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Antitrust Year in Review – Canada Chapter ABA Section of International Law

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Legislative and Administrative Developments

On March 12, 2009, the Canadian Parliament passed legislation incorporating significant amendments to Canada's Competition Act (the "Act").[1] The amendments were part of an extensive legislative package designed to implement the Canadian government's 2009 budget and economic stimulus measures. A summary of the key amendments is provided below.

Merger review

The Act's merger review process has been amended so that it is much more closely aligned with the US procedures under the Hart-Scott-Rodino Antitrust Improvements Act. Thus, a notifiable transaction may not be completed until the expiry (or early termination) of a 30-day waiting period following notification. Before the expiry of this 30-day period, if issues remain that it wishes to investigate, the Competition Bureau (the "Bureau") may issue a supplementary 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.

Additionally, the "transaction size threshold" for pre-merger notification has been increased. Now, transactions will not be notifiable if the book value of the target's assets in Canada, or its annual gross revenues from sales in or from Canada, do not exceed CDN$70 million (approximately US$68.1 million) (up from the previous CDN$50 million (approximately US$48.6 million) threshold). This threshold amount will increase in subsequent years according to a formula that is tied to changes in the inflation rate.

Finally, the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one year.

Cartels

Effective March 12, 2010 the amendments will repeal the 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 current conspiracy provision, the new offence will 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 CDN$25 million (approximately US$24 million) fine per count, up from the current maximums of five years and CDN$10 million (approximately US$9.7 million) per count.

Also effective March 12, 2010, all other agreements between competitors that have the effect of substantially lessening or preventing competition will be dealt with under a new civil provision. The Bureau will be able to apply to the Competition Tribunal (the "Tribunal") under this new provision for an order to remedy the effects of such agreements.

Increased penalties / expanded offences

Additional amendments were also enacted to expand the scope of certain offences or increase their penalties. These include (i) granting the Tribunal the power to order an "administrative monetary penalty" of up to CDN$10 million (approximately US$9.6 million) for contravention of the abuse of dominance provisions and up to CDN$15 million (approximately US$14.4 million) for subsequent contraventions; (ii) increasing the maximum penalties for misleading advertising and obstruction of a Bureau investigation; and (iii) expanding the bid-rigging offence

1 Bill C-10, Budget Implementation Act, 2009, 2d Sess. 40th Parl., 2009, available at http://www2.parl.gc.ca/content/hoc/Bills/402/Government/C-10/C-10_4/C-10_4.PDF.

to include a prohibition against persons agreeing to withdraw their already-submitted bids.

Pricing matters

The amendments repealed the Act's price discrimination, predatory pricing and promotional allowance offences. However, conduct that could formerly be addressed under these provisions may still form the basis of an application under the Act's abuse of dominance provisions. The price maintenance offence was also repealed, but replaced with a similar civil provision under which the Bureau can apply to the 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.

Administrative developments

On August 5, 2009, Melanie Aitken was appointed as Commissioner of Competition ("Commissioner") for a five-year term. As Commissioner, Ms. Aitken will be the head of the Bureau and have the statutory responsibility for administering and enforcing the Act. In addition to aiming to ensure the effective, transparent and efficient implementation of the amendments to the Act, Ms. Aitken has stated that one of her priorities as Commissioner will be to bring forward responsible cases to clarify the law[2]. As a result, an increased number of cases are expected to be brought in the coming years.

Cartels and other Anticompetitive Practices

Draft guidelines

On December 23, 2009, the Bureau issued its final Competitor Collaboration Guidelines (the "Collaboration Guidelines"),[3] which describe the Bureau's general approach to assessing competitor collaborations under the Act's new amended provisions relating to agreements among competitors. The Collaboration Guidelines set out the Bureau's view that the new criminal conspiracy offence will apply only to "categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects". With this in mind, the Collaboration Guidelines provide examples of types of ancillary restraints that the Bureau will generally not assess under the new criminal offence, although they may be subject to review under the new civil provision. These include non-compete clauses found in an employment agreement; agreements to abstain from making material changes to a business pending consummation of a merger; and non-compete obligations between the parent undertakings and a joint venture where such obligations correspond only to the products, services and territories covered by the joint venture agreement.

It should be noted that the Collaboration Guidelines do not have the force of law and are not binding on the courts or private plaintiffs. For example, private parties will still be free to bring claims for the commission of criminal offence with respect to all forms of agreements, even those that the Bureau may decide not to pursue as criminal offences as an enforcement matter.

Pleas

Guilty pleas continued to be made following an investigation into price fixing in the retail gasoline market in the province of Quebec. Between March and December 2009, eight individuals and two companies pleaded guilty for their roles in the alleged conspiracy.[4] Since charges were first laid in June 2008, ten individuals and six companies have pleaded guilty, with fines totalling over CDN$2.7 million (approximately US$2.6 million). Of the ten individuals who have pleaded guilty, six have been sentenced to terms of imprisonment totalling 54 months.[5] Also in 2009, five air cargo carriers, Qantas, Air France, KLM, Martinair and British Airways pleaded guilty for their roles in an air cargo cartel affecting Canada.[6] Total fines imposed on the companies exceeded CDN$14.6 million (approximately US$14 million).

2 Melanie L. Aitken, Commissioner of Competition, Speech at the Canadian Bar Association, Competition Law Section, Annual Conference, Gatineau, Quebec, Canada, September 25, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html

3 Competition Bureau, Competitor Collaboration Guidelines, December 23, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html

4 Press Release, Competition Bureau, More Guilty Pleas in Quebec Gasoline Cartel Case, March 17, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03024.html; Press Release, Competition Bureau, Sixth Individual Pleads Guilty in Quebec Gasoline Cartel Case, March 30, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03034.html; Press Release, Competition Bureau, Three More Guilty Please in Quebec Gasoline Cartel Case, May 21, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03055.html; Press Release, Competition Bureau, Individual Sentenced in Quebec Price-Fixing Cartel, August 31, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03116.html; Press Release, Competition Bureau, Ninth Individual Sentenced in Quebec Price-Fixing Cartel, October 23, 2009, available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03145.html; and Press Release, Competition Bureau, Tenth Individual Sentenced in Quebec Price-Fixing Cartel, December 7, 2009, available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03168.html.

5 Press Release, Competition Bureau, Tenth Individual Sentenced in Quebec Price-Fixing Cartel, id.

6 Press Release, Competition Bureau, British Airways Pleads Guilty in Air Cargo Price-fixing Conspiracy, October 30, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03147.html

Abuses of a Dominant Position

In January 2009, the Bureau released its draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions[7] (the "Draft Abuse Guidelines").[8] The Draft Abuse Guidelines expand upon the Bureau's previous Enforcement Guidelines on the Abuse of Dominance Provisions[9] and potentially signal more aggressive enforcement by the Bureau in this area. Notably, the Draft Abuse Guidelines indicate a shift in the Bureau's approach to joint dominance and state that the Bureau will now consider the abuse of dominance provisions of the Act to apply where two or more firms engage in "similar" anticompetitive practices and "together hold market power based on their collective share of the market, barriers to entry or expansion, and other factors".

Indeed, on June 16, 2009, the Bureau announced that it had entered into a consent agreement with two commercial waste collection firms, Waste Services (CA) Inc. and Waste Management of Canada Corp., to resolve issues raised by contracts that each company used with its respective customers on Vancouver Island (British Columbia).[10] Specifically, the allegation was that the two companies jointly engaged in an abuse of a dominant position by using long-term contracts and restrictive terms to lock in customers and exclude competitors. In line with the Bureau's more aggressive approach under the Draft Abuse Guidelines, neither the Bureau's press release nor the consent agreement indicate that the Bureau found any agreement or understanding between the companies with respect to the challenged conduct.

Court Decisions

On September 28, 2009, the Ontario Superior Court of Justice issued the first decision by a Canadian court in a contested case certifying a price-fixing class action on behalf of a class which includes indirect purchasers. The case, Irving Paper Limited et al. v. Atofina Chemicals Inc. et al.,[11] concerns a class action claim on behalf of all persons in Canada (excluding the defendants) who purchased hydrogen peroxide, products containing hydrogen peroxide or products using hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005. The Act allows persons who have suffered loss or damage as a result of a contravention of the Act's criminal provisions to sue for damages. Previous cases[12] involving price-fixing claims by indirect purchasers had denied class certification on the ground that the plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis. In those cases, the defendants had successfully argued that there was insufficient evidence that the increased price had been passed through to each indirect purchaser.

Shortly thereafter, in November 2009, the British Columbia Court of Appeal certified a price-fixing class action on behalf of a consolidated class of direct and indirect purchasers.[13] The action was brought on behalf of all persons in British Columbia who purchased computer memory chips known as "DRAM" (dynamic random access memory) or products containing DRAM, either directly from the manufacturers or indirectly from intermediaries, during the class period.

If unchanged on appeal, the decisions could significantly broaden the scope in Canada for indirect purchaser price-fixing class actions. It could also mean that class action law in Canada will be inconsistent with U.S. federal law, which bars indirect purchasers from making damages claims.

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7 See Sections 78 and 79 of the Competition Act.
8 Competition Bureau, Updated Enforcement Guidelines on the Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act (Draft for Public Consultation), January 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html
9 Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions, July 2001, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html
10 Press Release, Competition Bureau, Competition Bureau Cracks Down on Joint Abuse of Dominance by Waste Companies, June 16, 2009, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03081.html
11 [2009] O.J. No. 4021.
12 See, e.g., Chadha v Bayer Inc. (2003), 223 D.L.R. (4th) 158.
13 Pro-Sys Consultants Ltd. v. Infineon Technologies AG et al., 2009 BCCA 503.