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Top Competition and Foreign Investment Review Trends and Issues for 2021

In our annual review of Canadian competition and foreign investment review law, we evaluate how trends in these areas over the past year will influence practice in the year to come.

Ongoing Impact of COVID-19 on the Competition Bureau's Enforcement

The enforcement of competition law in Canada has been affected by the widespread social, health and economic impacts of the COVID-19 pandemic. The Competition Bureau (Bureau) issued several statements during the course of 2020 on the effect of the pandemic on its enforcement policies and processes. We expect many of these statements to remain relevant well into 2021.

In April 2020, for example, the Bureau released a statement on competitor collaborations clarifying that "in circumstances where there is a clear imperative for companies to be collaborating in the short-term to respond to the [COVID-19] crisis, where those collaborations are undertaken and executed in good faith and do not go further than what is needed, [the Bureau] will generally refrain from exercising scrutiny." The Bureau's statement also indicated that such collaborations must not be motivated by a desire to achieve a competitive advantage and that the Bureau would have "zero tolerance" for attempts to abuse its flexibility as "cover for unnecessary conduct that would violate the *Competition Act*" (Act). In a speech to the Canadian Bar Association in October, the Commissioner also said the Bureau will heighten its vigilance and outreach to detect illegal competitor collaboration, such as bid-rigging, in respect of government procurement, which is expected to increase as a result of stimulus measures associated with the COVID-19 pandemic. Past experience has shown that dire economic circumstances can lead businesses to enter inappropriate (even if well-intentioned) agreements. Time will tell whether the economic impacts of COVID-19 lead to greater use of the Bureau's immunity regime or increased cartel enforcement generally.

In May 2020, the Bureau announced that it was actively monitoring misleading representations in the marketplace and would take action where claims give Canadians a false impression that products or services treat or protect against COVID-19. At that time, the Bureau had already issued several direct compliance warnings to businesses, and it cautioned all businesses to consider the severe financial penalties and jail time they could face if they failed to comply with the law in this regard. In December 2020, Canada's Commissioner of Competition, Matthew Boswell, noted in his remarks to the House of Commons Standing Committee on Industry, Science and Technology (INDU Committee) that in response to the Bureau's warnings, most of the recipient businesses had taken corrective action to remove products from the market or cease the misleading claims. We expect that misleading representations to the public will remain a Bureau area of focus for the duration of the pandemic.

The Bureau has also discussed the impact of the pandemic on the exercise of its merger review powers under the Act. In March 2020, the Bureau issued a cautionary statement that, owing to pandemic restrictions, its staff might not be able to meet the Bureau's non-binding service standard timelines for merger reviews. In practice, we have not yet seen a material impact on merger review timelines. However, companies should continue to be aware of the possibility of lengthier reviews when they are assessing and planning merger transactions in 2021, especially if governments continue to impose lockdowns that could affect the Bureau's ability to obtain information from market participants in a timely manner.

National Security Reviews Still Prominent in Foreign Investment Review

Maintaining the trend we discussed in last year's forecast, enforcement priorities under Canada's foreign investment review legislation, the *Investment Canada Act* (ICA), have continued to shift away from the "net benefit to Canada" review process and toward national security considerations. This shift coincides with an increased concern over investments by foreign state-owned enterprises. In

December, for example, TMAC Resources (a gold mining company operating in Nunavut) announced that its proposed acquisition by Shandong Gold Mining Co., Ltd. (a Chinese state-owned enterprise) was turned down by the Canadian government on national security grounds (see Davies' bulletin). We expect this trend to persist in the coming year, especially in light of the heightened sensitivity to foreign acquisitions of certain types of Canadian businesses in the wake of the COVID-19 pandemic.

Notably, in April 2020, the federal government announced that foreign investments in Canadian businesses related to public health or the supply of critical goods and services as well as all investments by foreign state-owned investors would be subject to "enhanced scrutiny" under the ICA. Since relatively few transactions are subject to net benefit reviews given the increasingly high review thresholds, this policy is most likely to be manifested through the "national security" review process, under which no financial review thresholds apply. According to the policy announcement, this enhanced scrutiny for certain transactions will continue "until the economy recovers from the effects of the COVID-19 pandemic."

Additionally, in July the government extended the statutory timelines to decide if it will commence a national security review. The timeline was increased to 60 days (from 45 days) following the filing of an application for review or notification (and six months following closing in the case of investments not subject to review or notification). The measures also extended the total timeline for national security reviews to 260 days (from 200 days) or longer on consent. These timelines expired on December 31, 2020, and, absent government action in 2021, we expect to see a return to the standard timelines in 2021.

Potential for Expanded Scope and Significance of the Failing Firm Defence in Merger Reviews

The economic landscape created by COVID-19 will set the stage for mergers in 2021 and will, in turn, influence merger enforcement. Perhaps unsurprisingly, the pandemic had a material impact on the number of merger transactions reviewed by the Bureau in 2020. According to Bureau statistics, a robust 13% year-over-year increase in merger reviews in the first quarter of 2020 was followed by year-over-year declines of 55% and 40% in the second and third quarters, respectively. The situation does not seem to have improved in the fourth quarter of 2020 either, as merger reviews in October and November declined by 33% compared with the previous year. Therefore, a key development to watch for in 2021 is whether this trend will be reversed as the economy recovers from the impact of the pandemic.

These current conditions have also raised the question whether the Bureau will give greater consideration to "failing firm" arguments in its merger assessments. The Act expressly provides that in assessing a merger, the Bureau would consider "whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail." If this threshold is met, the loss of actual or future competition from the failing firm is not attributed to the proposed merger. The Bureau has interpreted this failing firm defence quite strictly in practice, taking the view that the purchasing party must demonstrate that the target is likely to exit the market absent the acquisition, whether owing to insolvency, bankruptcy or receivership. This is a high standard to meet, and the failing firm defence has been successfully invoked in only a relatively few transactions. One very recent example is the Bureau's clearance in April 2020 of the merger of Total Metal Recovery Inc. (TMR) and American Iron & Metal Company Inc. (AIM), the two largest scrap metal processors in the province of Québec. In that case, the Bureau concluded that TMR was a failing firm and that its assets were likely to exit the market in the absence of the merger.

Given the significant economic impact of COVID-19 restrictions and the interest in preventing Canadian jobs from permanently disappearing, some market observers have called for the expansion of the scope of the failing firm defence for target firms adversely affected by the pandemic. Although the Bureau did not make express reference to the pandemic when it announced its clearance of the TMR/AIM transaction, some observers pointed to this example as a hopeful sign of a relaxation in the Bureau's position. However, in September 2020, the Deputy Commissioner in charge of the Bureau's Mergers branch wrote in an article that the Bureau did not intend to relax its standards to accommodate the acquisition of firms weakened by the pandemic. Accordingly, even though we expect that the failing firm defence will be raised more frequently in the year ahead, merging parties thinking of relying on this argument should not expect an easier path forward simply due to COVID-19.

Continued Bureau Interest in Minority Ownership Interests

Consistent with our comments in last year's review, the Bureau's scrutiny of minority interest holders in merging parties has continued, often resulting in detailed information requests for merging parties. This focus is likely to continue to feature prominently in the coming

year. Enforcement action seeking to limit common shareholdings in competing firms could have a chilling effect on overall investment, be unworkable in practice and raise other legal and policy issues. It remains to be seen whether the Bureau would seek to block a transaction solely on the basis of non-controlling minority interests held by an investor in competing firms. For now, the Bureau's requests for details on minority interests can cause delays in merger reviews and may raise disclosure issues or involve information unavailable to the purchaser.

Sustained Focus on Enforcement in the Digital Economy

As we have noted in previous publications, since his appointment in 2019, Commissioner Boswell has repeatedly stated that the digital economy is an enforcement priority for the Bureau. The Commissioner has explained that this focus is a natural by-product of the "explosive growth" in the digital sector, which "means that digital is more important to our economy than many of the more traditional sectors."

The Bureau's Strategic Vision for 2020-2024 and 2020-2021 Annual Plan: Protecting Competition in Uncertain Times confirm that enforcement in the digital economy will remain a priority in the coming year. The Strategic Vision set out the Bureau's goal of being "a world-leading competition agency, one that is at the forefront of the digital economy and champions a culture of competition for Canada." To achieve this goal, the Bureau has committed to (i) protecting Canadians through enforcement action; (ii) promoting competition in Canada; and (iii) investing resources to ensure it keeps pace with the digital economy. The Annual Plan echoed the digital-focus of the Strategic Vision and set out concrete steps for each of its three objectives. For example, the Bureau committed to furthering its enforcement action by focusing on key economic sectors (including digital services, online marketing and financial services) and continuing to advance early detection technologies. With respect to promoting competition, the Bureau committed to continuing its engagement with policy-makers, particularly in the health and telecommunications sectors, and to maintaining its leadership roles internationally.

Over the past year, the Bureau reached a consent agreement with Facebook and initiated an investigation into Amazon's business practices with a focus on a potential abuse of dominance. Although these cases have not reached the scale of investigations by the Bureau's counterparts in the United States and the European Union (EU), which have recently commenced high-profile cases against Facebook and Amazon, we expect the Bureau to continue its focus on digital economy issues in the coming year.

Increasing Overlap Between Privacy and Competition Law

As we move into 2021, we expect the Bureau to continue its efforts to expand the ambit of the Act into areas affecting privacy concerns. In particular, we expect the Bureau will continue to investigate whether representations concerning the privacy protections provided to consumers may also violate the Act's prohibition on misleading representations.

This effort was best exemplified in 2020 by the Bureau's consent agreement with Facebook. The Bureau alleged that Facebook had shared users' information from its Messenger application in a manner that was inconsistent with the representations it made including in its privacy policies. Facebook agreed to pay an administrative monetary penalty of $9 million and to cease misrepresentations regarding its protection of users' privacy.

There had been concerns that the Bureau's forays into privacy law might result in a bureaucratic "turf war" with the federal Office of the Privacy Commissioner, which has primary responsibility for enforcing Canada's national privacy legislation. However, efforts appear to be under way to address these concerns and to promote cooperation between the two authorities. In November 2020, for example, the Bureau, together with the Office of the Privacy Commissioner and the Canadian Radio-television and Telecommunications Commission, issued letters to 36 mobile application companies raising concerns about their advertising practices and treatment of personal information. Moreover, draft federal privacy legislation tabled in November 2020 would, if enacted, increase the ability of the Commissioner of Competition and the Privacy Commissioner to share information about their activities. Businesses operating in Canada should therefore be aware of the increasing risk that their representations about privacy may be scrutinized by both the Commissioner of Competition and the Privacy Commissioner.

Revised Approach to Competitor Collaborations

In addition to its guidance on competitor collaborations in the context of COVID-19, the Bureau published draft revisions to its Competitor Collaboration Guidelines in July 2020 and invited public comments on the proposed changes. The proposed revisions would mark the first update to the guidelines since they were issued in 2009. The public consultation ended in September 2020, and we expect to see a final version of the revised guidelines in the coming year.

While the draft revised guidelines did not signal any major changes in the Bureau's enforcement approach to competitor collaborations, they did highlight a few issues of interest. For example, in the current version of the guidelines, the Bureau suggests that it would review non-compete clauses in merger agreements under the Act's civil provisions rather than as possible criminal conspiracies. However, the draft revised guidelines now open the possibility that the Bureau could review non-compete clauses in purchase and sale transactions under the Act's criminal cartel provisions in certain "rare instances." For example, the draft revised guidelines suggest a non-compete clause could be subject to scrutiny as a potential criminal offence where it "may amount to a market allocation agreement." Unfortunately, the draft revised guidelines do not provide any further examples of non-compete clauses that could be subject to review under the Act's criminal offence provisions; nor do they provide details on the Bureau's likely analysis of such clauses.

In a similar vein, the draft revised guidelines now caution that the Bureau may investigate a merger under the Act's criminal conspiracy offence if the merging parties are competitors and enter any agreement that "goes beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement." This statement appears to stem from a recently closed Bureau investigation into a transaction in which the parties were alleged to have also agreed to close down competitive, overlapping operations once the merger transaction was completed.

The draft revised guidelines also contain a more in-depth discussion of "hub-and-spoke" conspiracies. A hub-and-spoke conspiracy refers to agreements between horizontal competitors facilitated by a non-competitor (usually a customer or supplier of the colluding parties). In that regard, the current guidelines note: "Where an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under section 45." The draft revised guidelines state more directly that "a wholesaler who facilitates a price-fixing conspiracy among its retail clients may be a party to the conspiracy even if it does not compete in the retail market." Again, this appears to reflect the Bureau's approach in several recent investigations in which it alleged that parties at one level of the supply chain had facilitated a conspiracy among parties at another. However, the Bureau's suggested approach has yet to be accepted by any court in Canada.

Finally, although not covered in the current draft of the revised guidelines, the Bureau has since indicated that it intends to include a discussion about whether the Act's criminal provisions apply to "buy side agreements" between competitors in the final version of the revised guidelines. The issue has arisen particularly in the context of alleged agreements between competitors not to "poach" employees from each other, and alleged agreements affecting wages and terms of employment. The Bureau issued a statement on this topic on November 27, 2020, which presumably foreshadowed the position that is likely to be adopted in the finalized guidelines. In that statement, the Bureau indicated that while it views such agreements with concern, the particular language of the criminal cartel offence limits its application to agreements between competitors affecting the "supply" of products and services, not agreements affecting the "purchase" of products and services, such as services from employees. To the extent that buy-side agreements raise competition issues, the Bureau will investigate them under the Act's civil provision prohibiting anticompetitive agreements between competitors. Unlike the criminal cartel offence, this civil provision does not permit the imposition of sanctions such as fines and imprisonment. Rather, remedies are largely limited to orders prohibiting parties from engaging further in offending conduct.

Ongoing Bureau Advocacy for *Competition Act* Reforms

In May 2019, the Minister of Innovation, Science and Industry published an open letter to the newly appointed Commissioner Boswell, inviting him to consider whether the Act should be amended to increase its impact and effectiveness. The Commissioner used a recent appearance before the House of Commons INDU Committee to provide a glimpse of the Bureau's possible shopping list for reforms.

In response to the Committee's questions, the Commissioner suggested that financial penalties are inadequate and would have more of a deterrent effect if scaled to the size of the offending enterprise, in line with the approach of competition authorities in some other jurisdictions. The Commissioner also suggested that the conduct for which civil administrative monetary penalties are available could be expanded (these penalties are now limited to cases of abuse of dominance and deceptive marketing practices). Finally, the

Commissioner made repeated reference to the fact that the Bureau does not have authority under the Act to conduct meaningful "market studies" or to impose "codes of conduct" on industries. He compared this situation unfavourably to the powers available to competition authorities in some other jurisdictions (for example, in the United Kingdom and Australia) where codes of conduct governing relations between grocery retailers and their suppliers have been established.

Some of the Commissioner's "wish list" items are long-standing – for example, the Bureau's desire to have expanded powers to conduct market studies. Other items are more recent, including the proposed increase or expansion of criminal and civil financial penalties.

To some degree, all the proposals outlined above are driven by the Bureau's focus on possible anticompetitive conduct in the digital economy and its concern that it lacks sufficient powers to investigate these allegations and impose meaningful sanctions. Interestingly, the Commissioner did not address the anticompetitive effects of acquisitions of startups and nascent competitors by large market incumbents, an issue that has garnered recent global attention in the digital space. For example, in response to concerns that Facebook's acquisition of WhatsApp nearly avoided merger control review in the EU, Germany introduced amendments to its merger notification regime to capture certain acquisitions of nascent companies. In the United States, both the Federal Trade Commission and 48 state attorneys general have announced cases alleging Facebook engaged in illegal behaviour in its acquisitions of WhatsApp and Instagram. Given these actions by its counterparts in other jurisdictions, it will be interesting to see if the Bureau will seek to broaden Canadian merger notification requirements or otherwise amend the Act's merger provisions to more expansively capture acquisitions of nascent companies by incumbents..

Neither the Bureau nor the Canadian government has given any formal indication to date of an intention to introduce amendments to the Act in 2021. The government's clear current priorities are managing the pandemic and dealing with critical issues relating to Canada's economic recovery. However, in a recent interview, the Minister of Innovation, Science and Industry indicated that the government would be "looking at" making changes to the *Competition Act*. This is therefore an issue that bears continued attention in the coming year.

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