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Amendments to *Competition Act* and *Investment Canada Act*

April 22, 2009

George Addy
John Bodrug

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OVERVIEW OF AMENDMENTS – BILL C-10

- Federal Government Budget Implementation Bill
- Received royal assent on March 12, 2009
- Includes significant changes to *Competition Act* and *Investment Canada Act* (ICA)

CHANGES TO *COMPETITION ACT* AND *INVESTMENT CANADA ACT* – HIGHLIGHTS

Competition Act

- Dual-track "conspiracy" provisions
- Bid-rigging provisions expanded
- Administrative monetary penalties (AMPs) for abuse of dominance
- Price maintenance and refusal to supply provisions decriminalized
- Price discrimination, predatory pricing and promotional allowances provisions repealed
- Restitution and asset freeze powers for misleading advertising
- New merger review process

Investment Canada Act

- Increased general net benefit review thresholds for acquisitions by WTO investors
- New national security review process
- Minister may now demand extensive information for ICA reviews

CHANGES TO *COMPETITION ACT* AND *INVESTMENT CANADA ACT* – WHAT IT MEANS

- Uncertain legal status of many agreements with competitors, such as JVs and buying groups
  - Greater risk of private litigation
- Greater flexibility for price discrimination, low pricing and resale price maintenance
- Greater risks for exclusionary conduct by dominant firms
- Mergers
  - Longer, costlier, less certain *Competition Act* reviews
  - Fewer general net benefit reviews under the ICA, but uncertain scope to new national security review

New Prohibition on Certain Agreements with Competitors – *Competition Act*

AGREEMENTS WITH COMPETITORS – OVERVIEW

- Existing conspiracy provisions replaced with a *per se* criminal offence and civil provisions:
  - *Per se* criminal offence prohibits agreements between competitors relating to price, supply or market allocation
  - Civil provisions apply to any agreements between competitors that have the effect of lessening competition substantially, in which case the Commissioner could apply for a remedial order
  - These changes come into force on March 12, 2010

AGREEMENTS WITH COMPETITORS – *PER SE* CRIMINAL OFFENCE

- *Per se* criminal offence applies to agreements between competitors to:
  - Fix or increase prices
  - Fix or lessen production or supply levels of a product/service
  - Allocate sales, customers or territories
- Will <u>not</u> require evidence that competition has been lessened or allow for an efficiencies defense
- Defense available if the agreement is <u>ancillary</u> to and reasonably <u>necessary</u> for a broader and legal agreement between the same parties
- Maximum penalties increased to 14 years imprisonment and/or $25 million fine
- Even if the Bureau does not prosecute, risk of civil damages, avoidance of contracts on basis of illegality

AGREEMENTS WITH COMPETITORS – *PER SE* CRIMINAL OFFENCE – WHAT IT MEANS

- Agreements with competitors that are legal today could have uncertain legal status under the new *per se* criminal offence
  - JVs
  - Lending Syndicates
  - Distribution Agreements
  - Non-compete/Restrictive Covenants
  - Swap Agreements
  - Joint Bidding
  - Franchise Agreements
  - IP Licenses
- Greater risk of private litigation
- Need legal review of existing agreements with competitors to assess legality and restructure where needed
- Bureau preparing guidelines

Changes to Pricing/Distribution/ Advertising Provisions of the *Competition Act*

CHANGES TO *COMPETITION ACT* – ABUSE OF DOMINANCE

- Tribunal permitted to order AMPs of up to $10 million for abuse of dominance (up to $15 million for subsequent orders)
- Abuse of dominance generally falls into two categories:
  - Exclusionary conduct that raises rivals' costs or reduces rivals' revenues
    - Exclusive dealing, tied selling and bundling
    - Pre-empting scarce facilities or resources
    - Margin squeezing of downstream competitor by vertically-integrated supplier
  - Predatory conduct
    - Offering products to customers at a loss, with the expectation of eliminating a competitor and later raising prices above competitive levels

CHANGES TO *COMPETITION ACT* – PRICING PRACTICES AND BID RIGGING

- Price maintenance and refusal to supply provisions decriminalized and subject to private actions before the Tribunal, in addition to Bureau enforcement
  - Lengthy process – adversarial litigation
  - Limited remedies – prohibition or mandatory supply
- Price discrimination, predatory pricing and promotional allowances provisions repealed – could still qualify as "abusive" behaviour, but no issue for non-dominant firms and competitive impact now required for any remedial order or AMP
- Bid-rigging provisions expanded to include agreement to withdraw an already-submitted bid
  - Maximum penalty now: 14 years imprisonment and fine in the discretion of the court
- These amendments became effective March 12, 2009

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Changes to Merger Review Process – *Competition Act*

NEW *COMPETITION ACT* MERGER REVIEW PROCESS – OVERVIEW

- Increased "size of transaction" threshold to $70 million for all transactions, with future increases tied to inflation ("party size" threshold remains at $400 million)
- New initial 30-day waiting period for notified mergers during which the Commissioner can issue a "second request" for information (in which case the waiting period is extended until 30 days after compliance)
- Commissioner can ask for any "relevant" information – no court or Tribunal order required
- U.S. experience suggests that the Commissioner is likely to issue massive information requests to create leverage and bargaining strength

NEW *COMPETITION ACT* MERGER REVIEW PROCESS – IMPLICATIONS

- Some mergers that had to be notified previously will no longer be subject to notification
- Longer, costlier, less certain *Competition Act* reviews for notifiable transactions
- Even easy reviews are likely to gravitate to the new initial 30-day timeline from the prior 2 week short-form waiting period
- Previous 42-day long-form review cases will be squeezed to 30 days with increased likelihood of triggering "second request"
- Faced with a costly "second request", some merging parties may either abandon a transaction or choose to negotiate divestitures or other remedies with the Bureau that would not necessarily be ordered by the Tribunal
- These amendments became effective March 12, 2009

NEW *COMPETITION ACT* MERGER REVIEW PROCESS – SECOND REQUESTS

- U.S. experience: "second request" process imposes massive costs and burdens on the parties and adds significant time delays:
  - Average Cost: US$5 million
  - Average Time: 6 to 7 months
  - Average Volume:
    - Number of custodians searched – 126
    - Pages of e-mail produced – 1,566,867
    - Pages of other electronic documents produced – 5,411,437
    - Pages of documents produced in hard copy – 1,515,662
    - Pages of interrogatory responses produced – 872
    - Gigabytes of electronic data produced in response to interrogatories – 20

Source: April 2007 *Final Report* of the U.S. Antitrust Modernization Commission at pages 152, 163 and 164.

Changes to

Investment Canada Act

INCREASED NET BENEFIT REVIEW THRESHOLDS

- Direct acquisitions of Canadian businesses (other than cultural businesses) by or from WTO investors will be reviewable only if the enterprise value of the Canadian business is equal to or greater than:
  - $600 million – first two years after amendments come into force
  - $800 million – third and fourth years after amendments come into force
  - $1 billion – fifth and sixth years after amendments come into force
  - Future increases tied to inflation
- These thresholds come into effect on a day to be fixed by the Governor in Council
  - Until then, such acquisitions are reviewable only if the book value of Canadian business' assets is equal to or greater than $312 million
- Immediate repeal of lower thresholds applicable to the transportation, financial services and uranium sectors
- Lower thresholds remain for cultural businesses
- Indirect acquisitions of Canadian business by WTO investors continue to be subject to only post-closing notification, rather than review

NATIONAL SECURITY REVIEW PROCESS

- New review process for investments that "could be injurious to national security"
  - Applies to minority investments
  - No minimum financial threshold
  - Time frames for government review to be prescribed, but closing prohibited during review
- No mandatory filing, no limitation period on government challenge
  - Amendments do not expressly contemplate voluntary clearance process
- Allows the Governor in Council to take any measures considered advisable to protect national security, such as prohibiting a non-Canadian from implementing an investment
- Applies to investments implemented on or after February 6, 2009
- "National security" – broad concept, not defined

CHANGES TO *INVESTMENT CANADA ACT* – SUMMARY

- Higher general foreign investment review thresholds – fewer general net benefit reviews
- New wide ranging power to review or block foreign investments with national security implications – scope of this power is uncertain

Appendix

Text of Key Provisions Relating to New Section 45 Offence – Agreements With Competitors

COMPETITION ACT SECTION 45

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

COMPETITION ACT
SECTION 45

(8) The following definitions apply in this section.

“competitor”

"competitor" includes 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 referred to in paragraphs (1)*(a)* to *(c)*.

“price”

“price” includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

COMPETITION ACT UNDERWRITERS EXEMPTION

(2) For the purposes of this section, "underwriting" of a security means the primary or secondary distribution of the security, in respect of which distribution

(*a*) a prospectus is required to be filed, accepted or otherwise approved pursuant to a law enacted in Canada or in a jurisdiction outside Canada for the supervision or regulation of trade in securities; or

(*b*) a prospectus would be required to be filed, accepted or otherwise approved but for an express exemption contained in or given pursuant to a law mentioned in paragraph (*a*).

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Fundamental Changes Made to Canadian Regulatory Legislation: What They Mean For You

On March 12, 2009, Bill C-10, the Canadian Federal stimulus package, received Royal Assent, thereby bringing into law sweeping amendments to the *Competition Act* and the *Investment Canada Act.*

Competition Act	***Investment Canada Act***

• new longer, costlier merger review process
• new restrictions on agreements with competitors
• new or increased fines and penalties for:
    ○ agreements with competitors
    ○ abuse of dominance
    ○ misleading marketing practices
• greater unilateral pricing and distribution flexibility
	• higher general foreign investment review thresholds – fewer general net benefit reviews
	• new wide ranging power to review or block foreign investments with national security implications

Click here for more details on amendments to the *Competition Act* and what they mean for you.	Click here for more details on amendments to the *Investment Canada Act* and what they may mean for you.

Please do not hesitate to contact George Addy, John Bodrug, Mark Katz, Anita Banicevic, Jim Dinning, Richard Elliott, Chris Margison, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at 416.863.0900 (Toronto) or 514.841.6400 (Montréal).

Davies Ward Phillips & Vineberg LLP, with over 250 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and an affiliate in Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.

Amendments to the *Competition Act*: What Do They Mean For You?

The enactment of Bill C-10 ushers in fundamental changes to Canadian competition law. Below is a summary of the key amendments and their implications.

1. Merger Review

Key Changes

- The *Competition Act*'s merger review process will now be much more closely aligned with the U.S. merger review procedures under the *Hart-Scott-Rodino Antitrust Improvements Act*. Specifically, there will now be an initial 30-day waiting period during which a notified merger may not be completed so that the Competition Bureau can assess the likely competitive effects of the proposed transaction. Before that 30-day period expires, the Bureau may choose to issue a "second request" for information, in which case the proposed transaction may not be completed until 30 days after the requested information is provided to the Bureau.

- The "size of the transaction threshold" for pre-merger notification has been increased. Now, transactions will not be notifiable if the book value of target's assets in Canada, and its annual gross revenues from sales in or from Canada, do not exceed $70 million (up from the current $50 million threshold). This threshold amount will increase in subsequent years according to a formula that is tied to changes in the inflation rate.

Implications

- The threshold increase for pre-merger notifications will mean that some mergers that had to be notified previously will no longer be subject to notification. This is a positive development. It is not clear, though, how significant the decrease in the number of notifications will be.

- For those transactions that remain notifiable, the introduction of a U.S.-style merger review process is worrisome. While there is some benefit to greater convergence with the U.S., the adoption of a "second request" process threatens to introduce significant additional delays and costs for merger review in Canada. That has certainly been the experience in the United States. Indeed, it is possible that the Canadian process will be even more onerous than in the United States, e.g., the standard for compliance may be stricter in Canada than in the United States (full compliance rather than "substantial compliance"). This also leaves open the possibility of disputes between the merging parties and the Competition Bureau about whether the parties have filed all the required information, and therefore whether the waiting period has in fact expired so that the transaction can be completed.

- Faced with potentially millions of dollars in costs and months to fully respond to a very extensive information request, merging parties may either abandon a transaction or choose to negotiate divestitures or other remedies with the Competition Bureau that would not necessarily be ordered by the Competition Tribunal. The Bureau's power to issue very broad second requests raises a concern that the power could be used strategically to obtain negotiating leverage.
- Uncertainty in the short term is compounded by the fact that regulations in support of the new merger review regime, such as a new notification form, have not yet been passed, or even released in draft form.

2. Agreements Among Competitors

Key Changes

- Effective March 12, 2010, the *Competition Act*'s existing conspiracy provisions will be replaced with a *per se* criminal offence prohibiting agreements between competitors to fix prices; affect production or supply levels of a product; or allocate sales, customers or territories. Proof that the agreement would be likely to lessen competition is not required. Liability will be avoided, however, if the agreement is "ancillary" to a broader agreement that does not contravene the conspiracy offence and is necessary to give effect to the objective of that broader agreement.
- Effective immediately, the *per se* bid-rigging offence will now also prohibit agreements among parties to withdraw an already-submitted bid, in addition to prohibiting agreements not to bid or to coordinate the terms of the bid.
- Also effective March 12, 2010, all other agreements between competitors that have the effect of lessening or preventing competition substantially will now be dealt with under a new civil provision. The Bureau will be able to apply to the Competition Tribunal for a remedial order to deal with such agreements.

Implications

- The introduction of a *per se* offence for agreements between competitors represents a fundamental shift in one of the cornerstones of Canadian competition law, eliminating as it does the requirement to prove that the agreement, if implemented, would have a negative impact on competition in the relevant market.
- Although the new provision contains a defence that applies when the relevant conduct is "ancillary" to a broader, legitimate agreement, there is no guidance on what "ancillary" means in this context. In the U.S., where the courts have developed a similar concept, there continues to be an ongoing and extensive debate

over the meaning of "ancillary". It will likely be some time before Canadian courts settle how that term should be interpreted in the context of the new offence.

- As a result, the new conspiracy offence casts doubt on the legality of many agreements between competitors that involve prices, allocation of customers or territories, or levels of production or supply. This means that many common, ordinary course and seemingly benign types of agreements between competitors could now be subject to the risk of criminal prosecution and civil litigation, or parties seeking to avoid contracts. Examples may include:
    - "swap" agreements (even efficiency enhancing ones) such as used in the petroleum industry;
    - non-competition agreements in the context of mergers or joint ventures;
    - IP licensing agreements;
    - distribution agreements where the supplier restricts where its distributors may sell, or to whom they can sell, particularly if the supplier also sells the products directly in competition with its distributors;
    - agreements between franchisors and franchisees that limit where the franchisees can operate;
    - cooperative agreements in network industries
- Fortunately, the new conspiracy provisions only come into effect one year from the date of enactment of Bill C-10 (i.e., March 12, 2010). Businesses of all sizes would be well-advised to use this opportunity to review any agreement they have with competitors, including in the context of trade association activities, to assess their compliance with the new law. To assist in that effort, Bill C-10 provides that parties may seek advisory opinions from the Competition Bureau with respect to the legality of existing agreements at no cost during the one year transitional period.

3. New/Increased Penalties

Key Changes

- The maximum penalties for the criminal conspiracy offence are increased to 14 years imprisonment and a fine of $25 million per count, up from the current five years in prison and a fine of $10 million per count.
- The Competition Tribunal can now order an "administrative monetary penalty" of up to $10 million for a contravention of the abuse of dominance provisions and up to $15 million for subsequent contraventions.

- The maximum penalties for misleading advertising and obstruction of a Bureau investigation are also increased. In addition, the Competition Tribunal or a court now has the power to order restitution to consumers in relation to certain misleading marketing practices and in certain circumstances to issue "freezing orders" forbidding the disposition of specified property.

Implications

- The increased penalties underscore the new seriousness with which the Conservative government perceives violations of the *Competition Act*. It is expected that this attitude will also manifest itself in a mandate to the new Commissioner of Competition to increase enforcement levels over the previous administration.

- The most significant innovation in terms of penalties is the Competition Tribunal's new power to impose substantial "administrative monetary penalties" for contraventions of the abuse of dominance provisions. This is a controversial change, which may deter conduct that is not inherently anti-competitive and raises constitutional issues that may have to be litigated.

4. New Pricing and Distribution Flexibility

Key Changes

- The price discrimination, predatory pricing, geographic price discrimination and promotional allowance offences are repealed.

- The price maintenance offence is repealed and replaced with a new, but similar, civil provision pursuant to which the Competition Bureau can apply to the Competition Tribunal for relief in situations where the conduct is having or is likely to have an adverse effect on competition in a market. Private parties are also entitled to apply to the Tribunal for remedies.

Implications

- These are positive changes that have long been sought and that should offer suppliers more flexibility in developing pricing and distribution strategies in Canada and to influence the resale prices of their distributors or retail customers. However, potential risk still remains with respect to conduct that falls offside the new civil price maintenance provision.

5. Conclusion

With some exceptions, the general thrust of the new amendments to the *Competition Act* is to enhance the Competition Bureau's enforcement capabilities. Unfortunately, this is likely to mean greater burdens on the business community, which will only be compounded by the uncertainties surrounding many of the key aspects of the amendments, particularly the new criminal offence for agreements with competitors. It seems strange that such measures were included in a stimulus Bill meant to help Canada recover from an economic downturn. It is stranger still that they were enacted with such haste and without the usual stakeholder consultations.

Amendments to the *Investment Canada Act*: What Do They Mean For You?

The enactment of Bill C-10 introduces significant changes to the *Investment Canada Act*. Below is a summary of the key amendments and their implications.

Key Changes

- The usual thresholds for review for direct acquisitions of Canadian businesses (other than acquisitions of cultural businesses) by foreign investors will change as of a date to be determined by the federal Cabinet. These transactions are now reviewable if the book value of the assets of the Canadian business exceeds $312 million, but will shortly be subject to a general net benefit review only if the "enterprise value" of the assets of the Canadian business is equal to or greater than (a) $600 million, in the case of investments made during the first two years after the amendments come into force; (b) $800 million, in the case of investments made during the third and fourth years after the amendments come into force; and (c) $1 billion, in the case of investments made between the fifth year after the amendments come into force and December 31 of the sixth year after the amendments come into force. This threshold will thereafter be adjusted on an annual basis. In addition, the lower threshold ($5 million) currently applicable to the transportation, financial services and uranium sectors are repealed.

- There is now a new review process for investments that could be "injurious" to national security. The federal Cabinet is authorized to take any measures that it considers advisable to protect national security, including the outright prohibition of a foreign investment in Canada.

Implications

- The apparent intention of amending the threshold for direct acquisitions is to reduce the number of foreign investments subject to a general net benefit review under the *Investment Canada Act*. Unfortunately, no definition has yet been provided for the new benchmark, i.e., "enterprise value", so it is difficult to assess the extent to which this goal is likely to be achieved.

- There is a similar lack of clarity with respect to the new "national security" review process. No definition of "national security" has been provided. The applicable standard, "<u>could</u> <u>be</u> <u>injurious</u> to national security", is ambiguous, and potentially open to wide interpretation. As a result, the Minister of Industry and the federal Cabinet will have wide discretion to decide which transactions they will review.

- The Investment Review Branch of Industry Canada may now require that foreign investors provide any information considered necessary for an *Investment Canada*

Act review, which may extend the scope of reviews and raise issues about the Branch's use of such information.

Conclusion

As with the amendments to the *Competition Act*, the *Investment Canada Act* amendments were rushed through Parliament in unprecedented fashion. This has left many open questions about how the new provisions are to be interpreted and applied. The lack of certainty is particularly apparent as it affects the new regime for national security review, given the potentially significant implications for transactions caught by this process.

Canada's competition reforms

New legislation introduces major changes to the existing regime

*by **Mark Katz** and **Jim Dinning****

On 12 March 2009, the Canadian parliament passed legislation incorporating significant amendments to Canada's Competition Act.

The amendments were part of an extensive legislative package designed to implement the Canadian government's 2009 budget and economic stimulus measures. As a result, passage of the legislation occurred much more quickly than normal, and without any opportunity for consultation or modification.

A summary of the key amendments and their anticipated implications is provided below.

Merger review

Proposed amendments to the premerger notification process. Under the Competition Act's former merger review process, transactions that exceeded certain financial thresholds and, in the case of share acquisitions, that exceeded an additional voting interest threshold, could not be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depended on whether the acquirer elected to make a short-form filing (14-day waiting period) or a long-form filing (42-day waiting period). The Bureau's substantive review of transactions ran on a different (but simultaneous) non-statutory timetable, based on the complexity of the transaction. These non-binding "service standard periods" ranged between two weeks (for the least complicated transactions) to over five months (for the most complex).

Following the recently enacted amendments, the Competition Act's merger review process is now essentially aligned with the merger review process in the United States. Thus, a notifiable transaction may not be completed until the expiry (or early termination) of a 30-day waiting period following notification. Before that 30-day period expires, the Bureau may advise the parties that it does not intend to challenge the transaction. Alternatively, if issues remain that it wishes to investigate, the Bureau may send a second request for information, in which case the proposed transaction may not be completed until 30 days after the Bureau receives the requested information from the parties.

The adoption of a US-style process follows the recommendations made by the federally appointed competition policy review panel in a report released in June 2008. The panel recommended that Canada's merger review process be modelled after the US merger notification process under the Hart-Scott-Rodino Antitrust Improvements Act. The stated rationale for the recommended changes was to reduce uncertainty and costs for merging parties.

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian review process with that in the US. However, the adoption of a second-request process is of considerable concern, particularly in the current economic climate. The US second-request process has been widely criticised for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a second request in the US can range from US $3.3m (on average) up to US $20m or US$25m (for the most complex cases) and that second-request investigations can take six or seven months to complete, on average. These studies also indicate that, despite the lengthy and expensive investigations, there is no evidence to suggest that the burden imposed by the second-request process leads to better decision-making.

The amendments also do not adequately address one of the key failings of the former merger review process, namely the lack of a set deadline within which the Bureau must complete its merger reviews. First, there is no limit on how long the second-request process can last – the burden is placed on merging parties to respond as quickly as they can. Moreover, unlike in the United States, parties cannot satisfy their burden by achieving "substantial compliance" with the second request. Rather, it appears that there must be "full compliance" – ie the Bureau must receive *all* of the required information from the parties. Finally, although parties will be entitled to close their transactions within 30 days of successfully completing the second request, the amendments do not state that the Bureau must also have completed its review by that time. Thus, in theory, the Bureau could continue its investigation even after the 30-day period has expired, thereby forcing parties to either close without substantive approval or wait until the Bureau has completed its review.

Increased merger notification thresholds. On the positive side, the amendments increase certain thresholds for premerger notification. Currently, the Competition Act generally requires the aggregate value of the target's assets in Canada, or the annual gross revenues from sales in or from Canada, to exceed C$50m in order for the notification requirements to be triggered. This "size of the transaction" threshold is now increased to C$70m initially, with future increases tied to changes in inflation (or as prescribed by regulation).

The threshold increase for premerger notifications will mean that some mergers that had to be notified previously will no longer be subject to notification. This is a positive development. It is not clear, though, how significant the decrease in the number of notifiable transactions will be.

Ex post review. The other notable change ushered in by the amendments is that the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one year. This amendment is of some theoretical benefit to merging parties, in that it purports to reduce post-

* *Mark Katz is a partner in – and Jim Dinning is an associate with – Davies Ward Phillips & Vineberg LLP*

closing deal risk. However, since the Bureau has rarely if ever exercised its power to challenge transactions post-merger, the practical benefits are limited.

Agreements among competitors

The amendments also repeal the Competition Act’s existing conspiracy offence and replace it with a per se criminal prohibition against agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories. Unlike the former conspiracy provision, the new offence does not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly. However, liability can be avoided if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offence and is necessary for giving effect to the objective of that broader agreement. Maximum penalties under the new offence are 14 years imprisonment and a $25m fine per count, up from the current maximum of five years and $10m per count.

As part of this reform, a new civil provision will apply to all agreements between competitors that are not caught by the new per se offence but that have the effect of lessening or preventing competition substantially. The Bureau will be able to apply to the Competition Tribunal under this new civil provision for an order to remedy the effects of such agreements.

The introduction of a per se offence for agreements between competitors represents a fundamental shift in one of the cornerstones of Canadian competition law, eliminating the requirement to prove that the agreement, if implemented, would have a negative impact on competition in the relevant market.

Although the new provision contains a defence that applies when the relevant conduct is “ancillary” to a broader, legitimate agreement, there is no guidance on what “ancillary” means in this context. In the US, where the courts have developed a similar concept, there continues to be an ongoing and extensive debate over the meaning of “ancillary”. It will probably be some time before Canadian courts settle how that term should be interpreted in the context of the new offence.

Consequently, the new conspiracy offence casts doubt on the legality of many agreements between competitors that involve prices, allocation of customers or territories, or levels of production or supply. So many common, ordinary course and seemingly benign types of agreements between competitors could now be subject to the risk of criminal prosecution and civil litigation, or parties seeking to avoid contracts, including “swap” agreements (such as used in the petroleum industry), IP licensing agreements, and supply agreements that limit where distributors may sell (particularly if the supplier also sells the products directly in competition with its distributors).

Fortunately, the new conspiracy offence only comes into effect on 12 March 2010 – ie one year from the date of enactment of the amendments (this also applies to the new civil provision regarding anticompetitive agreements). Businesses would be well advised to use this opportunity to review any agreement they have with competitors, including in the context of trade association activities, to assess their compliance with the new law. Parties may seek advisory opinions from the Competition Bureau with respect to the legality of existing agreements at no cost during the one-year transitional period.

Increased penalties/expanded offences

A series of additional amendments were also enacted to expand the scope of certain offences or increase their penalties. These include: (1) granting the Competition Tribunal the power to order an “administrative monetary penalty” of up to $10m for a contravention of the abuse of dominance provisions and up to $15m for subsequent offences; (2) expanding the bid-rigging offence to include a prohibition against persons agreeing to withdraw their already-submitted bids; (3) expanding the false or misleading representation offence to apply to companies targeting foreign individuals, and increasing the maximum penalties for contravention of the misleading advertising provisions; and (4) increasing the maximum penalties for obstruction of a Bureau investigation.

The increased penalties underscore the new seriousness with which the current government perceives violations of the Competition Act. It is expected that this attitude will also manifest itself in a mandate to the new commissioner of competition to increase enforcement levels over the previous administration (the former commissioner having left office in December 2008).

The most significant innovation in terms of penalties is the Competition Tribunal’s new power to impose substantial “administrative monetary penalties” for contraventions of the abuse of dominance provisions. This is a controversial change, which may deter conduct that is not inherently anticompetitive and raises constitutional issues that may have to be litigated.

Pricing matters

One other positive aspect of the amendments is that they repeal the Competition Act’s price discrimination, predatory pricing and promotional allowances offences. The price maintenance offence is also repealed, but replaced with a similar civil provision under which the Bureau can apply to the Competition Tribunal for relief in situations where the price maintenance conduct is having or is likely to have an “adverse effect” on competition in a market. Private parties are also entitled to apply to the Tribunal for remedies under this new provision.

The repeal of the pricing offences should offer suppliers more flexibility in developing pricing and distribution strategies in Canada and influence the resale prices of their distributors or retail customers. However, potential risk still remains with respect to conduct that falls offside the new civil price maintenance provision.

Conclusion

With some exceptions, the general thrust of the new amendments to the Competition Act is to enhance the Competition Bureau’s enforcement capabilities. Unfortunately, this is likely to mean greater burdens on the business community, which will only be compounded by the uncertainties surrounding many of the key aspects of the amendments, particularly the new criminal offence for agreements with competitors. It seems strange that these measures were included in legislation meant to help Canada recover from an economic downturn. It is stranger still that they were enacted with such haste and without the usual stakeholder consultations.

DECEMBER 2008, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Antitrust Legislation and Policy in a Global Economic Crisis—A Canadian Perspective

George Addy, Anita Banicevic, & Mark Katz

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RELEASE: DEC-08 (1)

Antitrust Legislation and Policy in a Global Economic Crisis—A Canadian Perspective

George Addy, Anita Banicevic, & Mark Katz *

I. INTRODUCTION

As the global economic crisis continues, governments and private parties worldwide have undertaken a number of measures to safeguard the stability of their ailing economies. For example, governments in the United States, Europe, and to a lesser degree, Canada, have delivered significant infusions of capital and facilitated major mergers in the financial sector (e.g., Wells Fargo/Wachovia, Bank of America/Merrill Lynch, JP Morgan/Bear Stearns) in a bid to help financial institutions withstand the crisis. In addition to such unilateral measures, given the increasing interdependence and integration of global financial markets and institutions, governments are considering the need for drastic restructuring of multilateral institutions and trading instruments.

When contemplating the implications of a global economic crisis, one is bound to ask what, if any, is the appropriate role of antitrust legislation and policy and what impact there will be on future antitrust enforcement. On the one hand, it could be argued that antitrust policy should be shunted aside—at least in the context of merger review—and not be allowed to prevent restructurings that are necessary for economic stability even though they may also allow the merging parties to acquire market power. Time is of the essence in responding to the financial crisis and timeliness of decision making has been a

*Partners, Davies Ward Phillips & Vineberg LLP, Toronto, Canada.

serious challenge for competition agencies in the past. On the other hand, it is possible to contemplate an even greater role for antitrust enforcement, particularly in areas such as cartels and abuse of dominance. Furthermore, given the global scope of the contemplated restructurings, it is quite plausible that the enforcement posture of one jurisdiction could lead to pressure to adopt the same stance in other jurisdictions, putting a severe strain on recent inter-agency cooperation.

To date, the approach of antitrust agencies has been anything but uniform. In Canada, the Competition Bureau has been silent on its views of the role of antitrust law and policy in the current crisis. This is in contrast to, for example, the European Commission, which has demanded a much more active role for itself (both in merger review and the review of State aid proposals). In the United States, the antitrust authorities have reviewed several significant mergers precipitated by the economic crisis but to date have taken a relatively non-interventionist approach. With the incoming Obama administration, which is expected to be much more activist in its antitrust enforcement, antitrust authorities in Washington may soon become much more involved in dealing with the crisis.

The Canadian Competition Bureau's relative silence may be attributed, in part, to the lower levels of government intervention that Canadian financial institutions and other industries have required to date. While the Canadian federal government has delivered a $5 billion infusion to Canada's major domestic banks, plans to purchase $75 billion in insured mortgages, and is expected to follow the United States with auto sector support, there has yet to be a failure or major merger or acquisition of a major domestic financial institution. It also must be recognized that Canada has recently undergone a federal election, and indeed is still in a state of political flux, which has tempered government officials from opining upon politically sensitive matters.

Nonetheless, there are aspects of Canadian competition law that are clearly applicable in a period of economic dislocation. The Competition Bureau also has a track record of dealing with restructuring in the Canadian banking industry, which would be of obvious relevance to potential developments going forward.

In this article, we review some of the general considerations surrounding the role of antitrust law and policy in a global economic crisis and then discuss the Canadian situation in this global context.

II. ANTITRUST IN A TIME OF GLOBAL CRISIS

To some degree, the impact of the global economic crisis upon future antitrust policy and enforcement (particularly in the financial sector) is likely to depend upon the remedies used to restore viability and stability to the global financial sector.

If domestic remedies (i.e., mergers between industry participants and infusions of capital) are abandoned in favor of an internationally coordinated intervention, then it is conceivable that antitrust issues will be relegated to a second tier policy imperative in favor of the urgent need to restore stability to the world's financial institutions. Indeed, if a "Bretton Woods" like accord is required to restructure and perhaps regulate the global financial industry, it would not be surprising if this restructuring involved a diminished role for antitrust considerations. Governments that are prepared to revert to deficit financing and large scale stimulus packages will also be willing to accept market concentration fallout for the sake of economic stability.

If, however, targeted domestic tactics continue to be the preferred remedy, then individual antitrust regimes may have at least a theoretical role in overseeing these remedies. However, as evidenced by the U.K. Office of Fair Trading's experience with the Lloyds/HBOS merger (where the government intervened to allow the merger despite the OFT's concerns), political pressures to move quickly and continue to keep large institutions afloat may not allow any meaningful role for antitrust review.

For antitrust authorities, the speed with which large institutions have decided to enter into large scale transactions may force them to intervene and address excessive concentration issues on an ex-post basis, e.g., via post-closing merger review. Antitrust scholars point to the post-World War II break-up of the aluminum monopoly held by Alcoa as an example of the kind of intervention that may be required at a later stage, once the "dust has settled." The creation of excessive concentration may also lead antitrust agencies to investigate more monopolization or "abuse of dominance" cases in the future. Indeed, the approach of getting through the crisis and dealing with negative consequences later is the model advocated by most economists and central banks when asked about post-crisis inflationary risks.

Even leaving aside mergers/acquisitions brokered by governments, strategic mergers between competitors are likely to increase parties' reliance on "failing firm" and efficiencies arguments in antitrust merger review. Interestingly, some antitrust scholars have argued that if efficiencies are considered a factor in favor of a merger's approval, then the excessive debt loads which have resulted from certain mergers/acquisitions in the current environment should also be considered as a potentially negative factor in assessing the impact of the proposed merger.[1]

One area that is still likely to keep antitrust authorities busy is cartel enforcement. Difficult economic times often lead to increased temptations for competitors to reach anticompetitive agreements to "share the pain." It thus would not be surprising to see an increase in cartel enforcement. Moreover, given the already significant levels of cooperation among antitrust authorities worldwide, as well as the global nature of commerce (and thus, it follows, conspiracies), increased cartel enforcement in one jurisdiction could lead to increased enforcement in other countries. Economic difficulties may, however, make it more difficult for antitrust authorities to obtain the types of dramatic fines that have become more common in recent years, which could lead antitrust agencies to look for other methods of deterrence, such as jail sentences or other sanctions for individuals.

III. THE CANADIAN PERSPECTIVE

If any major merger involving Canada's financial institutions was proposed as a way of coping with the financial crisis, the question of the appropriate interaction between antitrust policy and economic policy would be particularly controversial given the federal government's 1998 decision to impose a *de facto* moratorium on major bank

[1] *An Interview with Bert Foe*r, November 2008, http://www.antitrustinstitute.org/archives/files/Multinational%20Monitor%20Foer%20Interview.11.4.08_110420081230.pdf.

mergers in Canada. This decision came after four of Canada's five leading banks proposed two separate mergers that would have seen their overall numbers reduced to three. The Competition Bureau reviewed the proposed mergers and issued letters to the parties indicating several areas of concern. However, it was quite clear that the Bureau's review was subordinate at all times to the ultimate decision-making authority of the Minister of Finance, who would have the final say on the mergers.[2] In the end, the Minister refused to approve the mergers and, until recently, there had been little political momentum to raise the issue anew, although there was also much speculation about the circumstances in which bank mergers might be approved.

In June 2008, a panel assembled by the federal government to conduct an independent review of Canada's competition policy and legislation recommended that the *de facto* prohibition on mergers be lifted.[3] The reason cited was the need for Canada's banks to become more competitive in the global arena. On the other hand, some individuals (most notably Canada's former prime minister, Jean Chretien) have recently credited the relative strength and stability of Canada's financial institutions to the federal government's moratorium on major bank mergers.[4] Supporters of the moratorium argue that this decision prevented Canadian institutions from playing a more significant international role and, consequently, becoming more intertwined with their international

[2]The Minister of Finance's authority to override competition issues is incorporated in the *Competition Act*, which specifically provides that a bank merger cannot be blocked if the Minister certifies that it is "in the public interest." *Competition Act*, R.S.C. 1985, c. C-34, s.94(b).

[3]Competition Policy Review Panel, *Compete to Win*, 52 (June 2008). A copy of the full report is available from: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00040e.html.

[4]S. Stewart, "Lucky or prescient? Chretien takes credit for stronger banks", *Globe and Mail* (October 8, 2008). Available from: http://www.reportonbusiness.com/servlet/story/RTGAM.20081008.wrbankschretien08/BNStory/Business/home?cid=al_gam_mostemail.

peers. This relative independence, it is argued, has decreased the exposure of Canadian financial institutions to the U.S. sub-prime mortgage meltdown. The current financial difficulties at Citibank are used as an illustration of the increased risk associated with a larger size.

In view of recent experience in other jurisdictions, it is certainly within the realm of possibility that two or more of Canada's leading banks will again float the possibility of a merger. As before, any proposed merger would be subject to review by the Competition Bureau (for the competitive impact of the transaction), the Office of the Superintendent of Financial Institutions (for the prudential impact of the transaction), as well as a "public interest review" by the Minister of Finance, with the ultimate decision regarding approval resting with the Minister. In a 2003 statement, the federal government set out five criteria that the Minister would consider in assessing the "public interest": (1) access to financial services by Canadian consumers; (2) continued access to sufficient choice by Canadian consumers; (3) impact of the merger upon international competitiveness and long-term growth prospects for the merging parties; (4) contribution of the merger to the "deepening and broadening" of Canadian capital markets; and (5) transition of employees displaced by the merger. While it may not fit squarely into any one of these criteria, one would presume that ensuring the stability of Canada's financial sector, or economy, would also qualify as part of the "public interest."

There are few other industries in Canada that are subject to an explicit "public interest" override of competition considerations.[5] Moreover, the Competition Bureau

[5]The transportation industry is one other example. Any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which involves a federal "transportation

prides itself on its independence and imperviousness to political pressure. But it is still legitimate to ask what would happen if a merger between two large manufacturers were proposed to save the North American/Canadian auto industry: Would the review be handled by the Competition Bureau in the usual fashion, or would the review be expedited or overridden by political concerns and pressures from other areas of government or, indeed, from other foreign governments or antitrust agencies? Similarly, could pressures from other antitrust agencies and governments to review and potentially challenge a merger of this kind increase the likelihood of Canadian antitrust intervention? When last faced with a similar, albeit lesser sectoral crisis, the Canadian Government was quick to suspend the application of the *Competition Act*.[6]

While there may not be a "public interest" override for most industries, Canadian competition law incorporates other forms of exceptions or defenses that may be relevant in difficult economic times. For example, section 92 of the *Competition Act* provides that it is appropriate to consider whether the target of a merger "has failed or is likely to fail" when assessing a transaction's effect on competition. In other words, if it is likely that the target of a merger will exit the market even in the absence of the merger (due to extreme financial difficulties), any reduction in competition as a result of the "failing firm's" acquisition is not attributed to the merger.

According to the Bureau's *Merger Enforcement Guidelines*, a firm will be considered to be "failing" for these purposes if: (1) it is insolvent or is likely to become

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undertaking" must also be notified to the Minister of Transport. The Minister must then determine whether the proposed transaction negatively affects the "public interest" as it relates to national transportation.

[6]When faced with the imminent demise of one of Canada's major domestic airlines in 1999, a provision of the *Canada Transportation Act* was invoked to temporarily suspend application of the *Competition Act.*

insolvent; (2) it has initiated or is likely to initiate voluntary bankruptcy proceedings; or (3) it has been or is likely to be petitioned into bankruptcy or receivership. The Bureau will also typically require financial information from the firm (such as projected cash flows, credit information) to support its claims that it is failing or is likely to fail. In addition, before the failing firm argument is accepted, the Bureau will consider whether any preferable alternatives to the merger exist and are likely to result in a materially greater level of competition. In particular, the Bureau will consider whether there are any third parties whose purchase of the "failing firm" would be likely to result in a materially higher level of competition in a substantial part of the market. The Bureau must be satisfied that a thorough search for a competitively preferable purchaser has been conducted (referred to as a "shop" of the failing firm). If not, the Bureau will require an independent third party (such as investment dealer, trustee, or broker) to conduct the shop. The Bureau will also consider whether the retrenchment or restructuring of the failing firm (e.g., restructuring with focused or narrower operations) or liquidation would lead to a materially greater level of competition than if the proposed merger proceeds.

The "failing firm" criteria are quite onerous on their face. However, it remains to be seen whether, given the significant time pressures to clear such transactions, the Bureau would show greater flexibility in the current environment, particularly with respect to the "shop" requirement. There is some precedent for this. For example, the Competition Bureau decided in 1999 not to challenge the merger of Canada's two major domestic airline carriers (Air Canada and Canadian), notwithstanding that the merged airline accounted for 90 percent of domestic passenger revenues. In what was a very short time for a review of that nature, the Bureau determined that there was no competitively preferable purchaser and that the acquisition as proposed (which included a set of significant undertakings for the acquirer) was preferable to the liquidation of Canadian.

In addition to the "failing firm" argument, Canadian competition law explicitly provides for an "efficiency defense," which allows anticompetitive mergers to be cleared if they are likely to generate gains in efficiency that "will be greater than, and will offset the effects of any prevention or lessening of competition." This defense has been relied upon very infrequently due to the debate surrounding the appropriate standards to be used in measuring and weighing the efficiencies arising from a transaction. The only case to have successfully invoked the efficiencies defense was litigated extensively and prompted the Competition Bureau to attempt to amend the statutory provision. The statutory defense still stands and the Competition Bureau appears to have moved away from suggesting that the provision should be significantly amended or deleted. However, there remains significant uncertainty as to how the provision is to be applied in practice.[7] That said, the current economic climate and the inevitable consolidation in certain industries will likely lead parties increasingly to invoke and test the application of the efficiencies defense.

There are also several avenues in Canadian competition law whereby the Bureau can bring proceedings following an acquisition if necessary. These "safety valves" may provide the Bureau with the comfort it needs to allow a questionable merger to proceed,

[7] The Bureau released draft guidelines earlier this year but the general reaction is that these guidelines still do not provide sufficient clarification of this complex issue.

knowing that it could bring proceedings at a later stage if competition problems crystallize.

For example, section 97 of the *Competition Act* authorizes the Bureau to challenge a transaction up to three years following closing. Although this authority has almost never been exercised—and it is clearly the Bureau's preference to deal with potential problems up front—difficult economic times may persuade the Bureau to rely on this option as a matter of practical expediency rather than seek to prevent a merger from closing.

More generally, the Bureau also has the authority to bring applications against dominant parties for abuse of that dominant position. While the Competition Bureau has not brought a case to the Competition Tribunal in over six years, it has in the past commenced abuse of dominance proceedings in industries that have undergone significant restructuring. For instance, although Air Canada's acquisition of Canadian was allowed in 1999, the Bureau subsequently brought an abuse of dominance case against Air Canada in 2000 for predatory pricing on certain routes.

Finally, cartel enforcement is sure to remain a key enforcement priority for the Bureau as well. As such, parties in Canada will also have to resist trying to stabilize market conditions through coordinated conduct. Indeed, the Competition Bureau recently announced further guilty pleas in an alleged domestic retail gasoline cartel as well as a guilty plea and associated fines in its investigation of an international cartel involving sales of hydrogen peroxide. In these recent cases, the Bureau alleged that collective action among competitors was undertaken to deal with economic pressures. As evidenced by some of these developments, the Bureau continues to benefit from cooperation from immunity applicants (who are the first to report anticompetitive activity to the Bureau) as well as cooperation with foreign antitrust enforcement agencies.

IV. CONCLUSION

The credit crunch and associated economic downturn have created new challenges for economic policy around the world. As governments struggle to fashion remedies to prime the global economic pump, they may also be tempted to ignore or downplay antitrust concerns in favor of mergers or restructurings that offer a "fast fix." Canadian competition law already contains elements that could smooth the way for more lenient application. However, one also expects that if today's resolutions truly raise significant antitrust issues (such as excessive concentration), then it will only be a matter of time before antitrust concerns (in one form or another) rise to the forefront again, albeit perhaps at odds with macroeconomic recovery imperatives.