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Amendments to the *Competition Act* and *Investment Canada Act*: *What Do They Mean For Business?*

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Amendments to the Competition Act and Investment Canada Act: *What Do They Mean For Business?*

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On March 12, 2009, Canada enacted new legislation that ushers in fundamental changes to the Competition Act and Investment Canada Act. Below is a summary of the key amendments and their implications.

Competition Act

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 further 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.

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 industrynon-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 the Bureau will issue advisory opinions on the legality of existing agreements at no cost during the one year transitional period.

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.

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.

Investment Canada Act

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, "could be injurious 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

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.

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, which is also unfortunate given the potentially significant implications for transactions caught by this process.

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