

Canada

AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF CANADA REGARDING THE APPLICATION OF THEIR COMPETITION LAWS¹²¹

THE EUROPEAN COMMUNITY AND THE EUROPEAN COAL AND STEEL COMMUNITY (the European Communities) of the one part and THE GOVERNMENT OF CANADA (Canada) of the other part (the Parties):

Considering the close economic relations between them;

Recognising that the world's economies, including those of the parties, are becoming increasingly interrelated;

Noting that the parties share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Acknowledging their commitment to enhancing the sound and effective enforcement of their competition laws through cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting that coordination of their enforcement activities may, in certain cases, result in a more effective resolution of the Parties' respective competition concerns than would be attained through independent enforcement action by the Parties;

Acknowledging the Parties' commitment to giving careful consideration to each other's important interests in the application of their competition laws and to using their best efforts to arrive at an accommodation of those interests;

Having regard to the Recommendation of the Organisation for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on 27 and 28 July 1995, and

Having regard to the Economic Cooperation Agreement between Canada and the European Communities adopted on 6 July 1976, to the Declaration on European Community-Canada Relations adopted on 22 November 1990 and to the Joint Political Declaration on Canada-EU Relations and its accompanying action plan adopted on December 17, 1996;

HAVE AGREED AS FOLLOWS:

1. Purpose and definitions

1. The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the Parties and to lessen the possibility or impact of differences between the Parties in the application of their competition laws.

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Signed on 17 June 1999. OJ L 175, 10.7.1999, p 49—Council and Commission decision of 29 April 1999 (1999/445/EC, ECSC)

2. In this Agreement, “anti-competitive activities” shall mean any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

“competent authority of a Member State” shall mean that authority of a Member State set out in Annex A. Annex A may be added to or modified at any time by the European Communities. Canada will be notified in writing of such additions or modifications before any information is sent to a newly listed authority;

“competition authority” and “competition authorities” shall mean:

(i) for Canada, the Commissioner of Competition appointed under the Competition Act, and

(ii) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities; “competition law or laws” shall mean:

(i) for Canada, the Competition Act and regulations thereunder, and

(ii) for the European Communities, Articles 85, 86, and 89 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations pursuant to the said Treaties including High Authority Decision No 2454, as well as any amendments thereto and such other laws or regulations as the parties may jointly agree in writing to be a “competition law” for the purposes of this Agreement, and “enforcement activity” shall mean any application of competition law by way of investigation or proceeding conducted by the competition authority of a Party.

3. Any reference in this Agreement to a specific provision in either Party’s competition law shall be interpreted as referring to that provision as amended from time to time and to any successive provisions.

II. Notification

1. Each Party shall notify the other Party in the manner provided by this Article and Article IX with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party and therefore ordinarily give rise to notifiable circumstances include those:

(i) that are relevant to enforcement activities of the other Party;

(ii) that involve anticompetitive activities, other than mergers or acquisitions, carried out wholly or in part in the territory of the other Party;

(iii) that involve conduct believed to have been required, encouraged or approved by the other Party or one of its provinces or Member States;

(iv) that involve a merger or acquisition in which:

- one or more of the parties to the transaction, or
 - a company controlling one or more of the parties to the transaction, is a company incorporated or organised under the laws of the other Party or one of its provinces or Member States,
- (v) that involve the imposition of, or application for, remedies by a competition authority that would require or prohibit conduct in the territory of the other Party, or
- (vi) that involve one of the Parties seeking information located in the territory of the other Party.

3. Notification pursuant to this Article shall ordinarily be given as soon as a competition authority becomes aware that notifiable circumstances are present, and in any event, in accordance with paragraphs 4 through 7 of this Article.

4. Where notifiable circumstances are present with respect to mergers or acquisitions, notification shall be given:

(a) in the case of the European Communities, when a notice is published in the Official Journal, pursuant to Article 4(3) of Council Regulation (EEC) No 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorisation from the Commission is required under that provision, and

(b) in the case of Canada, not later than when its competition authority issues a written request for information under oath or affirmation, or obtains an order under section 11 of the Competition Act, with respect to the transaction.

5. (a) When the competition authority of a Party requests that a person provide information, documents or other records located in the territory of the other Party, or requests oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the other Party, notification shall be given at or before the time that the request is made.

(b) Notification pursuant to subparagraph (a) of this paragraph is required notwithstanding that the enforcement activity in relation to which the said information is sought has previously been notified pursuant to Article II, paragraphs 1 to 3. However, separate notification is not required for each subsequent request for information from the same person made in the course of such enforcement activity unless the notified Party indicates otherwise or unless the Party seeking information becomes aware of new issues bearing upon the important interests of the notified Party.

6. Where notifiable circumstances are present, notification shall also be given far enough in advance of each of the following events to enable the other Party's views to be considered:

(a) in the case of the European Communities,

(i) when its competition authority decides to initiate proceedings with respect to the concentration, pursuant to Article 6(1)(c) of Council Regulation (EEC) No 4064/89;

(ii) in cases other than mergers and acquisitions, the issue of a statement of objections;
or

(iii) the adoption of a decision or settlement,

(b) in the case of Canada,

(i) the filing of an application with the Competition Tribunal,

(ii) the initiation of criminal proceedings,

(iii) the settlement of a matter by way of undertaking or consent order.

7. (a) Each Party shall also notify the other whenever its competition authority intervenes or otherwise participates in a regulatory or judicial proceeding, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to:

(i) regulatory or judicial proceedings that are public, and

(ii) intervention or participation that is public and pursuant to formal procedures.

(b) Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

8. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effects of the enforcement activity on its own important interests. Notifications shall include the names and addresses of the natural and legal persons involved, the nature of the activities under investigation and the legal provisions concerned.

9. Notifications made pursuant to this Article shall be communicated in accordance with Article IX.

III. Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party undertakes to consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. During consultations under paragraph 1, the competition authority of each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the matter under discussion.

IV. Coordination of enforcement activities

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent compatible with the assisting Party's laws and important interests.

2. In cases where both Parties' competition authorities have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, either in whole or in part, each Party's competition authority shall take into account the following factors, among others:

- (i) the effect of such coordination on the ability of each Party's competition authority to achieve the objectives of its enforcement activities;
- (ii) the relative ability of each Party's competition authority to obtain information necessary to conduct the enforcement activities;
- (iii) the extent to which either Party's competition authority can secure effective preliminary or permanent relief against the anticompetitive activities involved;
- (iv) the opportunity to make more efficient use of resources, and
- (v) the possible reduction of cost to persons subject to enforcement activities.

3. (a) The Parties competition authorities may coordinate their enforcement activities by agreeing on the timing of those activities in a particular matter, while respecting fully their own laws and important interests. Such coordination may, as agreed by the Parties' competition authorities, result in enforcement action by one or both Parties' competition authorities, as is best suited to attain their objectives.

(b) When carrying out coordinated enforcement activity, each Party's competition authority shall seek to maximise the likelihood that the other Party's enforcement objectives will also be achieved.

(c) Either Party may at any time notify the other Party that it intends to limit or terminate the coordination and pursue its enforcement activities independently and subject to the other provisions of this Agreement.

V. Cooperation regarding anticompetitive activities in the territory of one Party that adversely affect the interests of the other Party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party has reason to believe that anticompetitive activities carried out in the territory of the other Party are adversely affecting, or may adversely affect the first Party's important interests, the first Party may request that the other Party's competition authority initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the requesting Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authority is able to provide.

3. The requested Party shall consult with the requesting Party and the requested Party's competition authority shall accord full and sympathetic consideration to the request in deciding whether or not to initiate, or expand, enforcement activities with respect to the anticompetitive activities identified in the request. The requested Party's competition authority shall promptly inform the other Party of its decision and the reasons for that decision. If enforcement activities are initiated, the requested Party's competition authority shall advise the requesting Party of significant developments and the outcome of the enforcement activities.

4. Nothing in this Article limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the anticompetitive activities identified in the request, or precludes the requesting Party's competition authority from undertaking enforcement activities with respect to such anticompetitive activities.

VI. Avoidance of conflict

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party's important interests throughout all phases of competition enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, consistent with the general principles set out above, use its best efforts to arrive at an appropriate accommodation of the Parties competing interests and in doing so each Party shall consider all relevant factors, including:

(i) the relative significance to the anticompetitive activities involved of conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

(ii) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(iii) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;

(iv) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies including those expressed in the application of, or decisions under, their respective competition laws;

(v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

- (vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (vii) the location of relevant assets;
- (viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory;
- (ix) the need to minimise the negative effects on the other Party's important interests, in particular when implementing remedies to address anti-competitive effects within the Party's territory, and
- (x) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

VII. Exchange of information

1. In furtherance of the principles set forth in this Agreement, the Parties agree that it is in their common interest to share information which will facilitate the effective application of their respective competition laws and promote better understanding of each others enforcement policies and activities.
2. Each Party agrees to provide to the other Party on request such information within its possession as the requesting Party may describe that is relevant to an enforcement activity that is being contemplated or conducted by the requesting Party's competition authority.
3. In the case of concurrent action by the competition authorities of both Parties with a view to the application of their competition law, the competition authority of each Party shall, on request by the competition authority of the other Party, ascertain whether the natural or legal persons concerned will consent to the sharing of confidential information related thereto between the Parties competition authorities.
4. During consultations pursuant to Article III, each Party shall provide the other with as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of a particular transaction.

VIII. Semiannual meetings

1. In furtherance of their common interest in cooperation and coordination in relation to their enforcement activities, appropriate officials of the Parties' competition authorities shall meet twice a year, or otherwise as agreed between the competition authorities of the Parties, to: (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

2. A report on these semiannual meetings shall be made available to the Joint Cooperation Committee under the Framework Agreement for Commercial and Economic Cooperation between the European Communities and Canada.

IX. Communications under this Agreement

Communications under this Agreement, including notifications under Article II and requests under Articles III and V, may be carried out by direct oral, telephonic or fax communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles III and V, however, shall be confirmed promptly in writing through normal diplomatic channels.

X. Confidentiality and use of information

1. Notwithstanding any other provision of this Agreement, neither Party is required to disclose information to the other Party where such disclosure is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible, any application by a third party for disclosure of such information.

3. (a) The competition authority of the European Communities, after notice to the Canadian competition authority, will inform the competent authorities of the Member State or Member States whose important interests are affected of the notifications sent to it by the Canadian competition authority.

(b) The competition authority of the European Communities, after consultation with the Canadian competition authority, will inform the competent authorities of such Member State or Member States of any cooperation and coordination of enforcement activities. However, as regards such activities, the competition authority of the European Communities will respect the Canadian competition authority's request not to disclose the information which it provides when necessary to ensure confidentiality.

4. Before taking any action which may result in a legal obligation to make available to a third party information provided in confidence under this Agreement, the Parties competition authorities shall consult one another and give due consideration to their respective important interests.

5. Information received by a Party under this Agreement, apart from information received under Article II, shall only be used for the purpose of enforcing that Party's competition laws. Information received under Article II shall only be used for the purpose of this Agreement.

6. A Party may require that information furnished pursuant to this Agreement be used subject to the terms and conditions it may specify. The receiving Party shall not use such

information in a manner contrary to such terms and conditions without the prior consent of the other Party.

XI. Existing law

Nothing in this Agreement shall require a Party to take any action that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or Member States.

XII. Entry into force and termination

1. This Agreement shall enter into force on signature.
2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.
3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation. Attached to this Agreement are three letters exchanged between the Parties. These letters form an integral part of this Agreement.

STATEMENT BY THE COMMISSION

(regarding the information to be provided to the Member States)

In accordance with the principles which govern the relationship between the Commission and the Member States in the application of the Competition rules as enshrined, for example, in Council Regulation No 17, and in accordance with Article X(3) of the Agreement between the European Communities and Canada regarding the application of their competition laws,

- the Commission shall forward to the Member State or Member States whose important interests are affected the notification sent by the Commission or received from the Canadian competition authority. Member States shall be notified as soon as is reasonably possible and in the language of the exchange. Where the Commission sends information to the Canadian authorities, Member States shall be informed at the same time,
- the Commission shall also notify the Member State or Member States whose important interests are affected of any cooperation or coordination of enforcement activities, as soon as is reasonably possible.

For the purposes of this statement, it is considered that the important interests of a Member State are affected where the enforcement activities in question:

- (i) are relevant to enforcement activities of the Member State;

(ii) involve anticompetitive activities, other than mergers or acquisitions, carried out wholly or in part in the territory of the Member State;

(iii) involve conduct believed to have been required, encouraged or approved by the Member State;

(iv) involve a merger or acquisition in which:

- one or more of the parties to the transaction, or

- a company controlling one or more of the parties to the transaction,

is a company incorporated or organised under the laws of the Member State;

(v) involve the imposition of, or application for, remedies that would require or prohibit conduct in the territory of the Member State; or

(vi) involve the Canadian competition authority seeking information located in the territory of the Member State.

In addition, at least twice a year at meetings of government competition specialists, the Commission will inform all the Member States about the implementation of the Agreement, and particularly about the contacts which have taken place with the Canadian competition authority as regards the forwarding to the Member States of information received by the Commission under the Agreement.

EXCHANGE OF LETTERS

A. Letter to the Government of Canada

Dear...,

On..., the Council of the European Union and the Commission of the European Communities concluded the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws.

In order to ensure a clear understanding of the European Communities' interpretation of the Agreement, we set out below two interpretative statements.

1. In the light of Article XI of the Agreement, Article X(1) should be understood to mean that the information covered by the provisions of Article 20 of Council Regulation No 17 or by equivalent provisions in other regulations in the field of competition may not under any circumstances be communicated to the Canadian competition authority, save with the express agreement of the source concerned.

Similarly, the information referred to in Articles II(8) and VII of the Agreement may not include information covered by Article 20 of Regulation No 17 nor by equivalent provisions in other regulations in the field of competition, save with the express agreement of the source concerned.

2. In the light of Article X(2) of the Agreement, all information provided in confidence by either of the Parties in accordance with the Agreement will be considered as confidential by the receiving Party which should oppose any request for disclosure to a third

party unless such disclosure is (a) authorised by the Party supplying the information or (b) required under the law of the receiving Party.

This is understood to mean that:

- each Party assures the confidentiality of all information provided in confidence by the other Party in accordance with the receiving Party's applicable rules, including those rules intended to assure the confidentiality of information gathered during a Party's own enforcement activities,
- each Party shall use all the legal means at its disposal to oppose the disclosure of this information.

We also to confirm that, should a Party become aware that, notwithstanding its best efforts, information has accidentally been used or disclosed in a manner contrary to the provisions of Article X, that Party shall notify the other Party forthwith.

Would you kindly confirm by return letter whether this interpretation raises any difficulties with the Canadian Government.

Please accept, Sir, the assurance of our highest consideration.

For the European Community and for the European Coal and Steel Community

B. Reply from the Government of Canada

Dear Commissioner

Thank you for your letter dated (...). We are very pleased that the Agreement between the European Communities and the Government of Canada regarding the application of our respective competition laws has now been completed. The interpretative and other statements included in your letter are consistent with our understanding of the Agreement.

I would also like to confirm that, with respect to the application of Article XI, and for greater certainty, no information may be exchanged by Canada pursuant to this Agreement which could not have been exchanged in the absence of this Agreement. I would ask that you confirm your understanding to this effect by return letter.

We look forward to continuing and furthering our relationship of competition law cooperation as reflected in the Agreement and in our mutual conduct to date.

Please accept, Sir, the assurance of my highest consideration.

C. Reply to the Government of Canada

Dear...

Thank you very much for your letter dated... We confirm that your letter does not give rise to any difficulties for the European Communities.

We are extremely pleased that the Agreement between the European Communities and Canada has been completed and look forward to close cooperation in the future.

Please accept, Sir, the assurance of my highest consideration.

Provisions on international relations in EU competition policy

For the European Community and for the European Coal and Steel Community

OJ L 131, 15.6.1995, p. 38

OJ L 173, 18.6.1998, p. 26

OJ L 175, 10.7.1999, p. 49