COMPETITION LAW

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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 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, 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 abuse of dominant position, 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

The Commissioner of Competition can review and challenge all mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business), whether or not they are subject to pre-merger notification requirements under the Act (as described below), within one year of closing. If the Commissioner 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. The Act also provides a uniquely

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Canadian "efficiencies defence" to anticompetitive mergers, which applies in cases where the efficiencies from the merger (that are realizable in Canada and calculated according to case law) are likely to be greater than and offset the transaction's anticompetitive effects.

Certain types of transactions that exceed prescribed thresholds require pre-merger notification and the filing of information with the Commissioner. Generally, pre-notification of such transactions is required if both (i) the parties to the transaction (together with their affiliates) have combined aggregate assets in Canada, or combined gross revenues from sales in, from and into Canada, exceeding C$400 million and (ii) the aggregate assets in Canada of the target (or of the assets in Canada that are the subject of the transaction) or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$93 million (2023; this threshold is adjusted annually). Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20% in the public company context, more than 35% in the private or non-corporate entity context or an acquisition of more than 50% of a public company voting shares or private entity equity if a minority interest is already owned by purchaser).

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 such notice has been given to the Competition Bureau and the statutory waiting period has expired or, alternatively, has been terminated early or waived by the Bureau. The parties' notification filings are customarily accompanied by a substantive white paper, known as the request for an Advance Ruling Certificate (ARC).

The filing of both parties' complete notification forms triggers an initial 30-day suspensory waiting period. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), which is an extensive request for documents and data similar to a Second Request under the U.S. *Hart-Scott-Rodino Act*, the waiting period is extended to 30 days after a complete response to the SIR by both parties 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 legally 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 often takes longer than the applicable statutory waiting period.

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

It is possible in some circumstances to obtain an ARC from the Commissioner of Competition and thereby avoid the formal 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$82,719.12 (2023) filing fee applies to companies filing a pre-merger notification and/or requesting an ARC. The filing fee is subject to an annual consumer price index adjustment.

Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order by the Competition Tribunal if it results in a substantial lessening of competition. The order can include monetary penalties up to three times the value of the benefit derived from the anticompetitive conduct (or, where such value cannot be reasonably determined, 3% of annual worldwide gross revenues).

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 anticompetitive acts, which includes any act that is intended to have a predatory, exclusionary or disciplinary negative impact on a competitor or to have an adverse effect on competition. There is nothing wrong with market dominance in and of itself; what causes a problem is the adoption by a dominant player of predatory, exclusionary or disciplinary 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 anticompetitive 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 anticompetitive 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, a vertically integrated supplier charging more advantageous prices to its own retailing divisions, or a dominant player targeting a new entrant or growing competitor. Predatory pricing is also a practice that could constitute an anticompetitive act.

The Act also allows private parties to bring an application to the Competition Tribunal if they are directly and substantially affected by the anticompetitive acts of another party. Applicants seeking private access must obtain leave from the Competition Tribunal and are not entitled to damages (i.e., the Competition Tribunal can only impose an administrative monetary penalty or make an order prohibiting the anticompetitive conduct).

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.

Agreements between unaffiliated employers to fix or control wages or other terms and conditions of employment (wage-fixing) or to agree not

to solicit or hire each other's employees (no-poach agreements) are also criminalized (as of June 2023). The prohibition does not require parties to the agreement to be competitors or for the agreement to have an anticompetitive effect. These agreements will not be pursued criminally where they are ancillary to an otherwise legitimate merger, collaboration, strategic alliance or joint venture; however, in those cases the Bureau can still review them under the Act's civil competitor collaboration provision.

Penalties for persons found guilty of the Act's criminal provisions include imprisonment for up to 14 years and/or fines set at the discretion of the court with no statutory maximum. 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.

Deceptive Marketing

It is against the law to advertise or market goods and services in a way that is false or misleading. The Act's deceptive marketing provisions apply to all forms of marketing to Canadian consumers regardless of the medium used. The Act contains criminal provisions for more egregious conduct, such as deceptive telemarketing, wilful or reckless misleading advertising, pyramid selling and multi-level marketing schemes. Some deceptive marketing practices, such as false or misleading representations or drip pricing, can be pursued under criminal or civil provisions, depending on the severity of conduct. Other deceptive marketing practices, such as warranty or guarantee claims and performance claims based on inadequate testing, and misleading pricing tactics, such as misleading ordinary price representations and bait and switch selling, are subject only to the Act's civil provisions.

Under the civil provisions, the Tribunal can order monetary penalties of up to three times the value of the benefit derived from the deceptive conduct (or, where such value cannot be reasonably determined, 3% of annual worldwide gross revenues). Penalties under the criminal provisions are the same as those noted above for other criminal violations.

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