

# Update

## Competition Law

November 5, 2008

### Merger Review by the Minister of Transport, Infrastructure and Communities

Draft guidelines recently issued by the Minister of Transport, Infrastructure and Communities (“Minister”) confirm a potentially significant expansion of the Minister’s review of mergers in relation to transportation undertakings, with implications for merger timing and possible increased regulatory intervention in this sector.

The Canada Transportation Act (“CTA”) was amended in 2007 to expand the merger review provisions relating to air transportation undertakings to encompass all transportation undertakings. The draft guidelines issued this past summer discuss the range of public interest considerations that may be taken into account by the Minister in a review and the information that should be provided in a notification, but do not address important threshold issues, such as the scope of transactions subject to review.

The amended merger review provision requires parties to a proposed transaction that involves a transportation undertaking to give notice to the Minister if the parties are required to notify the Commissioner of Competition under merger notification provisions of the *Competition Act*. The Minister then has 42 days to decide if the matter will be reviewed under the CTA merger provisions. If the Minister does decide that a public interest assessment as it relates to national transportation is warranted, then the proposed transaction cannot be completed unless it is approved by the Governor in Council, i.e., the Federal Cabinet. Under the CTA merger review process, the Commissioner of Competition has up to 150 days, or such longer period

as the Minister may allow, to report to the Minister and the parties on concerns relating to any potential prevention or lessening of competition that may occur as a result of the proposed transaction. This report will be made public immediately after its receipt by the Minister. The Minister may also direct the Canadian Transportation Agency (“Agency”) to examine public interest issues as it relates to national transportation, in which case the Agency has up to 150 days, or such longer period as the Minister may allow, to report to the Minister.

The CTA amendments raise many important threshold questions on which the draft guidelines fail to provide clarity. For example, the term “transportation undertaking” is not defined, and could mean the movement of goods or people by any mode within federal jurisdiction, including transportation by air, rail, marine, truck, bus, electrical transmission or pipelines. It may also include services that relate to transportation, such as airports or ports. There is no *de minimis* exception, so even where transportation services are a small part of the business, they may be considered a transportation undertaking. Moreover, the term “involves a transportation undertaking” is sufficiently ambiguous that it may include a proposed transaction where a transportation undertaking is acquiring a non-transportation undertaking, even though such a proposed transaction is very unlikely to have any effect on the national interest as it relates to national transportation.

While it is expected that the Minister will conduct a full public interest assessment only in the relatively few transactions affecting major transportation undertakings, in the absence of guidelines or appropriate exemptions, a significant number of transactions may be required to notify the Minister and provide the information outlined in the guidelines.

If a public interest assessment is conducted and concerns are raised with respect to the proposed transaction, parties may be required to make significant changes to the proposed transaction or commit to certain undertakings in order to obtain approval.

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While the public interest was not defined in the amendments, the draft guidelines suggest a host of possible considerations, including the impact on users, communities, tourism, employment, other transportation undertakings, trade, environment, security and safety.

It is hoped that when the Minister publishes the guidelines in final form, more clarity will be provided on these issues. In addition, it would be useful for the Minister to put in place exemptions that would narrow the potential scope of the CTA merger provisions to those types of proposed transactions that are most likely to raise significant public interest concerns as they relate to national transportation.

If you would like to know more about this subject or any other aspect of competition law, please contact Richard Annan or Michael Koch or any other member of Goodmans' Competition Group:

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