

No Profits for Interac: Commissioner will not agree that payments association can become for-profit corporation

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On February 12, 2010, Canada's Commissioner of Competition announced that she would not agree to changes to a fourteen-year old Competition Tribunal order which, among other things, prohibits the Interac Association from operating on a for-profit basis. Interac is the organization that develops and operates a national payment network allowing Canadians to access their money through automated banking machines and point-of-sale terminals. Surprisingly, the Commissioner appears to favour a dated and cumbersome regulated structure over evolution to a market-based entity. The press release issued by the Commissioner did not explain the analysis that lies behind her decision and raises a number of questions as to why she would not support a move by a regulated entity towards a more market-based structure.

In 1996, on the application of the Commissioner, the Competition Tribunal issued an Order on consent against Interac and the leading Canadian banks who were its founding members under the abuse of dominance provision of the *Competition Act*. The detailed Order was intended to remedy an alleged joint abuse of dominance by the respondents. In brief, the structure and rules regarding membership and services, which had been established when massive and risky investment to develop technology was required, were by 1996 alleged to be inhibiting competition in financial services and payments innovation.

The Order required, among other things, that Interac be maintained as a business corporation and managed on a not-for-profit basis. Any fees or charges Interac imposed for the use of the inter-member banking network could only recover costs, which apparently could include cost of capital, but not returns on risk capital.

The Competition Tribunal issued reasons in 1996 when the Order was made. The Tribunal noted that the Commissioner of the day described the measures in the order that relate to the structure of the board of directors as providing for a more competitive environment within Interac, which would lead to enhanced innovation in services offered over the Interac network. Innovation was thus recognized as something to be encouraged. The requirement that Interac operate as a non-profit organization was apparently intended to preclude the charter members of Interac from exploiting their control of the network for their own gain.

In 2009, approximately thirteen years after the Order was issued, Interac (which has continued to develop and now has an increased and diversified

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GCR 100 (2009)
CHAMBERS GLOBAL 2009

This newsletter was prepared by members of the Competition/Antitrust Group at Stikeman Elliott.

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membership) requested that the Commissioner consent to vary the Order to allow Interac to restructure to a for-profit model. The Competition Bureau conducted a comprehensive assessment of Interac's request and obtained extensive information from Interac and other market participants, as well as consulting with a number of experts.

The Commissioner's press release states:

Based on currently available information, including Interac's current dominant position in the market, the Bureau cannot support changing or removing the safeguards in the Consent Order, which are effective in protecting consumers from potentially anti-competitive activity. In particular, the Bureau does not agree that the removal of the restriction against for-profit activities by Interac would be pro-competitive, or is necessary to allow Interac to remain competitive....To provide Interac with greater flexibility to respond to any material entry in the future by a competitor, the Bureau also evaluated other changes to the governance structure and corporate status of Interac. Those changes would allow Interac to continue as a not-for-profit corporation with independent directors. The Bureau has concluded that such changes would be acceptable, as they would maintain the necessary safeguards against anti-competitive activity that are contained in the Order.

The Commissioner is thus prepared to accept some changes to the board structure, but is not willing to agree to a for-profit model. This is curious because the Commissioner would normally be expected to recognize that profit is the best (and a completely acceptable) incentive for innovation, and that profit-motivated market forces are generally more effective in delivering the benefits of a competitive marketplace than are regulated market structures. It is, therefore, unexpected and puzzling that the Commissioner would reject a proposal for Interac to evolve into a more market-based model without providing an explanation as to why this deviation is appropriate in the circumstances (beyond merely alleging a dominant position).

European law recognizes the setting of an excessive price as an exploitive abuse of dominant position. In Canada, however, it is generally accepted that the mere setting of a high price or the earning of significant profits are not in themselves anti-competitive acts. The Commissioner's rejection of a proposal to earn profits raises the question as to whether the underlying concern is related to pricing. This is a dangerous area for any competition law enforcement agency, given the considerable difficulty of determining what constitutes an excessive price. Indeed, the Bureau's usual preference for market forces over regulated industries is understood to be due in part to skepticism about the ability of regulatory authorities to act in place of normal market pricing signals to determine an appropriate price. Hopefully, the Commissioner's decision with respect to Interac is restricted to the unique facts and does not presage a shift towards a more interventionist European approach to pricing. Perhaps future developments in the Interac matter will shed more light on the Commissioner's views on the roles of profit and pricing decisions in the marketplace.

Canada's tougher cartel law into force March 12, 2010

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The one-year delay before Canada's new, tougher, cartel law comes into force expires this month. Starting March 12, 2010, prohibited agreements between competitors will be criminally illegal in Canada, regardless of their impact on competition. The amendments result in the creation of a new category of "per se" criminal offences (so-called because the outlawed categories of agreement are "per se" illegal without proof of economic effect). Penalties under the new offence will also increase: from the former maximum five years imprisonment and/or C\$10 million fine, to a maximum of 14 years and/or C\$25 million.

The prohibited categories of agreement include agreements with existing or potential competitors to fix prices, allocate sales, customers, or markets, and to limit or control production or supply of a product. Such agreements are a criminal violation of Canadian competition law, unless the defence can show that they are both "ancillary and necessary" to a broader or different agreement, the purpose of which is not also prohibited (e.g., customer allocation could be necessary, in some circumstances, to a distribution agreement).

The amendments removed the requirement, which had existed in Canadian law since 1890, for the Crown to prove that the impugned agreement had led or was likely to lead to an “undue lessening of competition” – thus facilitating the prosecution of “hardcore” cartels.

As noted in the January 2010 edition of this newsletter,¹ the Competition Bureau has issued *Competitor Collaboration Guidelines* outlining its intended approach to the enforcement both of the stricter section 45 prohibition against cartels, and of the accompanying civil provision under the new section 90.1 of the *Competition Act*, which enables the Competition Tribunal, on application by the Commissioner of Competition (head of the Bureau), to prohibit agreements which – although not criminally illegal – nonetheless have led or are likely to lead to a substantial lessening or prevention of competition.

While the Commissioner and the Guidelines have gone out of their way to attempt to reassure the Canadian business community that the new powers will be used responsibly, the fact remains that many agreements which were previously regarded as legal under Canadian law, due to their lack of economic impact, need to be reassessed under the new law.

Canadian merger notification regulations revised

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Amendments to the *Notifiable Transactions Regulations* made under the *Competition Act* (the Regulations) came into force on February 2, 2010. These amendments reflect the legislative amendments to the *Competition Act* passed in March, 2009. The highlights include the creation of a uniform notification form for all transactions, changes to the prescribed information that must be supplied to the Commissioner, and stipulations as to how certain asset and revenue values are to be calculated for amalgamations.

The 2009 amendments had already created a single, thirty-day initial waiting period for all transactions (extendable by issuance of a “second request,” just as in the United States), and eliminated the choice between a fourteen-day or a forty-two-day waiting period that had existed under the old regime. Under the amended Regulations, the former distinction between a “short form” notification and a “long form” notification has also been removed in favour of a single list of prescribed information for all notifiable transactions. As a result, all transactions will now require the provision of certain information that previously was supplied only for “long forms.” The additional requirements are:

- > a copy of each legal document, or the most recent draft of that document if it is not yet executed, that is to be used to implement the proposed transaction; and
- > all studies, surveys, analyses and reports that were prepared or received by a senior officer for the purpose of evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions and, if not otherwise set out in that document, the names and titles of the individuals who prepared the document and the date on which it was prepared. (In the United States, for the equivalent *Hart-Scott-Rodino* filing, these types of documents are normally referred to as the “4(c) documents” — the Canadian language has also been changed to conform with that in the *Hart-Scott-Rodino Act*, such that a single search will now suffice.)

The amended Regulations also describe how the asset and revenue values are to be calculated to determine whether an amalgamation satisfies the new notification test, which establishes a second “size of parties” threshold for amalgamations (each of at least two of the amalgamating parties must have assets or gross revenues exceeding C\$70 million).

The 2009 *Competition Act* amendments also permit the indexing of the C\$70 million “size of transaction” threshold. Although the Minister responsible can reduce the threshold to C\$67 million in keeping with the slight dip in Canadian prices in 2009, he has not as yet taken action in this regard.

¹ See Hutton and Brown, “Canada’s Competitor Collaboration Guidelines Issued in Final Form” ([The Competitor](http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/13435.htm), January, 2010), available on-line at www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/13435.htm.

Investment Canada: threshold watch

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The *Investment Canada Act* threshold for review of direct acquisitions of control by WTO investors in non-cultural industries has now been officially lowered to C\$299 million for transactions closing in 2010. Draft amendments to the *Investment Canada Act* regulations that would change the C\$299 million (book value of assets) threshold to C\$600 million (enterprise value) have yet to be issued in final form, as the government continues to consider comments on the draft.

For more information regarding any of the above articles, please contact your Stikeman Elliott representative, any authors listed above or any member of our Competition/Antitrust

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