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Update

Competition Law

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Amendments to the *Competition Act* and the *Investment Canada Act* Granted Swift Passage

On March 12, 2009 major changes to Canada's competition law and foreign investment review process became law. These changes, which were described in our February 11, 2009 Client Update, have important implications for current business practices and transactions.

Competition Act

The new law has substantially altered the merger notification process to parallel in many respects the current U.S. system. There is now only one type of notification form with a waiting period of 30 days. Like the U.S., the 30 day waiting period 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. However, as the overwhelming majority of mergers do not raise any substantial competition issues, the second request should not be issued frequently. Most mergers should continue to be reviewed within a 30 day time period.

A positive change for business is the reduction, from 3 years to 1 year, of the period during which the Commissioner of Competition may challenge a merger after it has been substantially completed. As well, unlike the U.S., it is still the case that parties may be exempted from notification by either receiving an advance ruling certificate or being granted a waiver from notification because substantially similar information was supplied with the request for an advance ruling certificate.

The new law also contains a major reform of the criminal conspiracy provision. Now agreements between competitors that relate to fixing prices, allocating customers or markets or agreeing on supply, will be illegal regardless of the effects on competition. All other types of agreements between competitors would be reviewed under a new civil provision where remedial action could only be taken if such agreements would or would likely lessen or prevent competition substantially.

This new criminal conspiracy provision raises a host of questions as to how it will operate in practice and will create a period of uncertainty. For example, an agreement between a manufacturer and a wholesaler that limits where the wholesaler may sell could be problematic if the manufacturer also competes with the wholesaler. Although such a situation is clearly not anti-competitive in most cases and is far removed from the "hard core" criminal cartel activity that the new *per se* law is designed to attack, it may nevertheless be caught by the strict wording of the new criminal conspiracy provision. Further, while a new defence has been created for "ancillary restraints", it is not at all clear how such a provision will be applied in practice. In light of the new criminal law, businesses will need to review their agreements with competitors to see if changes should be made.

Implementation of the new criminal and civil conspiracy provisions have been delayed by one

year in order to allow businesses some time to review their conduct and hopefully for the Commissioner of Competition and the Director of Public Prosecutions to provide some practical guidance on how the new law will be enforced.

In other changes, the elimination of the criminal price discrimination, promotional allowance, price maintenance and predatory pricing provisions should provide many businesses with greater flexibility in terms of the pricing practices and policies they may choose to pursue. For example, resale price maintenance programs are no longer *per se* criminally illegal, but will be reviewed under a new civil provision and must be shown to have or likely to have an adverse effect on competition before a remedial order could be granted. Similarly, businesses that are not dominant in any market may be less concerned with offering different pricing and terms of trade to customers that compete with one another and that are purchasing similar quantity and quality of goods.

On the other hand, firms that are dominant in their markets will need to review their current practices and policies in light of the addition of new significant administrative monetary penalties to the abuse of dominance provision. The Competition Tribunal may now order penalties of up to $10 million for an initial order and $15 million for a subsequent order for anti-competitive conduct by a dominant firm that has had, is having or is likely to have the effect of substantially lessening or preventing competition.

Investment Canada Act

In general, the significant increase in the size of the thresholds for the review of direct acquisitions of control (albeit on the new basis of as yet undefined "enterprise value" and not book value) should significantly reduce the number of transactions that will be subject to review. The amendments also now eliminate the special review threshold for businesses engaged in transportation, financial services and uranium production, although the review threshold for cultural businesses has not been changed. This is a positive development for timing and certainty in respect of acquisitions of Canadian businesses by foreign purchasers. The changes to the threshold limits are not yet in force and will only be in force when the Government decides to implement them, likely when regulations defining "enterprise value" are ready to be implemented.

On the other hand, the new power to review transactions based on their impact on national security raises uncertainty as to when and how it will be used. This power applies to transactions regardless of size and in some cases even where there may not have been a change of control. It is expected that it will not be used very often and would need to involve genuine national security concerns to be consistent with Canada's international trade obligations.

Conclusion

With unprecedented speed, significant changes to Canada's competition and foreign investment laws have been made. While some of these changes provide more flexibility and certainty, other changes have created potential new risks that should be evaluated in the context of current conduct, agreements and practices. In particular, businesses will need to review their agreements with competitors to see if these require amendments to ensure they do not run afoul of the new criminal conspiracy provision.

If you have any questions about the new provisions of Canada's competition or foreign investment laws, please contact Richard Annan, Michael Koch or Joel Schachter, or any other member of Goodmans' Competition Group:

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