated timing for updates on the status of the Bureau’s review and its interim and final assessments, the dates by which the Bureau will identify employees or agencies of the parties that it wishes to interview, the date by which the parties anticipate that they will comply with the SIR, and the date by which the Bureau will provide a preliminary assessment as to whether the parties have complied with the SIR.

The Draft Process Guidelines also identify a number of “generally applicable scope restrictions” for SIRs that will apply “in all but exceptional cases.”⁶⁰ These include:

- limiting the number of custodians to be searched in preparing a response to a SIR to thirty individuals—although this will not exempt production of records in central files, employees at the local level where multiple local markets are relevant to the merger review, or predecessors, successors, secretaries, and assistants of the thirty identified custodians;
- limiting the search period for (i) hard copy and electronic records to two years from the date of the SIR; and (ii) data requests to three years from the date of the SIR;⁶¹ and
- not requiring back-up tapes/media where sufficient records can be obtained through less onerous means.

⁵⁶ The language in the draft regulations tracks fairly closely the language of item 4(c) of the HSR Act form and may be further revised to eliminate some or all of the remaining inconsistencies. The two-stage merger review regime is in force even though amended regulations reflecting the new provisions have not yet been issued. Section 124 of the Act requires that any regulations relating to merger notification be published in draft form and be open for comment for at least sixty days. By virtue of the Federal Interpretation Act, since the existing regulations under sections 114 and 116 likely are considered “reasonably workable” for an interim period in the context of the new regime, the fact that amended regulations are not yet available has not delayed the introduction of the new two-stage merger regime.

⁵⁷ Draft Process Guidelines, *supra* note 6, at 4.

⁵⁸ *Id.*

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 8–11.

⁶¹ The distinction between these two categories remains somewhat unclear. At a public consultation meeting in Toronto on May 4, 2009, senior Bureau officials suggested that the first category contemplates documents and records with written material whereas the second category contemplates documents and records that are essentially “just numbers.”

Moreover, with respect to information and documents provided to a foreign agency, the Draft Process Guidelines state:

The Bureau will accept access to and copies of information and documents produced to a foreign agency as compliance with the relevant terms of a [SIR] (to the extent such information and documents are responsive), provided parties agree that information and documents received in this manner will be treated for all purposes “as if” provided directly to the Bureau and the parties do not impose restrictions on the use of such documents that are unacceptable to the Bureau.⁶²

Importantly, the ability

of the Commissioner

to issue an advance

ruling certificate (ARC)

has been retained.

If issued, an ARC

exempts a transaction

from the notification

regime and effectively

immunizes the

transaction from further

challenge, unless

substantially new facts

come to the Bureau’s

attention.

The Bureau also has committed in the Draft Process Guidelines to establishing an internal review committee to assess the scope of draft SIRs, consider departures from the aforementioned self-imposed restrictions, and generally scrutinize the propriety of the SIR in the circumstances. In addition, the Bureau has committed to establishing an internal appeal procedure to deal with any disputes as to the scope of a SIR or the issue of compliance with the SIR.⁶³ Where the Bureau remains of the view that the parties have not complied with a SIR, the Commissioner may apply to a court for a determination of this issue. In such a proceeding, the burden presumably would be on the Commissioner to demonstrate non-compliance. Pursuant to section 123.1 of the Act, if non-compliance is established and the court determines that a person “without good and sufficient cause, the proof of which lies on the person, has completed or is likely to complete a proposed transaction before the end of the applicable period,” the court may make an order prohibiting the completion of the transaction, requiring a completed transaction to be dissolved or requiring the payment of an AMP up to a maximum of \$10,000 for each day on which the parties have failed to comply (in the case of a completed transaction).

Importantly, the ability of the Commissioner to issue an advance ruling certificate (ARC) has been retained. If issued, an ARC exempts a transaction from the notification regime and effectively immunizes the transaction from further challenge, unless substantially new facts come to the Bureau’s attention.⁶⁴ However, as a practical matter, an ARC typically is issued only where it is very clear that a transaction is not likely to have any adverse impact on competition whatsoever (i.e., in precisely those circumstances in which an ARC arguably is not necessary).⁶⁵

Given that the Commissioner retains the ability to challenge a transaction post-closing, albeit only for one year following the substantial completion of a merger (as opposed to the former three-year period that existed prior to these amendments), merging parties can be expected to continue to seek an ARC in a range of situations (including where their lenders insist on receiving such pre-closing comfort). Indeed, merging parties also may continue the customary practice of seeking a “no action” letter in the event that an ARC is not granted (or even if an ARC is not requested), particularly given that the Bureau has begun under the new system to issue notices at the end of the initial waiting period stating that it has not yet completed its review (even though

⁶² Draft Process Guidelines, *supra* note 7, at 12.

⁶³ Pursuant to this procedure, the “independent” internal reviewer (who will be a Senior Deputy Commissioner or Deputy Commissioner of a branch of the Bureau other than the Mergers Branch) may request additional information from the appealing party within five business days of receipt of the written appeal, and will render a decision within seven days after the party has provided all of the requested information. *Id.* at 13–14.

⁶⁴ It does not appear that the Bureau has ever challenged a transaction with respect to which an ARC previously had been issued, although in at least one case the Bureau reopened its file after substantially different facts than those which formed the basis for the issuance of the ARC came to its attention.

⁶⁵ COMPETITION BUREAU CANADA, FEE AND SERVICE STANDARDS HANDBOOK (2003), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01338.html>.

it has not issued a SIR). Seeking an ARC or “no action” letter also may be considered to be prudent in light of the Interim Commissioner’s commitment to developing a “Made in Canada” approach to the SIR process that incorporates a degree of flexibility not present in the U.S. system.⁶⁶

AMPs for Abuse of Dominance

Another important change brought about by the amendments is the creation of a new power for the Competition Tribunal to impose AMPs of up to \$10 million—\$15 million for subsequent orders—with respect to any conduct that is found to constitute an abuse of dominance and is the subject of another order under the abuse of dominance provisions. It is not clear why the issuance of such other order (which can include any of the types of order that the Tribunal has been able to impose since the abuse of dominance provisions were added to the Act in 1986) is a precondition to the issuance of an AMP. Perhaps it was simply a case of minimizing the changes to the pre-existing language in paragraph 79(3.1), which allowed the Tribunal to impose an AMP against a dominant airline carrier.

In any event, the factors that the Tribunal was required to take into account under section 79(3.2) in determining the amount of an AMP that might be imposed against a dominant airline carrier have been retained (for general application to all industries) with minor modification. Those factors are as follows:

- a. the effect [of the practice] on competition in the relevant market;
- b. the gross revenue from sales affected by the practice;
- c. any actual or anticipated profits affected by the practice;
- d. the financial position of the person against whom the order is made;
- e. the history of compliance with this Act by the person against whom the order is made; and
- f. any other relevant factor.

Importantly, subsection 79(3.3) states: “The purpose of an order made against a person under subsection 79(3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.”

The creation of this new power to impose an AMP of up to \$10 million (\$15 million for subsequent orders) will significantly increase the risk associated with engaging in conduct that may be found to constitute an abuse of dominance.⁶⁷ Accordingly, businesses that may be dominant will need to exercise greater caution when contemplating conduct that may later be found to (i) have been intended (on the basis of an objective test) to have an exclusionary, predatory, or disciplinary effect on a competitor, and (ii) have had, or be likely to have, the effect of preventing or lessening competition substantially.

Increased Penalties for Deceptive Marketing Practices

The amendments increase the maximum prison term that can be imposed under the criminal misleading advertising provisions of the Act from 5 years to 14 years; and for corporations, increase the maximum AMPs under the civil provisions to \$10 million (\$15 for each subsequent violation), from \$100,000 (and \$200,000). For individuals the maximum AMPs have been increased to \$750,000 (\$1 million for each subsequent violation), from \$50,000 (\$100,000). These increases apparently are a response to complaints from U.S. authorities of widespread cross-border activ-

Seeking an ARC or “no action” letter also may be considered to be prudent in light of the Interim Commissioner’s commitment to developing a “Made in Canada” approach to the SIR process that incorporates a degree of flexibility not present in the U.S. system.

⁶⁶ See Aitken, *supra* note 19.

⁶⁷ Note that the Interim Commissioner has observed that AMPs will only be sought in “appropriate” cases. *Id.* at 6.

ities by Canadian-based companies targeting U.S. residents with marketing scams, in particular telemarketing scams. These changes, together with new injunction provisions, are expected to facilitate increased monitoring and prosecution of deceptive telemarketing practices in Canada.

Conclusion

The repeal of the criminal pricing practices formerly in paragraphs 50(1)(a) (price discrimination) and 50(1)(c) (predatory pricing), section 51 (promotional allowances) and section 61 (price maintenance) will provide non-dominant businesses with much greater flexibility to structure their pricing strategies and practices. The same is true regarding vertical and other non-horizontal agreements that may have been caught by the current language in section 45 of the Act, which will be replaced on March 12, 2010, by amended provisions that are confined to agreements between “competitors.” Indeed, the decriminalization of the approach to horizontal agreements other than the specific types of “hard-core” cartel agreements described in the amended section 45 also will give businesses much greater flexibility to pursue arrangements that otherwise may not have been pursued because of the potential criminal liability that they might have attracted.

However, the amendments create substantial new risks for engaging in hard-core cartel conduct and deceptive marketing practices. These risks should lead firms to be much more vigilant in adopting serious and effective compliance programs. They also should lead firms contemplating legitimate conduct that may unavoidably or unintentionally raise issues under the new per se provisions in section 45 to carefully consider how to restructure their plans to reduce the increased risk that now exists.

Similarly, given the new power conferred upon the Tribunal to impose substantial administrative monetary penalties under the abuse of dominance provisions of the Act, dominant firms will have to be careful not to engage in any pricing or other practices that could be found to contravene those provisions. As a practical matter, it is difficult to see how price discrimination or promotional allowances might be found to be likely to prevent or lessen competition substantially, as required by the abuse of dominance provisions. The same is arguably true, although perhaps to a lesser extent, of predatory pricing.

Finally, the amendments to the merger review process may require companies contemplating notifiable transactions to adapt their closing conditions and will require them to prepare for substantially increased filing requirements where there is a material risk of the issuance of a SIR. Those amendments also will require parties to such transactions to build into their transaction timeline much more time for the completion of the Bureau’s merger review process. ●