North American
Free Trade & Investment Report

WorldTrade Executive, Inc.

Biweekly report on legal & financial issues affecting direct investment and cross-border trade in Mexico, the U.S., and Canada

United States: Trade

U.S. Trade Agenda: Rhetoric Raised Towards China; Trade Agreements to be Taken Up

By Steven J. Mulder (Greenberg Traurig)

Important Congressional leaders and the Bush Administration recently stepped up rhetoric toward China and Congress now seems poised to move forward with legislation to address U.S. complaints (real and perceived) over trade with China.

Sharpening speculation that Congress may soon move forward with legislation are recent comments by the Chairman of the Senate Finance Committee, Chuck Grassley (R-Iowa), who indicated that he would produce a "comprehensive legislative approach" to address

*See **Free Trade,** page 10➢*

Canada: Competition

Canadian Competition Bureau – Recent Initiatives in Merger and Cartel Law

By Mark Katz, Charles Tingley and Elisa Kearney
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The Canadian Competition Bureau (the "Bureau") has taken several initiatives recently in connection with two central aspects of its jurisdiction under Canada's *Competition Act* (the "Act"): (i) merger review and (ii) cartel enforcement.

With respect to merger review, the Bureau has issued a draft information bulletin describing its approach to designing and implementing merger remedies under the Act (the "Draft Remedies Bulletin"). In the area of cartel enforcement, the Bureau has embarked on a process to revise and update its immunity program, which has proved to be one of the most effective tools in facilitating the Bureau's detection and investigation of cartels in Canada. Both of these developments are described in more detail herein.[1]

*See **Canada,** page 13➢*

HIGHLIGHTS

Vol. 16, No. 5
March 15, 2006

Important U.S. Congressional leaders and the Bush Administration recently stepped up rhetoric toward China and Congress now seems poised to move forward with legislation to address U.S. complaints (real and perceived) over trade with China. Congress is expected to take up at least two free trade agreements this year.
Page 1

The Canadian Competition Bureau has issued a draft information bulletin describing its approach to designing merger remedies. Canada has moved to make its cartel immunity program more consistent with new leniency programs in the EC, Australia and elsewhere.
Page 1

NAFTIR continues its two part review of Mexico's oil and power sector. Approximately 30% of the power generated in Mexico is generated by private investors. It remains to be seen whether the new President to be elected in July will be able to promote new reforms to increase this output.
Page 3

Mexico has taken the first step toward providing incentives to use renewable energy.
Page 5

What lies ahead in global trade negotiations in 2006?
Page 8

➢***Canada,*** *from page 1*

The Draft Remedies Bulletin

Section 92 of the Act authorizes the Commissioner of Competition (the "Commissioner"), who heads the Bureau, to challenge merger transactions that are likely to "prevent or lessen competition substantially" in a relevant market. Applications to challenge mergers are brought by the Commissioner before the Competition Tribunal (the "Tribunal"), a hybrid administrative body comprised of both judges and non-judicial members. The Tribunal may issue orders preventing a merger from being consummated, dissolving the merger or imposing a remedy requiring the disposition of specific assets or shares. With the consent of the parties, the Tribunal may also issue orders requiring that "any other action" be taken in respect of a merger by the person against whom the order is directed.

The Commissioner has only rarely exercised the authority to challenge merger transactions before the Tribunal. In the approximately 20 years since the Act's merger provisions were enacted, there have been only four fully-contested applications (a number of applications were commenced but settled prior to adjudication; one contested application is currently underway). To the extent that issues are raised by a merger, they are generally resolved through some form of negotiated remedy between the Commissioner and the merging parties.

The purpose of the Draft Remedies Bulletin is to set out the "essential elements" that the Bureau will take into account in merger cases where remedial action is required. Key points of interest from the Draft Remedies Bulletin are summarized below.

Negotiation Rather Than Litigation

The Draft Remedies Bulletin re-affirms the Bureau's clear preference for negotiating merger remedies rather than resorting to litigation. The Draft Remedies Bulletin states that proceeding by way of settlement is less costly, more expeditious and allows a wider range of remedies to be considered.

Structural versus Behavioral Remedies

The Draft Remedies Bulletin reiterates past statements by the Bureau that it will normally insist upon structural remedies (i.e., divestitures of assets or businesses) over behavioral remedies. According to the Draft Remedies Bulletin, structural remedies are simpler, more effective, less costly to administer and more readily enforceable than behavioral remedies. For these reasons, the Bureau will consider stand-alone behavioral remedies only where no viable structural remedy is available or where such remedies have a significant structural impact by reducing or eliminating barriers to entry, offering access to necessary infrastructure or key technology, or otherwise facilitating new entry or expansion. Examples of such "quasi-structural" behavioral remedies include licensing intellectual property, granting non-discriminatory access rights to networks and supporting the removal or reduction of tariffs.

Divestiture Criteria

According to the Draft Remedies Bulletin, the Bureau will agree to a negotiated divestiture remedy only if it meets the following minimum criteria:

- the assets elected for divestiture must be viable and sufficient to eliminate the substantial lessening of competition;
- the divestiture must occur in a timely manner; and
- the buyer of the assets must be independent of the merged entity and have the ability, incentives and intention to compete effectively in the relevant market(s).

The Bureau will also not normally agree to permit closing to take place before a remedy is agreed upon, e.g., pending completion of its investigation.

The Draft Remedies Bulletin places much emphasis on the second point above, i.e., quick implementation of merger remedies. For example, the Bulletin sets out the Bureau's preference for "fix-it-first" solutions, which involve divestiture of relevant assets to an approved buyer prior to or upon completion of the merger. In the Bureau's view, this is the optimal approach because it avoids issues regarding the marketability of a divestiture package, prevents material devaluation of the relevant assets, and preserves or restores competition in the relevant market as quickly as possible.

The same concern about ensuring early implementation underscores the Bureau's approach to post-merger divestiture remedies. These remedies ordinarily provide for a fixed period of time in which the vendor can market the divestiture package on the best terms it can negotiate with potential buyers. Where a sale is not effected in the initial period, an independent trustee will be appointed to complete the sale.

One requirement the Bureau says it will now impose in this regard is to give vendors only 3 – 6 months in which to divest the asset package before a trustee will be appointed to take over the process. This period is shorter than the initial sale periods in past merger settlements which have typically varied between 6 months and 1 year. According to the Draft Remedies Bulletin, the Bureau may grant a short extension of the initial sale period in "exceptional circumstances" or where there is a binding letter of intent and closing of the divestiture transaction is "clearly imminent". The trustee sale period will also normally be 3-6 months, depending on the circumstances.

The Draft Remedies Bulletin states that the Bureau also will not agree to any settlement that imposes restrictions on the price at which the trustee may sell the designated assets, regardless of how those restrictions may be expressed (e.g., "fair market value", "going concern", "liquidation price", "fire sale", etc.).

In addition, the Bureau may require "crown jewel" provisions that would allow specified assets to be added to or substituted for the initial divestiture package to make the sale more appealing to buyers during the trustee sale period. According to the Draft Remedies Bulletin, crown jewel provisions are not intended to be punitive but rather to encourage vendors to implement the initial divestiture package quickly and to ensure a viable alternative remedy if the initial package is not saleable. The Draft Remedies Bulletin provides little guidance about when the Bureau will require crown jewels except to say that the Bureau is more likely to use crown jewel provisions to support the effective implementation of partial divestitures.

International Mergers

The Draft Remedies Bulletin contains a separate section discussing the Bureau's approach to remedying the anticompetitive effects in Canada resulting from international mergers. When a merger leads to similar anticompetitive effects in Canada and other jurisdictions, the Bureau will coordinate with other competition authorities to develop remedies. Coordination may involve ongoing communication as developments arise in particular jurisdictions, participation in joint discussions with merging parties and the creation of parallel remedies to ensure consistency across jurisdictions.

According to the Draft Remedies Bulletin, cooperation on remedies will be helpful where a single buyer, trustee or monitor is required for a North American or global divestiture. In addition, and consistent with past Bureau practice, the Draft Remedies Bulletin notes that the Bureau may determine in appropriate cases that action beyond that taken by foreign jurisdictions is not required. (For example, the Bureau recently determined that divestitures required by the United States and European competition authorities with respect to Procter & Gamble's acquisition of Gillette adequately resolved concerns in Canada.)

On the other hand, the Bureau will be more likely to formalize its own remedies in Canada when the merger raises Canada-specific issues, the assets to be divested reside in Canada or remedial action in Canada is critical to enforcing the terms of the settlement.

Implications

There are few surprises in the Draft Remedies Bulletin. For example, it is very similar in content to the European Commission's Notice on merger remedies. With certain exceptions, the Draft Remedies Bulletin is also consistent with the approach taken by the U.S. antitrust authorities to merger remedies. (One point of distinction relates to "crown jewels". The Bureau, like the Federal Trade Commission, favors using "crown jewel" provisions in appropriate cases; the Antitrust Division of the U.S. Department of Justice does not.) There are concerns, however, with the Bulletin. For example, the proposed 3 to 6 month period for vendors to market a divestiture package before losing control of the process is shorter than past practice in Canada. It also compares unfavorably to the European experience, where a recent study by the Commission indicates that the average divestiture deadlines for remedies imposed under the ECMR was 7.6 months, while the average actual timeframe to implement a divestiture was 6.2 months. The European study also notes that imposing too short a divestiture period can actually operate against a successful sale by, e.g., reducing the time available for a potential purchaser to conduct necessary due diligence and to negotiate an adequate agreement. Another, broader concern, is that the Bureau will come to treat its Bulletin as setting out immutable rules to be followed in all cases. For example, the Bureau apparently plans to include a "template consent agreement" with the final version of the Bulletin when it is released. This template would reflect the "standard guiding principles" to be applied by the Bureau in dealing with merger remedies. The question to be asked is whether such a template would merely be a point of reference in remedy negotiations going forward, or whether merging parties would effectively be expected to adopt the template in every case.

Revising Canada's Immunity Program

Overview

The Bureau has operated a form of immunity (amnesty/leniency) program since 1990 in respect of criminal offenses under the Act. In 2000, the Bureau adopted a more formal program loosely modeled on the U.S. example. The Bureau considers its immunity program to be a powerful tool for detecting, investigating and prosecuting cartels.

The Bureau issued an information bulletin regarding its immunity program in September 2000 (the "Immunity Bulletin"). In October 2005, the Bureau released a revised set of responses to "frequently asked questions" about the immunity program (the "Immunity FAQ's"), which describes in greater detail the Bureau's policies and procedures with respect to various steps in the immunity application process.

Based on these documents, the key aspects of the Bureau's immunity program (as it currently stands) can be summarized as follows:

- The Bureau cannot grant immunity on its own. The authority to grant immunity technically resides with the Attorney General of Canada (the "Attorney General"), who has the sole authority to decide whether or not to prosecute under the Act. Accordingly, the Bureau will provide the Attorney General with a recommendation of immunity, which the Attorney General will then consider in light of his own separate policy on immunity. As a practical matter, however, the Attorney General will rarely, if ever, decline to accept the Bureau's recommendation regarding immunity.
- A request for immunity will be considered where (i) a party is the first to disclose an offense of which the Bureau is unaware or (ii) is the first to come forward with evidence in a situation where the Bureau is aware of an offense but has not yet obtained sufficient evidence to warrant a criminal referral.
- Being "first in" to the authorities in another jurisdiction will not automatically entail "first in" status in Canada.
- In addition to being "first in", a party also must fulfill the following requirements in order to secure a grant of immunity; otherwise, a subsequent party that does meet them may be eligible for immunity instead:

—the party must take effective steps to terminate its participation in the illegal activity;
—the party must not have been the instigator or the leader, of the illegal activity (as opposed to a "co-instigator" or "co-leader"), nor the sole beneficiary of the activity in Canada;
—the party must reveal any other criminal offenses under the Act in which it may have been involved and provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control relating to the offense(s) under investigation;
—the party must agree to co-operate fully, on a continuing basis, expeditiously and, when the party is a business enterprise, at its own expense, for the duration of the Bureau's investigation and any ensuing prosecutions;
—where possible, the party will make restitution for the illegal activity.

- Applicants should anticipate that the Attorney General will also ask them about any additional criminal activity under other legislation that could reasonably be expected to impact their credibility as witnesses.
- Only present directors/officers/employees will automatically come under the umbrella of an immunity grant made to a corporation; the situation of former directors/officers/employees will be considered on a case-by-case basis.
- The immunity application process will normally consist of the following steps:

– the "initial contact" with the Bureau, otherwise known as placing the "marker", which involves the disclosure of sufficient information, usually in hypothetical terms, for the Bureau to confirm that the party is "first in";
– the "proffer", which involves providing the Bureau with a more detailed description of the activity for which immunity is sought, usually within 30 days of the "marker";
– the "provisional guarantee of immunity", which involves the Bureau presenting the proffer information to the Attorney General, who will then decide whether to provide a written provisional guarantee of immunity pending further assessment of the claim;
– the "full disclosure" stage, at which the Bureau will expect to receive full, frank and truthful disclosure of the nature of the offense, through the production of documents, witness interviews, etc., on the understanding that the Bureau will not use this information against the party unless the party fails to comply with the terms of the immunity agreement; and
– the "immunity agreement", which involves the negotiation of the terms pursuant to which immunity will be granted by the Attorney General.

- Importantly, the Bureau will not insist that immunity applicants provide information in written form. This is to avoid potential disclosure issues for immunity applicants in any follow-on civil litigation.
- The Bureau also offers the possibility of "Immunity Plus", i.e., even if an applicant is not qualified to obtain immunity with respect to offense A, it may be "first in" and otherwise qualify for immunity in respect of offense B.
- As a general rule, the Bureau will not disclose the identity of a party requesting immunity, or any information obtained from that party, without that party's consent. Exceptions to this rule are when:

– there already has been public disclosure by the party;
– disclosure is required by law; or
– disclosure is necessary to prevent the commission of a serious criminal offense.

The Bureau's position regarding confidentiality in immunity situations is very different from its approach to confidentiality in other circumstances, which is that it does not require the consent of a party to disclose information provided that disclosure is necessary for the "administration and enforcement" of the Act. The difference in approach demonstrates the importance accorded by the Bureau to immunity applications. Note, however, that this special protection only applies to immunity applicants who are "first in" and does not assist cartel

participants who may come forward subsequently to cooperate.

Consultation Process

In February 2006, the Bureau released a "consultation paper" to solicit responses from stakeholders on various substantive issues that have arisen since the immunity program was adopted in its current form (the "Immunity Consultation Paper"). The issues addressed by the Immunity Consultation Paper include:

- how to balance the concern of immunity applicants that the information they provide be kept confidential against the disclosure requirements of the Canadian court system and the Bureau's need to coordinate with other competition authorities?
- are there certain communications that ought to be made in writing notwithstanding the Bureau's general acceptance of a paperless immunity application process?
- what criteria should the Bureau use to define what constitutes the "instigator/leader" of a cartel?
- should immunity also be automatically extended to past directors/officers/employees, which is not the current Bureau position?
- when is it appropriate to "carve out" directors/officers/employees from a grant of immunity?
- should parties that fail to disclose a second offense under the Act face an increased penalty ("penalty plus") for that offense in addition to possible revocation of immunity for the first offense they disclosed?
- is providing restitution an appropriate prerequisite for immunity?
- what are the circumstances in which immunity should be revoked?
- should the Bureau also adopt formal standards setting out when it will be prepared to grant leniency short of complete immunity?
- is it appropriate for the Bureau to initiate approaches to potential immunity applicants to encourage one or more to come forward?

Comments are requested by May 10, 2006

Implications

Canada is not alone in seeking to update its immunity program. In recent months, Australia, the European Commission and the United Kingdom all have issued revisions to their existing leniency programs. In addition, jurisdictions such as Japan, Austria and Mexico have adopted their own such programs. What is striking in reviewing these various programs is the high degree of similarity in approach. Although some differences are still evident, there is a clear trend towards convergence in policies and procedures. Indeed, one of the main goals of the consultation process in Canada is to make the Canadian immunity program even more consistent than it already is with the leniency programs of other jurisdictions such as the United States, Europe, Australia and the United Kingdom. This reflects the growing recognition by both competition authorities and immunity applicants of the value in having largely consistent approaches across jurisdictions.

[1] Unless otherwise indicated, all Bureau materials referred to in this article are available at http://www.competitionbureau.gc.ca.

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