Canada's competition reforms

New legislation introduces major changes to the existing regime

*by **Mark Katz** and **Jim Dinning****

On 12 March 2009, the Canadian parliament passed legislation incorporating significant amendments to Canada's Competition Act.

The amendments were part of an extensive legislative package designed to implement the Canadian government's 2009 budget and economic stimulus measures. As a result, passage of the legislation occurred much more quickly than normal, and without any opportunity for consultation or modification.

A summary of the key amendments and their anticipated implications is provided below.

Merger review

Proposed amendments to the premerger notification process. Under the Competition Act's former merger review process, transactions that exceeded certain financial thresholds and, in the case of share acquisitions, that exceeded an additional voting interest threshold, could not be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depended on whether the acquirer elected to make a short-form filing (14-day waiting period) or a long-form filing (42-day waiting period). The Bureau's substantive review of transactions ran on a different (but simultaneous) non-statutory timetable, based on the complexity of the transaction. These non-binding "service standard periods" ranged between two weeks (for the least complicated transactions) to over five months (for the most complex).

Following the recently enacted amendments, the Competition Act's merger review process is now essentially aligned with the merger review process in the United States. Thus, a notifiable transaction may not be completed until the expiry (or early termination) of a 30-day waiting period following notification. Before that 30-day period expires, the Bureau may advise the parties that it does not intend to challenge the transaction. Alternatively, if issues remain that it wishes to investigate, the Bureau may send a second request for information, in which case the proposed transaction may not be completed until 30 days after the Bureau receives the requested information from the parties.

The adoption of a US-style process follows the recommendations made by the federally appointed competition policy review panel in a report released in June 2008. The panel recommended that Canada's merger review process be modelled after the US merger notification process under the Hart-Scott-Rodino Antitrust Improvements Act. The stated rationale for the recommended changes was to reduce uncertainty and costs for merging parties.

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian review process with that in the US. However, the adoption of a second-request process is of considerable concern, particularly in the current economic climate. The US second-request process has been widely criticised for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a second request in the US can range from US $3.3m (on average) up to US $20m or US$25m (for the most complex cases) and that second-request investigations can take six or seven months to complete, on average. These studies also indicate that, despite the lengthy and expensive investigations, there is no evidence to suggest that the burden imposed by the second-request process leads to better decision-making.

The amendments also do not adequately address one of the key failings of the former merger review process, namely the lack of a set deadline within which the Bureau must complete its merger reviews. First, there is no limit on how long the second-request process can last – the burden is placed on merging parties to respond as quickly as they can. Moreover, unlike in the United States, parties cannot satisfy their burden by achieving "substantial compliance" with the second request. Rather, it appears that there must be "full compliance" – ie the Bureau must receive *all* of the required information from the parties. Finally, although parties will be entitled to close their transactions within 30 days of successfully completing the second request, the amendments do not state that the Bureau must also have completed its review by that time. Thus, in theory, the Bureau could continue its investigation even after the 30-day period has expired, thereby forcing parties to either close without substantive approval or wait until the Bureau has completed its review.

Increased merger notification thresholds. On the positive side, the amendments increase certain thresholds for premerger notification. Currently, the Competition Act generally requires the aggregate value of the target's assets in Canada, or the annual gross revenues from sales in or from Canada, to exceed C$50m in order for the notification requirements to be triggered. This "size of the transaction" threshold is now increased to C$70m initially, with future increases tied to changes in inflation (or as prescribed by regulation).

The threshold increase for premerger 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 notifiable transactions will be.

Ex post review. The other notable change ushered in by the amendments is that the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one year. This amendment is of some theoretical benefit to merging parties, in that it purports to reduce post-

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closing deal risk. However, since the Bureau has rarely if ever exercised its power to challenge transactions post-merger, the practical benefits are limited.

Agreements among competitors

The amendments also repeal the Competition 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 former conspiracy provision, the new offence does 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 $25m fine per count, up from the current maximum of five years and $10m per count.

As part of this reform, a new civil provision will apply to all agreements between competitors that are not caught by the new per se offence but that have the effect of lessening or preventing competition substantially. The Bureau will be able to apply to the Competition Tribunal under this new civil provision for an order to remedy the effects of such agreements.

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 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 US, where the courts have developed a similar concept, there continues to be an ongoing and extensive debate over the meaning of "ancillary". It will probably be some time before Canadian courts settle how that term should be interpreted in the context of the new offence.

Consequently, 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. So 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, including "swap" agreements (such as used in the petroleum industry), IP licensing agreements, and supply agreements that limit where distributors may sell (particularly if the supplier also sells the products directly in competition with its distributors).

Fortunately, the new conspiracy offence only comes into effect on 12 March 2010 – ie one year from the date of enactment of the amendments (this also applies to the new civil provision regarding anticompetitive agreements). Businesses 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. Parties may seek advisory opinions from the Competition Bureau with respect to the legality of existing agreements at no cost during the one-year transitional period.

Increased penalties/expanded offences

A series of additional amendments were also enacted to expand the scope of certain offences or increase their penalties. These include: (1) granting the Competition Tribunal the power to order an "administrative monetary penalty" of up to $10m for a contravention of the abuse of dominance provisions and up to $15m for subsequent offences; (2) expanding the bid-rigging offence to include a prohibition against persons agreeing to withdraw their already-submitted bids; (3) expanding the false or misleading representation offence to apply to companies targeting foreign individuals, and increasing the maximum penalties for contravention of the misleading advertising provisions; and (4) increasing the maximum penalties for obstruction of a Bureau investigation.

The increased penalties underscore the new seriousness with which the current 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 former commissioner having left office in December 2008).

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 anticompetitive and raises constitutional issues that may have to be litigated.

Pricing matters

One other positive aspect of the amendments is that they repeal the Competition Act's price discrimination, predatory pricing and promotional allowances offences. The price maintenance offence is also repealed, but replaced with a similar civil provision under which the Bureau can apply to the Competition 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.

The repeal of the pricing offences should offer suppliers more flexibility in developing pricing and distribution strategies in Canada and 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.

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 these measures were included in legislation 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.