

Primer on amendments to Canada's *Competition Act* and *Investment Canada Act*

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On March 12, 2009, the Canadian government enacted the most significant amendments in over 20 years to Canada's competition and foreign investment regimes, as part of Bill C-10, the *Budget Implementation Act, 2009*. The amendments to the *Competition Act* will result in fundamental changes to the way that business operates in Canada, and will provide the Competition Bureau with unprecedented enforcement tools and/or penalties in all areas. Fewer foreign investments in Canada will meet the increased thresholds for Ministerial review and approval under the changed *Investment Canada Act*, but all such investments will face potential scrutiny under a new "national security" test. The most significant amendments to both these laws are discussed below.

Competition Act Amendments

Two-tracks for dealing with agreements between competitors

- > The amendment of section 45 of the Act create a "per se" criminal conspiracy offence with respect to agreements or arrangements ("agreements") between competitors (which includes potential competitors) to: fix prices; allocate sales, customers or markets; or fix or control production or supply of a product. A new counterpart civil provision permits the Commissioner to deal with anti-competitive agreements that are not "hard core" (see below). A defence to criminal prosecution exists if the accused can establish on a balance of probabilities that the alleged conspiracy is "ancillary" to a broader or separate agreement between the same parties that does not itself contravene the provision and is "directly related to, and reasonably necessary" for giving effect to the objective of the broader agreement ("ancillary restraint defence"). The amendments expressly preserve the application of the common law "regulated conduct" doctrine (which exempts actions which are authorized or required pursuant to legislation). Agreements relating solely to exports are still exempt. Penalties under the new offence have more than doubled from the

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former maximum 5 years imprisonment and/or C\$10 million fine, to a maximum of 14 years and/or C\$25 million – still far lower in terms of potential fines than in the US or the EU. The new conspiracy offence has a delayed effective date of one year after March 12, 2009, during which time businesses can seek an advisory opinion on the legality of existing or proposed agreements (but may not be granted immunity against violations of the existing law unless they otherwise qualify under the immunity program).

- In contrast to the old conspiracy provision, which required the prosecution to establish an “undue” prevention or lessening of competition, the amended offence, albeit narrower in terms of the type of conduct it encompasses, does not on its face require market power or any impact on competition for conviction. Rather, it requires only that the parties to the impugned agreement be competitors or potential competitors, which will necessarily raise issues around the definition of the “market” for the product. In consultations on language similar to that in the Bill C-10, many parties criticized the ancillary restraint defence as being too narrow and potentially subjecting many widely-accepted agreements (e.g., franchise or exclusive distribution arrangements) to criminal prosecution. We will have to see whether the “rule of reason” analysis followed by US courts will become relevant in Canada, as our courts struggle to interpret the new defence.
- > The “second track” of the new approach to cartels creates a new civilly reviewable matter in respect of existing or proposed agreements between persons, two or more of whom are “competitors”, which prevent or lessen competition substantially. The factors to be considered in undertaking this assessment are effectively the same as the existing merger review provisions. On application by the Commissioner of Competition, the Competition Tribunal may prohibit any person, whether or not a party to the agreement, from doing anything under the agreement or, subject to a person’s consent, may order the person to take any other action. In terms identical to the existing merger review provisions, an efficiencies defence applies if the agreement brings about “gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition” and the efficiency gains would not be attained if a prohibition order were issued. Like the amendments to section 45, the new “civil conspiracy” provision has a delayed effective date of one year after March 12, 2009.
- In contrast to the *per se* criminal conspiracy offence, the new civil conspiracy provision applies to agreements between competitors to do anything (not simply to fix prices, for example) but only if the agreement substantially lessens or prevents competition. While the civil conspiracy provision only applies to agreements between “competitors”, the provision, in contrast to the proposed criminal conspiracy offence, omits the requirement that the parties be competitors in respect of the product that is the subject of the agreement. Moreover, empowering the Competition Tribunal to make a prohibition order against a person who is not a party to the agreement potentially raises issues of procedural fairness.

De-criminalized pricing practices

- > De-criminalization of price discrimination, predatory pricing and disproportionate promotional allowances.
- These “unfair” pricing practices were previously liable to criminal prosecution and punishable by imprisonment for up to 2 years. Stakeholders on all sides have long recognized the criminal sanctions to be inconsistent with modern economics. With the repeal of section 50 of the *Competition Act*, low prices that undercut the competition or the provision of different prices to different customers can only be sanctioned civilly as part of a “practice of anti-competitive acts” under the abuse of dominance provisions – and only if they substantially lessen or prevent competition. The liberalization of Canada’s pricing laws will bring welcome relief to many Canadian

businesses and will enhance competition to the extent the old law was chilling pro-competitive price competition.

Price maintenance – replacement of criminal provision with civil provision

- > The previous criminal prohibitions against attempting to induce another person to raise or refrain from lowering their prices, and against discriminating against a customer because of its low pricing policy, have been replaced by a new civil provision. On application by the Commissioner of Competition or by a private party to whom leave has been granted, the Competition Tribunal may prohibit the conduct or require a person to accept another person as a customer if the conduct has had, is having or is likely to have an “adverse effect on competition in a market.”
- > While the amendment effectively limits the provision to resale situations (the previous provision did not), the choice of “adverse effect on competition” as the relevant competitive effects test, which is currently used under the civil “refusal to deal” provision, suggests that a lower impact on competition may be required than is the case in respect of other civil matters (such as abuse of dominance and mergers) where a “substantial” prevention or lessening of competition must be shown. At the same time, the threshold for a private party to obtain leave to bring an application in respect of price maintenance is lower than in refusal to deal cases, since the amendments require only that the applicant be “directly affected” by the conduct, not that the applicant also be “directly and substantially affected”, as in respect of refusal to deal and exclusive dealing cases. That said, civil review is thought by many to be more appropriate than the old criminal prohibition, which subjected Canadian businesses to greater restrictions than were imposed on their US counterparts.

Deceptive marketing practices/obstruction of justice

- > Increased penalties for the criminal offences of: misleading advertising, deceptive telemarketing, and deceptive notice of winning a prize (in each case, to a maximum 14 years imprisonment and/or a fine in the discretion of the court); obstruction (to a maximum 10 years imprisonment and/or a fine in the discretion of the court, if convicted on indictment, or if on summary conviction, a maximum of 2 years imprisonment and/or a maximum C\$100,000 fine); and failure to comply with search warrants and court orders to provide information (to a maximum 2 years imprisonment and/or a fine in the discretion of the court, if convicted on indictment, or if on summary conviction, a maximum of 2 years imprisonment and/or a C\$100,000 fine).

Increased penalties for (non-criminal) misleading advertising

- > Introduction of a restitution remedy in respect of the civilly reviewable practice of making materially false or misleading representations to the public for the purpose of promoting a business interest. Subject to a due diligence defence, restitution, in any manner ordered by a court or the Competition Tribunal, will be capped at the total amount paid for affected products and be payable to persons who purchased the products, “except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products”. A court or the Competition Tribunal may issue an interim injunction prohibiting disposing or dealing with assets so as to frustrate a restitution remedy.
- As worded, the new restitution remedy has the potential to raise complicated issues regarding, among other things, passing-on (or indirect effects) with respect to the apportionment of overcharges at various levels of the distribution chain. It does not apply to criminal deceptive marketing practices.

- > Increased administrative monetary penalties for all civilly-reviewable deceptive marketing practices (including inaccurate “ordinary price” claims). In the case of individuals, the maximum penalty increased to C\$750,000 for a first infraction and C\$1 million for each subsequent infraction, with corresponding increases for corporations to C\$10 million and C\$15 million, respectively.
- Previously, penalties for individuals were capped at C\$50,000 for a first infraction and C\$100,000 for each subsequent infraction, while penalties for corporations were limited to C\$100,000 and C\$200,000 for first and subsequent infractions, respectively.

Fines for abuse of dominance/repeal of “airline” provisions

- > Introduction of “administrative monetary penalties” for abuse of dominance (so-called to negate the constitutional argument that their imposition by the Competition Tribunal pursuant to its civil procedures would amount to the imposition of criminal sanction without due process). Where ordered by the Competition Tribunal, the maximum fine is C\$10 million for a first infraction and C\$15 million for each subsequent infraction.
- Administrative monetary penalties were previously only available under the abuse of dominance provision against domestic airlines, which have now been repealed. Both their utility and their legality have been questioned by some commentators.

Merger review procedures

- > Increase in the “size-of-transaction” threshold for transactions requiring pre-merger notification. For the remainder of 2009, the target, together with its affiliates, must either have assets in Canada that exceed C\$70 million or annual gross revenues from sales in or from Canada generated from those assets that exceed C\$70 million. In the case of corporate amalgamations, the revised C\$70 million threshold must be exceeded by each of at least two of the amalgamating corporations, together with its affiliates. The C\$70 million threshold will be indexed annually to GDP, unless and until a different amount is prescribed by regulation.
- The size-of-transaction threshold previously was C\$50 million in assets in Canada or annual gross revenues from sales in or from Canada generated from those assets. It was not indexed, nor in the case of corporate amalgamations did it need to be met by each of two parties to the transaction.
- > Introduction of a US-style two-stage merger review process for transactions subject to pre-merger notification. An initial 30-day waiting period applies following the submission of certain prescribed information and could be reset for an additional 30 days following compliance with a second request by the Commissioner of Competition for additional information.
- Previously, parties to a notifiable transaction had the option of submitting either a “short-form” notification, which carried with it a 14-day waiting period, or a “long-form” notification, which carried with it a 42-day waiting period (if a short-form notification was filed, the Commissioner could request a long-form notification during the 14-day waiting period, in which case the 42-day waiting period began only once the long-form notification was filed). In either case, the waiting period was finite, and could not be extended. The Commissioner’s powers to obtain information beyond that contained in a notification currently were limited to voluntary information requests and court orders.
- The new procedure increases the waiting period for all transactions (more than 90% of which are reviewed by the Bureau within 14 days of receipt of a request for an Advance Ruling Certificate

(ARC) or similar competitive analysis), to a minimum of 30 days unless terminated earlier by the issuance of an ARC or a no-action letter.

- For complicated transactions, however, the new provisions will effectively mean there is no determinable end to the waiting period, as it will depend on how long it takes for the parties to comply with the “second request” for additional information that is relevant to the Commissioner’s assessment of the proposed transaction. As with the US system, this may provide an incentive for the Commissioner to request as much information as possible within the 30-day initial waiting period, when detailed analysis has typically yet to begin in very complex transactions. It remains to be seen whether this will result in an “everything and the kitchen sink” approach by the Bureau to second requests.
 - In the face of the Federal Court’s criticism of the Commissioner for issuing overly broad requests for information in the *Labatt/Lakeport* case last year, however, it seems that the Government is responding, some would say perversely, by removing the express provision for judicial oversight of the process.
- > Introduction of injunctive relief to enforce compliance with waiting periods. If a person has completed or is likely to complete a proposed transaction before expiry of the applicable waiting period, a court or the Competition Tribunal, on application by the Commissioner of Competition, can issue an interim injunction prohibiting implementation of the transaction or requiring its dissolution and, in the case of a completed transaction, can impose administrative monetary penalties of up to C\$10,000 for each day of non-compliance with the waiting period.
- Failure to comply with the statutory waiting period was previously a criminal offence punishable by a maximum fine of C\$50,000.
- > Decrease to one year the period of time within which the Commissioner of Competition may challenge a merger following its substantial completion.
- Previously, the Commissioner could bring an application to the Competition Tribunal challenging a merger within 3 years of its substantial completion.

Investment Canada Act amendments

Bill C-10 also made significant amendments to the review of foreign investments under Canada’s *Investment Canada Act*:

- > Increase in the minimum threshold for Ministerial review and approval of direct acquisitions of control of Canadian businesses by WTO-member based investors. The threshold will be C\$600 million in the “enterprise value” of the assets of the Canadian business for investments made within two years after the federal Cabinet proclaims the thresholds in force, C\$800 million for the subsequent two years, C\$1 billion for the subsequent year and the portion of the year thereafter that ends on December 31, and thereafter indexed to GDP. Please note: these new thresholds have not yet been proclaimed in force.
- The threshold for review of direct acquisitions by WTO investors in 2009 is currently C\$312 million and this amount is indexed annually to GDP. It will increase to C\$600 on an as-yet-unknown date when the new thresholds are proclaimed in force.
 - Indirect investments by WTO investors will remain exempt from review, unless they fall within certain “sensitive” sectors, the scope of which is to be narrowed to only “cultural businesses”, see below.

- > Elimination of the lower C\$5 million review threshold for direct acquisitions (and the C\$50 million threshold for review of indirect acquisitions of control) of Canadian businesses engaged in the “sensitive sector” activities of financial services, transportation services and uranium production, leaving only “cultural businesses” subject to this threshold and to review and approval by the Minister of Canadian Heritage.
- > Retroactive creation of a “national security” test for every establishment or acquisition of control of a Canadian business, regardless of the value of its assets, which the Minister of Industry has “reasonable grounds” to believe “could be injurious to national security”. Ultimately, if the Minister of Industry, after consultation with the Minister of Public Safety and Emergency Preparedness and representations from the investor, is satisfied that the investment would be “injurious to national security”, the federal Cabinet may “take any measures” it “considers advisable to protect national security”, including ordering the investment not to be implemented or to be implemented subject to conditions or written undertakings, and if the investment has been implemented, requiring divestiture of the Canadian business.
 - “National security” is not defined in Bill C-10, nor do the amendments specify factors that are to be considered in determining whether an investment is “injurious” to national security. Time periods for the national security review provisions would be prescribed by regulation.
 - The national security test is applicable to all transactions that have closed since February 6, 2009 (the day the Bill was announced).

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