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Update

Competition Law

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Significant Changes Proposed to the *Competition Act* and the *Investment Canada Act*

In a move that took many by surprise, the Canadian Government last week proposed significant changes to the country's competition law and foreign investment review process. These measures were introduced as part of the Government's budget implementation legislation, and accordingly, will be considered as part of the Government's economic stimulus package. If passed, these measures will substantially re-make the Canadian regime in the image of U.S. antitrust law.

Competition Act

The Government is proposing a long-debated reform to the cornerstone criminal conspiracy section by removing the requirement to show that an agreement among competitors would lessen or prevent competition unduly. Under the new provision, which will make such agreements "per se" illegal, competitors who agree, conspire or arrange among themselves to fix, maintain, increase or control prices or fix, maintain, control, prevent, lessen or eliminate supply of a product or allocate sales, territories, customers or markets for the production or supply of a product, are guilty of a criminal offence. Penalties will be increased to a maximum of $25 million for each count and up to 14 years of imprisonment. A new defence has been created where the agreement is ancillary to a broader agreement and is reasonably necessary to give effect to the broader agreement, provided that the broader agreement when considered alone would not contravene the criminal conspiracy provision. In addition, the common law principles that relate to a defence for regulated conduct will continue to apply to the new provision.

In respect of merger review, the Government is proposing to adopt a U.S. style merger notification system with a single 30 day waiting period which can be extended if the Commissioner of Competition issues a request for additional information. If the U.S. experience is any guide, it can be expected that this second request for information will be very extensive, increasing compliance costs and delaying timing for proposed transactions that require a more in-depth examination. When a second request for information is issued, parties will not be able to complete a transaction until 30 days after the information requested has been received by the Commissioner of Competition. The Government is also increasing the size of target threshold somewhat to $70 million in assets in Canada or $70 million in gross revenues from sales in or from Canada, with a subsequent yearly inflation adjustment. The potential consequences for non-compliance with the notification regime have increased dramatically, with penalties of up to $10,000 for each day of non-compliance following completion of a transaction that should have waited the applicable period prior to closing and the risk of a court order requiring the dissolution of the merger or the divestiture of assets.

The proposed amendments have also created a civil law conspiracy provision. This provision gives the Competition Bureau the new option of applying to the Competition Tribunal to seek a

remedy for any agreement among competitors that prevents or lessens competition substantially. The new "per se" criminal conspiracy provision and the new civil conspiracy provision will become law one year after the bill receives royal assent. During this transition period, parties to a pre-existing agreement can apply to the Commissioner of Competition without any payment of a fee for a binding opinion on the application of the new conspiracy provisions to their agreement.

The criminal provisions for predatory pricing, price discrimination, promotional allowances and price maintenance will be repealed. In the case of price maintenance, a new civil provision has been added that applies where price maintenance is likely to have an adverse effect on competition.

New administrative monetary penalties have been added to the abuse of dominance provision. This provision concerns anti-competitive conduct by dominant firms that substantially lessen or prevent competition. Currently, the Competition Tribunal has the power to stop the conduct or order the taking of other actions, including the divestiture of assets, if reasonable and necessary to remedy the anti-competitive effects of the conduct. Under the new proposal, however, the Competition Tribunal could also impose penalties of up to $10 million for an initial order and $15 million for a subsequent order.

Penalties for misleading advertising too would be dramatically increased from $50,000 to $750,000 for an initial order against an individual and from $100,000 to $10,000,000 for an initial order against a corporation. In addition, the Competition Tribunal would be empowered to order restitution be paid to victims of deceptive marketing practices.

Investment Canada Act

The Government is also proposing to significantly amend the *Investment Canada Act*, including adding a new power to block any investment by any non-Canadian on the basis that it could threaten national security. This, too, is similar to a power in the United States currently exercised by the Committee on Foreign Investment in the United States, known as "CFIUS".

The Government is proposing to raise the thresholds for review. For investors based in WTO member nations, the thresholds for the review of direct acquisitions of control is to increase from the current $312 million (based on book value) to $600 million (to be based on the "enterprise value" of the Canadian business) for the two years after the bill becomes law, to $800 million in the following two years and then to $1 billion for the next two years. Thereafter, the threshold is to be adjusted to account for inflation. In addition, the current low thresholds for transportation, financial services and uranium mining are to be eliminated and will be the same as for any other industry. However, the current $5 million (book value) asset threshold for review of cultural industries remains unchanged.

Many of these concepts still require definition and details of how these new changes will be implemented have yet to emerge. The proposed amendments however represent a significant change to Canada's regulation of foreign investment.

Conclusion

Bill C-10, Budget Implementation, 2009 received first reading in Parliament on February 6, 2009. With a minority Parliament, there are no guarantees that Bill C-10 will become law, but by incorporating these proposed amendments as part of its budget, the Government has thrown its full weight behind them, making it difficult for the opposition to insist on significant amendments. We will be monitoring the bill as it passes through the Parliamentary process and keep you informed of significant developments. These provisions will create significant changes in the application of competition law and foreign investment review in Canada and will require careful review of current conduct and practices if the proposed changes become law.

If you would like to know more about this subject, please contact Richard Annan, Joel Schachter, Michael Koch or any member of Goodmans' Competition Group.

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