Overview of Canadian competition law

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Canada's competition law is contained in a single federal statute, the Competition Act (the "Act"). With few exceptions, it applies to all businesses in Canada.

The Act contains both criminal and civil provisions. The criminal provisions deal with such matters as cartels, bid rigging and price maintenance, while the civil provisions include merger review, abuse of dominance, tied selling, exclusive dealing and refusal to deal. The Act also contains provisions dealing with deceptive marketing practices such as misleading advertising.

Enforcement

The Commissioner of Competition (the "Commissioner") is responsible for the administration and enforcement of the Act. The current Commissioner is Ms. Sheridan Scott. The Commissioner heads the Competition Bureau (the "Bureau"), a law enforcement agency with a staff of approximately 400 and an annual budget of approximately C$38 million.

In addition to voluntarily supplied information, there are a variety of formal powers available under the Act that maybe used to gather evidence. These include subpoenas to produce documents, attend oral hearings to give evidence or to provide written returns of information and search warrants to enter premises and seize evidence. Wire tapping is also available in certain provisions. These powers require court approval and meeting certain threshold requirements.

In terms of the civil provisions, the Commissioner can apply to the Competition Tribunal for remedial relief. The Competition Tribunal (the "Tribunal") is composed of federal court judges and lay experts, usually economists or experienced business people. For certain of the reviewable practices, such as refusal to deal, tied selling, exclusive dealing and market restriction, private litigants can apply, with leave, to the Tribunal for remedial relief. Only the Commissioner may bring a merger or abuse of dominance case to the Tribunal.

For criminal matters, it is the Attorney General of Canada that has the authority to initiate proceedings in the criminal courts. The Commissioner and her staff undertake the investigation of alleged breaches of the criminal provisions, and may refer matters to the Attorney General with a recommendation for prosecution.

The Bureau has an active compliance program to assist businesses in understanding the Act and its application by the Bureau. There are numerous enforcement guidelines, bulletins, press releases and speeches dealing with the provisions of the Act. In addition to enforcement action, there are other alternative case resolutions that are used in certain circumstances, such as compliance visits, warning letters and undertakings. A program of advisory opinions is also available.

Civil Provisions

1. Merger Review

Substantive Merger Provisions

A merger is defined by the Act as the acquisition of control over, or a significant interest in, the whole or part of a business. The Act does not define significant interest, but the Bureau has indicated in one case that a 10% voting interest constituted a significant interest. The key issue is the extent to which the acquiring party has the ability to materially affect the economic behaviour of the target company.

If the Tribunal finds that a merger lessens or prevents, or is likely to lessen or prevent competition substantially, it can block all or part of a proposed merger or order the dissolution of a completed merger or order the divestiture of assets or shares as are necessary to remedy the competition problem. Other remedial orders are possible, but only with the consent of parties against whom the order is directed and the Commissioner.

Very few mergers become the subject of applications to the Tribunal. Of the more than 4,300 mergers reviewed since 1986, when the merger provisions became operative, only eight cases have been brought to the Tribunal on a contested basis. The overwhelming majority of mergers do not raise merger issues. Those cases that do raise competition concerns, are usually resolved by negotiations with the Commissioner, resulting in consent orders, restructuring prior to or after closing, or in a few cases, behavioural remedies. There have been 19 consent orders since 1986, and in another 33 cases, competition concerns were resolved through voluntary divestitures or other actions.

The analytical framework used by the Bureau for merger review is very consistent with the framework used by the United States and the European Commission. Key issues include market definition, the degree of market concentration, entry conditions and the extent of remaining competition

in the market after the merger. A unique feature of the Canadian merger review provisions is an efficiency defense that can save an otherwise anti-competitive merger if the efficiency gains are greater than and offset the anti-competitive effects. This controversial feature is currently under review by the Bureau for possible future amendment.

Pre-merger Notification

The merger review provisions include a requirement for pre-merger notification for mergers of a certain size before such mergers can be completed. In order for a proposed merger to be subject to these requirements, it must exceed the size of parties threshold and the target company threshold[1]. Transactions that trigger notification include asset and voting share purchases, amalgamations and combinations. Certain transactions, including those among affiliates, asset securitizations and ordinary course transactions, are exempt from notification. The acquisition of voting shares triggers pre-merger notification if more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company are acquired.

The statutory waiting period, once the required information is filed, can vary from 14 to 42 days, depending on the complexity of the transaction and its possible competitive effects. As a practical matter, parties will often agree not to close their transaction until the Bureau has completed its review, even if that review extends beyond the statutory waiting period. The filing fee in respect of a merger is C$50,000. Failure to file is a criminal offence.

It is important to note that even if a merger is not subject to pre-merger notification, it can be reviewed for its effects on competition. The Commissioner has up to three years after a merger is substantially complete to file an application with the Tribunal.

2. Abuse of Dominance

In Canada, it is not a reviewable practice to have a dominant position, but can become so where the firm employs anti-competitive acts to maintain or enhance its dominant position to the detriment of competition. In order to give raise to an order, the Tribunal must find that the firm holds a dominant position or firms acting in concert hold such a position, that there has been a practice of anti-competitive acts, and that such conduct is or is likely to lessen or prevent competition substantially.

The Bureau's abuse of dominance guideline indicates that a single firm market share of less than 35% will not generally raise issues, while the Tribunal has ruled that a single firm market share of less than 50% will not give rise to prima facie finding of dominance[2]. The Bureau will also carefully consider entry conditions. Market share can be a misleading indicator of market power where entry is not difficult or where entry conditions are changing, for example due to changes in technology or government regulation that make it feasible for new competitors to appear or smaller competitors to expand.

In terms of anti-competitive acts, the Tribunal requires that such acts be done with a predatory, exclusionary or disciplinary object or intent in mind[3]. Examples of practices that have been found to be anti-competitive in the circumstances were contracts requiring or inducing exclusivity, tied selling and long term contracts with most-favoured nation and automatic renewal provisions.

Under the current law, the Tribunal may make an order prohibiting the firm or firms from engaging in the anti-competitive practice. Where this order would be insufficient to restore competition, the Tribunal may order the taking of actions, including the divestiture of shares or assets, as are reasonable and necessary to overcome the effects of the anti-competitive practice.

Parliament is now considering an amendment to the Competition Act that would give the Tribunal the power to levy an administrative monetary penalty of up to C$10 million for the first order, and up to C$15 million for any subsequent order, in relation to the abuse of dominance provisions.

Criminal Provisions

The cornerstone of the criminal provisions is targeted at outlawing agreements among competitors to fix prices, allocate customers or markets, or reduce supply. Unlike the United States, such agreements are not per se illegal, but must be found to unduly lessen or prevent competition. Consequently, not only must there be evidence or an agreement or arrangement, there must be an economic analysis, similar to that done for merger review, to show that the agreement has or will have the requisite anti-competitive effect.

Sanctions for cartels include both fines of up to C$10 million for each offence and, for individuals, terms of imprisonment of up to five years. Individual company fines have reached up to C$48 million for F. Hoffman-LaRoche Ltd. for its role in the bulk vitamins cartel.

In addition, the Act creates a civil cause of action for conduct that is contrary to the criminal provisions. Recovery is limited to actual damages suffered.

In 2000, the Bureau established an Immunity Program, similar to the U.S. Amnesty Program, that provides for the grant of immunity from prosecution for the first member of a cartel to come forward in Canada and provide evidence of any and all offenses in which it was involved and provide full and continuing cooperation. Subsequent parties to come forward may face reduced penalties in exchange for guilty pleas and cooperation, but they

Notes:

[1] The size of party threshold requires that the parties together with all of their affiliates have assets in Canada or gross revenues from sales in, from and into Canada that exceed C$400 million. The size of transaction threshold is met if the value of the assets or revenues from sales in and from Canada exceed C$50 million (C$70 million for amalgamations)

[2] Canada (Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289 (Competition Tribunal)

[3] Canada (Director of Investigation and Research v. NutraSweet Co. (1990) 32 C.P.R. (3d) 1 (Competition Tribunal)

will not be granted immunity. The program has been very successful at uncovering major cartels that effect Canadian customers.

Other criminal provisions include bid-rigging, price maintenance, price discrimination and predatory pricing. Parliament is now considering a proposal to repeal the criminal predatory pricing and price discrimination provisions.

Conclusion

Canada has a modern and comprehensive competition law framework that addresses the three pillars of competition law: cartel enforcement, merger review, and abuse of dominance. The Competition Bureau's enforcement approach is broadly consistent with that of Canada's major trading partners, the United States and Europe. cf

ABOUT THE AUTHOR

Richard Annan heads the Competition Law Group at Goodmans LLP. Richard specializes in competition law, having served 22 years with the Canadian Competition Bureau. He was the Major Case Director and Strategic Policy Advisor of the mergers branch.

Richard has been responsible for the examination of many significant mergers in a wide range of industries under the Competition Act. He led the examination of the proposed mergers between the Royal Bank of Canada and the Bank of Montreal, between the Toronto-Dominion Bank and the Canadian Imperial Bank of Commerce, as well as the examination of the merger between Air Canada and Canadian Airlines. Richard was the investigative team leader in the Gemini I and II cases that were resolved through Competition Tribunal proceedings.

Richard has a law degree from Queen's University, a master of business administration degree from the University of Western Ontario, and is a chartered financial analyst.