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By Oliver Borgers

COMPETITION LAW

The federal *Competition Act* (Act) provides for criminal sanctions against persons involved in agreements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising offences. A civil regime regulates the less egregious forms of misleading advertising. The Act also contains non-criminal or administrative provisions that allow the Competition Tribunal, on application by the Commissioner of Competition, to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anticompetitive impact. Reviewable practices include mergers, agreements among competitors, abuse of dominant position, or monopoly, and a number of vertical practices between suppliers and customers such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition Tribunal to challenge certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling and refusal to deal. The Competition Tribunal also has the power to impose monetary penalties for abuse of dominant position and misleading advertising.

Merger Regulation

Certain mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business) may be subject to pre-merger notification requirements under the Act (as described below). If the Commissioner of Competition believes that a merger is likely to prevent or lessen competition substantially, and the Commissioner of Competition challenges the merger before the Competition Tribunal, the merger is then subject to review by the Competition Tribunal. If an adverse finding is made, the Competition Tribunal may issue an order preventing or dissolving the merger in whole or in part.

The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. Because of the small size of the Canadian domestic economy, greater concentration may be acceptable in

BECAUSE OF THE SMALL SIZE OF THE CANADIAN DOMESTIC ECONOMY, GREATER CONCENTRATION MAY BE ACCEPTABLE IN CERTAIN INDUSTRIES.

industries where even a relatively high percentage of the Canadian market would still not allow for optimal efficiency and international competitiveness. This is why the thresholds that could trigger government review, such as those relating to market share, will in many industries be higher in Canada than in the U.S.

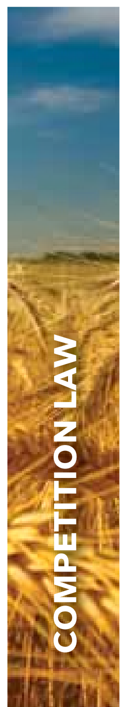
Larger mergers require pre-merger notification and the filing of information with the Commissioner of Competition. Generally, for a merger to be notifiable (i.e., subject to pre-merger notification), two threshold tests must be met: the "size of parties test" and the "size of transaction test." Under the "size of parties test," the parties to the transaction, together with their respective affiliates (defined to include all corporations joined by a 50%-plus voting link), must have assets in Canada or gross revenues from sales in, from and into Canada in excess of C$400 million in the aggregate. The size of transaction threshold is met where the assets in Canada or gross revenues from sales in and from Canada generated by such assets exceed a stipulated amount (an annually adjusted amount). The 2016 "size of transaction" threshold is C$87 million, which is expected to increase in 2017.

In general, and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity. Pre-merger notification involves the filing of a notification form with the Commissioner of Competition. A transaction that is subject to pre-merger notification may not be completed until the applicable waiting period has expired.

The initial waiting period is 30 days. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), then the waiting period is extended to 30 days after a complete response to the SIR has been provided to the Commissioner of Competition. Unlike the *Investment Canada Act* where the relevant minister approves the proposed transaction, the passing of the applicable waiting period under the Act does not preclude the Competition Bureau from subsequently opposing the merger at any time within one year after the merger has been completed. Accordingly, while a transaction may be completed after the expiry of the relevant waiting period, the parties will generally wait until they receive an indication from the Commissioner of Competition that the transaction will not be challenged before they complete the transaction. The Commissioner of Competition's review of complex mergers may take longer than the applicable statutory waiting period. It is possible in some circumstances to

obtain an Advance Ruling Certificate (ARC) from the Commissioner of Competition and thereby avoid the pre-merger notification process. If an ARC is issued in respect of a proposed transaction, the Commissioner of Competition will thereafter be precluded from challenging the transaction, assuming there are no material changes in circumstances prior to closing. It should be noted, however, that the granting of an ARC is discretionary, and that ARCs are typically issued only when it is clear the merger raises no competition issues. The Commissioner of Competition can also, in lieu of issuing an ARC, exempt the transaction from notification and issue a "no-action letter" indicating that the Commissioner of Competition does not have grounds to challenge the transaction, which is usually sufficient comfort for the merging parties to proceed. A C$50,000 filing fee is payable in respect of any transaction that is subject to pre-merger notification.

IT IS POSSIBLE IN SOME CIRCUMSTANCES TO OBTAIN AN ADVANCE RULING CERTIFICATE FROM THE COMMISSIONER OF COMPETITION AND THEREBY AVOID THE PRE-MERGER NOTIFICATION PROCESS.



Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order (including monetary penalties up to C$15 million) by the Competition Tribunal if it results in a substantial lessening of competition. To start with, there must be a dominant position or control of a market. A monopoly is not a prerequisite, but there must be a relatively high market share, such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors.

There must also be an abuse of such dominant position by the practice of anti-competitive acts. There is nothing wrong with market dominance as such; what causes a problem is the adoption by a dominant player of predatory or exclusionary business tactics. When a dominant firm attempts to exclude potential competitors or to eliminate existing competition, the Competition Tribunal can be called upon to intervene. It is not always easy to distinguish competitive from anti-competitive practices. There is nothing wrong with tough competition, even from a dominant firm. However, when a firm's intention is to eliminate competition or prevent entry into or expansion in a market, there could be an abuse of dominant position. The Act includes a non-exhaustive list of anti-competitive acts. These include

selling at prices lower than acquisition costs in order to discipline or eliminate a competitor, inducing a supplier to refrain from selling to competitors, or a vertically integrated supplier charging more advantageous prices to its own retailing divisions. Predatory pricing is also a practice that could constitute an anticompetitive act.

Criminal Violations

It is a crime under the Act (subject to available defences) to enter into an agreement or arrangement with a competitor to fix prices for the supply of a product, allocate customers or markets for the production or supply of a product, or restrict the production or supply of a product. It is also a crime to engage in bid-rigging. These practices are prohibited regardless of their effect on competition. Deceptive telemarketing and wilful or reckless misleading advertising are also offences under the Act. Penalties for persons found guilty of such activities include imprisonment for up to 14 years and/ or multi-million dollar fines. A violation of the criminal provisions of the Act can also result in a civil suit for damages by the person or persons who have suffered a loss as a result of such violation.

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