



September 28, 2004

Antitrust Modernization Commission  
1001 Pennsylvania Avenue NW  
Suite 800 – South  
Washington, D.C. 20004-2505

Attention: Public Comments

On behalf of the National Competition Law Section of The Canadian Bar Association (the "CBA Competition Law Section"), I am pleased to submit comments regarding suggested antitrust issues for study by the Antitrust Modernization Commission in fulfilling its mandate under the *Antitrust Modernization Commission Act of 2002*.

Canada and the United States enjoy a special economic partnership; we enjoy the world's largest and most comprehensive trading relationship. Canada and the United States are one another's largest trading partner, with US\$1.2 billion in trade crossing the Canada-US border every day. The United States is the largest foreign investor in Canada and the most popular destination for Canadian investment. In light of this close economic relationship, any changes to U.S. antitrust law will have significant implications on Canadian businesses.

The CBA Competition Law Section would be pleased to assist the Commission in any comparative assessment of antitrust laws or consideration of international issues helpful to its mandate, whether it relates to the issues suggested for study by the CBA Competition Law Section, or otherwise.

We look forward to making a contribution to the work of the Commission in the coming years.

Sincerely,

Donald S. Affleck, Q.C.  
Chair, National Competition Law Section  
The Canadian Bar Association

**The Canadian Bar Association  
Competition Law Section  
Comments Regarding Commission Issues for Study  
by the Antitrust Modernization Commission**

Further to the invitation by the Antitrust Modernization Commission (the "Commission") for comments, the Competition Law Section of The Canadian Bar Association (the "CBA Competition Law Section") welcomes the opportunity to submit comments to the Commission regarding the antitrust issues that are appropriate for Commission study in fulfillment of its mandate under the *Antitrust Modernization Commission Act of 2002* to examine whether the need exists to modernize U.S. antitrust laws and to identify and study related issues. We strongly endorse a consultative approach to important policy initiatives such as the work of the Commission and we support the decision to seek public input on possible topics for study.

The CBA Competition Law Section's membership includes over 1,300 lawyers throughout Canada. Many of the members of the CBA Competition Law Section practise antitrust law and have experience with the effects that the application of U.S. antitrust law can have on their clients that carry on business in Canada.

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**Proposed Issue:** How can the United States best manage the challenge of national antitrust enforcement in the context of global markets?

*Why this issue merits Commission study:*

As barriers to international trade and investment fall around the world, commerce has become more globalized. At the same time, there has been a proliferation of antitrust law regimes around the world. This dynamic has given rise to the potential for friction between national antitrust regimes.

The CBA Competition Law Section proposes an examination of conflict between U.S. and foreign antitrust laws. This examination would include, but not necessarily be limited to, the following:

- An examination of whether the U.S. Congress should clarify the reach of the U.S. antitrust laws to non-U.S. commerce in light of the recent U.S. Supreme Court decision in *Empagran*.<sup>1</sup> The Supreme Court decision did not settle the issue of whether a foreign purchaser could sue in a U.S. court for antitrust damages relating to foreign injury. The Supreme Court said that such an action would be possible where a connection exists between the foreign claim and the domestic injury, although it did not specify how much of a link must exist to give rise to an antitrust claim in U.S. courts. The ability to sue in a U.S. court for antitrust damages relating to foreign injury may impede antitrust enforcement in Canada for example, as the benefits of co-operating with the Canadian

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<sup>1</sup> *F. Hoffmann-LaRoche Ltd v. Empagran SA*, 124 S. Ct. 2359 (2004).

authorities (either by way of an immunity/leniency application or by voluntarily entering a guilty plea) may, in cross-border markets, be outweighed by the possibility of being sued in the U.S. for treble damages on global commerce (as opposed to just U.S. commerce). The issue might be best illustrated by the example of a Canadian company that decides not to sell its products into the U.S. for fear that even a small level of U.S. sales could constitute a significant enough connection between possible claims of Canadian and other foreign customers to allow them to sue in the U.S. for treble damages (which would not otherwise be available). In such a case, aggressive extraterritorial reach could limit international trade and have the perverse effect of reducing competition in the U.S. by excluding foreign suppliers.

- A reexamination of the notion of international comity as a possible solution to inconsistency or friction between antitrust regimes.<sup>2</sup> In the United States, the principle of international comity has not typically been recognized as a principle of international law, but has been used as a matter of administrative discretion in international enforcement.<sup>3</sup> The principle of comity could be revived to resolve frictional issues between different antitrust regimes.

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We hope that you find the above comments to be of assistance. The CBA Competition Law Section would welcome the opportunity to provide follow-up information and participate in further activities of the Commission once it has chosen topics for further study.

September 28, 2004

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<sup>2</sup> International comity is a principle of international law that reflects "the broad concept of respect among co-equal sovereign nations and plays a role in determining 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" See *Antitrust Enforcement Guidelines for International Operations*, Issued by the U.S. Department of Justice and the Federal Trade Commission, April 1995, citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) at p. 20.

<sup>3</sup> *Ibid.*