After Canada's recent election

How will the competition and foreign investment rules change?

*by **Mark Katz****

Given all of the attention paid to the recent US election, only the most devoted observers of North American politics will have noticed that Canada also went to the polls on 14 October 2008, electing a minority Conservative government. Even more noteworthy is the fact that the Conservatives included promises to change Canadian competition and foreign investment laws as part of their campaign platform.

Competition law

The Conservatives said that, if elected, they would introduce several far-reaching changes to Canada's Competition Act, including: (1) a new criminal conspiracy offence focused on hardcore cartel conduct such as price-fixing and bid-rigging, with other types of potentially anticompetitive agreements to be dealt with on a separate non-criminal track; (2) new maximum penalties for cartels and bid-rigging of $25m in fines and 14 years in prison (up from the current maximum of $10m in fines and five years' imprisonment); (3) new fines for abuse of dominance (up to $10m for initial offenders and $15m for repeat offenders); (4) new penalties for obstructing Competition Bureau investigations (up to $100,000 on summary conviction and up to 10 years' imprisonment for an indictable offence); (5) increased penalties for deceptive marketing; and (6) repeal of the Competition Act's criminal offences for price discrimination, promotional allowances and predatory pricing.

Many of these proposals (eg (1) and (3) above) are not new. Ironically, they formed part of the Competition Act amendments introduced by the former Liberal government in 2005, but which were then shelved after the Liberals were defeated by the Conservatives in 2006.

Following the 2006 election, the Conservatives signalled that they were not interested in amending the Competition Act. This view was broadly endorsed by Canada's business community, which opposed the idea of a per se criminal offence for hardcore cartels and fines for abuse of dominance (although there was support for decriminalisation of the pricing offences).

Over time, that position changed. Most importantly, the Conservative government appointed a panel in 2007 to review the impact of Canadian competition and foreign investment on the country's domestic and global economic competitiveness. This review panel (the Panel) reported back in June 2008 and recommended many of the same changes that the Conservatives included in their campaign platform. With their recent election, the Conservatives are now committed to implementing these changes, provided that they are able to obtain the support of a parliamentary majority.

Interestingly, the Conservatives failed to adopt one of the Panel's other main recommendations, namely to scrap Canada's current merger review system in favour of a process modelled after the US HSR regime. It is a good thing that they decided not to do so. While the US merger review process has much to offer Canada, a comparative disadvantage is the practice of US authorities to issue very extensive "second requests" as part of their phase 2 reviews. These second requests are far more onerous than anything experienced in Canada, and it is not clear how adopting this model would enhance the domestic or international competitiveness of Canadian businesses.

Foreign investment

The Conservatives also promised to enact very significant reforms to Canada's laws governing foreign investment in Canadian businesses. Among other things, they said that they would: (1) amend the Investment Canada Act (ICA) to increase the threshold for foreign investment reviews from the current level of $295m in gross asset value to $1bn in enterprise value, with the increase to be phased in over four years; (2) ensure greater transparency in the ICA process by requiring the responsible minister to give reasons if an investment is disallowed; (3) establish a new national security review mechanism in the ICA to ensure that foreign investments cannot jeopardise Canada's national security; (4) work with Canada's trading partners to ensure that foreign investment is a two-way street and that Canadian companies also receive increased access to investment opportunities abroad; (5) increase the permissible level of foreign investment in domestic airlines from 25% to 49% through bilateral negotiations with Canada's major partners such as Europe and the US that would also secure increased access to international flight routes and landing rights through open skies agreements; and (6) revise the non-resident ownership policy for uranium mining and development, provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investments in this sector meet the national security test.

The gist of these proposals (many of which were first made by the Panel) is that Canada's foreign investment rules should be pared back. In particular, if adopted, the ICA's application will be restricted to very limited circumstances, principally where national security interests may be implicated.

Implications

The Conservatives are likely to face opposition from Canada's business community if they press ahead with their proposed Competition Act amendments. The business community has no more reason to support these changes now than it did previously.

The proposed changes to Canada's foreign investment laws are also likely to generate opposition, but this time from the left side of the political spectrum, which is suspicious of foreign (eg US) takeovers of Canadian businesses.

While the Conservatives weathered opposition on both fronts during the election campaign, they may now be less keen on these issues in future, having only secured a minority government, and in the context of a global financial crisis.

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