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Update

Competition Law

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Recent developments in competition law include new jurisprudence on the interpretation of the abuse of dominance provisions, increased resources for criminal cartel enforcement and new guidance on merger review.

Abuse of Dominance

On June 23, 2006 the Federal Court of Appeal set aside the Competition Tribunal's decision to dismiss the Commissioner's case against Canada Pipe Company, finding that the Tribunal had erred in its interpretation of the abuse of dominance provisions and referred the matter back to the Tribunal for redetermination in accordance with its reasons.

This case concerns the use of a loyalty rebate program by a dominant firm. Under the Canada Pipe's loyalty rebate program, distributor customers are significantly rewarded for purchasing all of their requirements for cast iron drain, waste and vent products from Canada Pipe. In the original hearing, the Tribunal found that the program was not an anti-competitive act and it was not substantially lessening competition, as evidenced by the fact there was new entry and import competition despite the loyalty rebate program.

The Federal Court of Appeal found that the Tribunal applied the wrong tests for anti-competitive acts and anti-competitive effects.

Under the Competition Act for an act to be anti-competitive there needs to be evidence of an anti-competitive purpose. The Tribunal found that the Canada Pipe loyalty rebate program did not have an anti-competitive purpose as it produces benefits for distributor customers and end consumers by encouraging distributors to carry a full line of products. The Court found that these benefits were insufficient and indicated that the benefits must be demonstrated to have tangible efficiency benefits for the firm itself in order to establish that the program has a legitimate business justification which, if accepted, might negate evidence that the program had an anti-competitive purpose.

The Court also found that the Tribunal has used the wrong approach to determine anti-competitive effects. The test is not whether some "acceptable" level of competition existed in a market despite the anti-competitive practice. It is a comparative analysis that examines the level of competition that exists in the presence of the practice with that which would exist in its absence. If the difference between these two alternatives is substantial, then the competitive effects test would be met. In other words, would the markets of concern-in the past, present or future-be substantially more competitive but for the impugned practice of anti-competitive acts?

This jurisprudence sets a higher hurdle for dominant firms to meet when defending themselves from allegations of abuse of dominance. However, the story is not yet over as Canada Pipe has sought leave to appeal to the Supreme Court of Canada and the Tribunal has not applied the Federal Court of Appeal's reasoning to the facts at hand in the Canada Pipe case.

Cartel Enforcement

Cartel enforcement is the cornerstone provision of the Competition Act. In recent years, the Bureau, following the lead of the U.S. authorities, has had great success in uncovering international cartels as a result of immunity programs that shield from prosecution the first firm to come forward and provide evidence of the conspiracy.

In Canada, however, the record for uncovering and successfully prosecuting domestic cartels has been

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poor. In order to address this shortcoming, Sheridan Scott, the Commissioner of Competition, announced that she has increased the budget of the criminal branch by 50% over the past three years and has expanded the capabilities of the Competition Bureau's regional offices to take on domestic cartel investigations. Earlier this year, three companies plead guilty to a domestic cartel involving carbonless paper and were fined $37.5 million in total. It can be expected that the Bureau will continue to make cartel investigations, and in particular domestic cartel investigations, a top priority.

Merger Review

The Competition Bureau released in final form its Information Bulletin on Merger Remedies. While largely consistent with current practice, the Bureau has indicated that they are going to be more demanding in respect of those merger cases where divestiture remedies are required. First, they have significantly reduced the time that parties would have to sell an asset before it goes to a trustee sale from a period of 6 to 12 months to a period of 3 to 6 months. Second, the Bureau has indicated that it will be seeking more frequently so called "crown jewel" provisions. This means that if the parties to a merger are unable to sell the targeted assets during the initial sales period, the package of assets for sale by the trustee may include additional "crown jewel" assets. During the trustee sale, there is no minimum price below which the trustee may not sell.

As a result of this policy shift, parties contemplating a merger where significant competition issues are likely to arise should consider the issue of possible divestiture and potential purchasers early in the merger process.

In another development, the Commissioner in a recent address indicated that the Bureau has dropped for now its attempts to amend the efficiency defence. She has also indicated that the Bureau could apply the efficiency defence as part of its internal review without necessarily referring the matter to the Competition Tribunal. In the past, the Bureau had indicated that in a case where the anti-competitive effects were clear and substantial, parties would have to establish their efficiency defence at the Competition Tribunal. However, the Commissioner noted that the cases where such efficiencies would actually offset substantial anti-competitive effects would be rare, so a practical matter this does not represent a great shift in thinking at the Bureau.

If you have any questions or, if you wish to discuss this update, please contact any member of the Goodmans' Competition Group.

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