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On March 12, 2009, the Canadian Parliament passed legislation incorporating significant amendments to Canada's Competition Act. These amendments include:

- Amending the current merger notification process to mirror the U.S. Hart-Scott-Rodino Antitrust Improvements Act process and increasing the current merger notification thresholds.
- Replacing the existing conspiracy provisions in the Competition Act with a *per se* criminal offense for cartel-like agreements among competitors and a new civil provision to deal with other types of agreements among competitors that substantially lessen or prevent competition.
- Expanding the scope of offenses or increasing/creating new penalties, including granting the Competition Tribunal the power to order significant fines for contravention of the Competition Act's abuse of dominance provisions.
- Repealing the price discrimination, promotional allowances, and predatory pricing offenses and de-criminalizing the price maintenance offense.

While several of the amendments are welcome (for example, repeal of the pricing offenses), others have been more controversial. In particular, concerns have been

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expressed about the new merger review process and the new *per se* cartel offense.

There are also concerns about the legislative process that was followed to enact the amendments to the Competition Act. These amendments formed part of a broader legislative package designed to implement the Canadian government's 2009 budget and economic stimulus measures. As a result, passage of the amendments occurred much more quickly than normal, and without any opportunity for the consultation that has normally accompanied changes to the Competition Act.

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

I. MERGER REVIEW

A. Amendments to the Pre-Merger 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 2 weeks (for the least complicated transactions) to over 5 months (for the most complex).

Because the "service standards" were non-statutory, there was effectively no deadline within which the Bureau had to complete its reviews. This meant that parties often found themselves in a position where the waiting period had expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties then had to decide whether to wait until the Bureau was done or close subject to the risk that the Bureau might challenge the transaction post-closing.

The amendments discard much of the old system and establish a new "U.S.-style" regime in which 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 it does not intend to challenge the transaction. Alternatively, if issues remain that it wishes to investigate, the Bureau may send a "supplementary 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.

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 United States. However, the adoption of a "second request"-type process is of considerable concern, particularly in the current economic climate. The U.S. "second request" process has been widely criticized for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a "second request" in the United States can range from US\$3.3 million (on average) up to US\$20 or 25 million (for the most complex cases) and that

"second request" investigations can take six or seven months on average to complete. 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. Moreover, since it was implemented in the United States, no other country has implemented a similar, open-ended "second request" review process of this nature.

Another drawback is that the amended merger review process eliminates judicial oversight of the Bureau's production demands. Under the prior regime, the Bureau had to obtain a court order to compel production of information from merging parties. Although the courts tended to grant these orders without much question, parties had some ability to challenge them *ex post facto*. Indeed, in a recent case, the reviewing judge quashed a series of compulsory production orders on the basis of inadequate disclosure by the Bureau. With the new amendments, the Bureau can issue a wide-ranging "second request" for any information that is deemed "relevant" to an assessment of the transaction without any judicial supervision whatsoever.

Finally, the amendments 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 reviews of mergers that go beyond the initial 30-day review. First, there is no limit on how long the "supplementary 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 "supplementary request." Rather, it appears that there must be "full compliance"

with the "supplementary request," i.e., 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 "supplementary request," the amendments do not require the Bureau to have completed its review by that time. Thus, in theory, the Bureau could still continue its investigation and withhold substantive approval, even after the 30 day period has expired, thereby leaving parties in the same type of regulatory limbo that was a common occurrence under the old system.

B. Increased Merger Notification Thresholds

On the positive side, the amendments increase certain of the thresholds for pre-merger 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 CDN\$50 million in order for the notification requirements to be triggered. This "size of the transaction" threshold is now increased to CDN\$70 million initially, with future increases tied to changes in inflation (or as prescribed by regulation).

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 of a decrease there will be in the number of notifiable transactions.

C. 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 following closing. This amendment is of some theoretical benefit to

merging parties, as post-closing deal risk will be reduced. However, since the Bureau has rarely if ever exercised its power to challenge transactions post-merger, the practical benefits are very limited.

D. Transition Provisions

There are no transition provisions in the amendments applicable to the new merger provisions. As a result, as of March 12, 2009, the new merger notification regime is in place. Unfortunately, the speed with which the amendments were enacted did not give the Bureau sufficient time to develop new regulations (including a new notification form) to deal with the new notification process. According to the Bureau, these new regulations will be released in draft form at some point for public comment. In the interim, parties will be able to file using the old short-form notification.

II. AGREEMENTS AMONG COMPETITORS

The amendments also repeal the Competition Act's existing conspiracy offense and replace it with a *per se* criminal prohibition against agreements among 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 offense does not require proof that the conspiracy, if implemented, would unduly prevent or lessen competition. However, liability can be avoided if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offense and is necessary for giving effect to the objective of that broader agreement. Maximum penalties under the new offense are 14 years imprisonment and a CDN\$25 million fine per count, up from the current maximum of five years and CDN\$10 million per count.

As part of this reform, a new civil provision will apply to all agreements among competitors that are not caught by the new *per se* offense but that have the effect of substantially lessening or preventing competition. 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* offense for agreements among 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 defense 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 United States, 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 offense.

As a result, the new conspiracy offense casts doubt on the legality of many agreements among competitors that involve prices, allocation of customers or territories, or levels of production or supply. This means that many common, ordinary, and seemingly benign types of agreements among competitors can 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 industry;
- non-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; and
 - cooperative agreements in network industries.

Fortunately, the new conspiracy offense only comes into effect on March 12, 2010, i.e., one year from the date of enactment of the amendments (this also applies to the new civil provision regarding anticompetitive agreements). This will give businesses the opportunity to review any agreement they have with competitors (including agreements in the context of trade association activities) to assess their compliance with the new law. To assist in that effort, parties may seek advisory opinions at no cost from the Competition Bureau with respect to the legality of existing agreements during the one year transitional period.

III. INCREASED PENALTIES/EXPANDED OFFENSES

A series of additional amendments were also enacted to expand the scope of certain offenses or increase their penalties. These include:

- Granting the Competition Tribunal the power to order an "administrative monetary penalty" of up to CDN\$10 million for a contravention of the abuse of

- dominance provisions and up to CDN\$15 million for subsequent offenses.
- Expanding the bid-rigging offense to include situations where a person agrees with another to withdraw their already-submitted bid.
 - Expanding the false or misleading representation offense to apply to companies targeting foreign individuals.
 - Increasing the maximum penalties for contravention of the misleading advertising provisions.
 - Granting the Competition Tribunal or a court 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.
 - 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.

IV. PRICING MATTERS

One other positive aspect of the amendments is that they repeal the Competition Act's price discrimination, predatory pricing, and promotional allowances offenses. These provisions were almost never enforced, and were considered to be out of step with the modern approach to competition law because they tended to focus on the protection of individual competitors rather than the competitive process overall.

The price maintenance offense is also repealed, but replaced with a similar civil provision pursuant to which the 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 under this new provision.

The repeal of the pricing offenses 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. This is particularly true because of the repeal of the price maintenance offense, which had been enforced more vigorously by the Bureau than the other pricing offenses. Now, resale price maintenance will no longer be a *per se* criminal offense subject to fines and penalties. Price maintenance will only be a potential civil violation of the Competition Act, and only if the conduct has an "adverse effect on competition." Potential remedies are limited to ordering the party to cease its offending conduct or requiring the party to supply a customer within a specified time on usual trade terms.

V. 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; a burden which will only be compounded by the uncertainties surrounding many of the key aspects of the amendments, particularly the new criminal offense for agreements with competitors. For that reason, 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.