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Goodmans LLP

Canadian Competition, Antitrust and Foreign Investment

Competition, antitrust and foreign investment matters continue to attract significant attention in Canada. The Government of Canada is pursuing a consumer-focused agenda that includes more vigorous enforcement of Canada's anti-cartel laws. At the same time, the Competition Bureau has signalled its resolve to continue to investigate and prosecute difficult cases and a greater willingness to cooperate with the competition authorities of other countries in major international investigations. Although the Competition Tribunal has recently reinforced the evidentiary hurdles for private litigants to bring private enforcement proceedings before it, Canadian courts have opened the doors to greater private enforcement of Canada's competition laws through class proceedings. Foreign investment, and in particular investment by state-owned enterprises, is also under increased scrutiny by the Government of Canada. Strategic sectors of the Canadian economy, such as natural resources, technology and telecommunications, are also sectors of specific concern.

Merger Review

- Canada's *Competition Act* requires parties to a qualifying merger or acquisition to notify the Competition Bureau (the "**Bureau**") of the proposed transaction and to not close the proposed transaction for a prescribed period.

- An acquisition of assets will be subject to pre-merger notification requirements where, subject to limited exceptions:

  - the aggregate value of the target's assets in Canada, or the annual gross revenue from sales in or from Canada generated by the target's Canadian assets, exceed $87 million. This financial threshold is adjusted annually; and

  - the parties to the proposed transaction (together with their affiliates), have combined assets in Canada, or annual gross revenues from sales in, from or into Canada, exceeding $400 million in aggregate value.

- For share transactions, in addition to exceeding the financial thresholds noted above, pre-merger notification will normally be required where:

  - the purchaser, as a result of the transaction, holds more than 20% of the voting shares of the target public company (or more than 35% of the voting shares if they're not publicly traded), or

  - if the purchaser before the transaction holds voting shares of the target company that exceed 20% or 35%, as applicable, the purchaser will as a result of the transaction, hold more than 50% of the target company's voting shares.

- The initial statutory waiting period is 30 days. If the Bureau issues a supplementary information request (SIR), the period can be extended to 30 days after full compliance with the SIR.

- The Bureau will undertake a review of the proposed transaction to determine whether it is likely to lessen or prevent competition substantially. If the Bureau decides that the transaction is likely to do so, the Bureau can seek interim and permanent orders from the Competition Tribunal (the "**Tribunal**") prohibiting the transaction from proceeding, requiring the transaction be unwound, ordering the divestiture of certain assets or shares, or imposing certain other remedies on consent of the parties to the transactions and the Commissioner of Competition.

- If the Bureau seeks to prohibit or alter the proposed transaction, the transacting parties can raise a number of potential defences. One such defence is the "efficiencies defence." The Tribunal cannot issue a remedial order if: (i) the gains in efficiency resulting from the merger will likely be greater than, and offset, the merger's anti-competitive effects; and (ii) such gains in efficiency would not likely be attained if a remedial order were made.

- In January 2015, the Supreme Court of Canada released its decision in *Tervita Corporation et al. v. Commissioner of Competition*, 2015 SCC 3, in which it upheld the Tribunal's decision that a merger can be blocked based on a forward-looking analysis of whether, but for the merger, competition would likely be substantially greater. This "but for" analysis can involve consideration of a range of evidence and is not entirely dependent on the parties' assets, plans and businesses at the time of the merger. Of greater significance, the Supreme Court effectively imposed a new burden on the Bureau to quantify the anti-competitive effects of a merger, failing which the efficiencies defence may apply even where the alleged efficiencies are small. The Supreme Court held that where the anti-competitive effects of a merger are capable of being quantified, the anti-competitive effects will be assessed at zero unless the Bureau proves otherwise.

- As a result of this decision, where parties intend to rely on the efficiencies defence, it can be expected that the Bureau may demand considerable evidence and more time to review a proposed transaction to properly quantify the possible anti-competitive effects of a proposed transaction.

Foreign Investment Review

- Foreign investment reviews are increasingly attracting significant scrutiny in Canada on national interest and national security grounds. While the vast majority of transactions continue to gain approval, more proposed acquisitions have failed foreign investment review under the *Investment Canada Act* over the last 6 years than in the preceding 20 years.

- Under the *Investment Canada Act*, a prospective investor must demonstrate that the proposed transaction is of net benefit to Canada. The factors considered by the Minister of Innovation, Science and Economic Development (formerly titled the Minister of Industry) (the "**Minister"**) are:

  - the effect of the investment on the level and nature of economic activity in Canada;
  - the degree of participation by Canadians;
  - the factors of productivity, efficiency, technological development, product innovation and variety;
  - competition in Canada;
  - the compatibility with national industrial, economic and cultural policies; and
  - Canada's ability to compete in world markets.

- Certain of the monetary thresholds to trigger a review have been raised, and are expected to be raised further, as a result of Canada's commitments under certain treaties:

  - Effective April 24, 2015, the monetary thresholds for review of investments from WTO countries was changed from $369 million based on the book value of assets of the Canadian business being acquired, to $600 million based on the enterprise value of the Canadian business being acquired. The threshold will be further increased to $800 million in 2017 and to $1 billion in 2019.

  - Under the Trans-Pacific Partnership (TPP), Canada committed to increase the thresholds to $1.5 billion in enterprise value for investments from TPP countries. It is expected that the new threshold will take effect in 2017 if the TPP is ratified by Parliament. The Minister's determination of whether the investment is likely to be of "net benefit" to Canada will not be subject to the TPP's dispute settlement provisions.

  - Under the Canada-European Union Comprehensive Economic and Trade Agreement entered into in September 2014, Canada committed to increase the review thresholds to $1.5 billion in enterprise value for investments from the participating countries.

  - Cultural businesses will continue to be subject to an even lower, and fixed, $5 million book value review threshold, as will all acquisitions of control of any Canadian business by non-WTO, non-TPP and non-EU investors.

- "National security" is a review criterion introduced in 2009. This criterion is notable for the following reasons, among others:

  - the *Investment Canada Act* does not include a definition of what could be considered to be "injurious to national security;" and

  - there are no monetary or other thresholds for acquisitions or foreign interests that may be the subject of a national security review.

- The Canadian government has shown an increasing concern over foreign takeovers by state-owned enterprises (SOEs) of and investments in "strategic assets" (particularly in the natural resource sector). As a result, SOEs are subject to lower thresholds before triggering a review under the *Investment Canada Act*:

  - the definition of a SOE encompasses an entity controlled or influenced, directly or indirectly, by a foreign government or agency;

  - SOE investments are subject to a lower monetary threshold than non-SOE investments to trigger a review under the *Investment Canada Act* - $369 million in 2015 based on book value and adjusted annually in future years; and

  - the Minister now has discretion to consider whether an SOE acquires "control in fact" for determining whether such a review is required.

- The Canadian government has also announced major restrictions on foreign acquisitions in the oils sands sector, as well as greater restrictions on SOE investments generally. Specifically, the government announced:

  - further acquisitions of control of Canadian oil sands businesses by SOEs would be found to be of net benefit only in an "exceptional circumstance;" and

  - SOE investments in other sectors of the Canadian economy would be subject to increased scrutiny.

- It remains to be seen whether the Liberal government elected in October 2015 will continue to pursue the policies that were closely associated with the former Conservative government. To date, it has come under public scrutiny for not reviewing two acquisitions in the telecom sector under the national security provisions of the legislation.

Criminal Cartel Enforcement

- Cartel enforcement is a top enforcement priority of the Bureau. The *Competition Act* prohibits agreements between two or more persons to: (i) fix, maintain, increase or control the price of a product; (ii) allocate sales, territories, customers or markets for production or supply of a market; or (iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

- Penalties for price-fixing include fines up to $25 million, imprisonment to a maximum term of 14 years and an order prohibiting the commission of an offence or doing anything directed towards the commission of an offence.

- The Bureau has enhanced its cooperation with other jurisdictions to increase its enforcement efforts with respect to international cartels. In this regard, the Bureau has a particularly close working relationship with the Antitrust Division of the United States Department of Justice.

- Recent cartel cases include a wide ranging investigation into auto part suppliers with sales into Canada (guilty pleas and fines to date totalling over $56 million), chocolate confectionary (Hershey Canada paid a $4 million fine), polyurethane foam (Domfoam International Inc. paid a $12.5 million fine), and a number of international airlines involved in a cartel over fuel surcharges for air cargo (fines total $26 million to date).

- Price-fixing conspiracies are by their nature difficult to detect and prove. In a public speech presented at Goodmans LLP in 2016, the Commissioner of Competition, John Pecman, confirmed the Bureau's commitment to pursuing difficult criminal cartel cases despite potential evidentiary difficulties.

- The Bureau has immunity and leniency programs that encourage cartel participants to disclose the existence of cartels in exchange for immunity or leniency from criminal prosecution. To qualify for immunity, the participant must be the first to notify the Bureau of the cartel and must fully cooperate with the Bureau in its investigation and any subsequent legal proceedings.

Even if the participant is not the first to notify the Bureau, the participant may be a candidate for more lenient treatment if it cooperates with the Bureau and the federal prosecutors.

- Participation in an immunity or leniency program raises a number of strategic considerations, since information provided to the Bureau may be made available to, and used by, the accused's counsel in an open court proceeding, and could also potentially be made available in subsequent civil proceedings in Canada.
- When a company uncovers evidence that a competition offence might have occurred, it should quickly and carefully assess whether it should conduct an independent internal investigation. Among other things, an internal investigation may ensure that any unlawful activity has ceased and allow the company to determine if it should file for immunity or leniency. Professional advisors should be retained at an early stage to help ensure that privilege and confidentiality is preserved as best as possible.

Civil Class Actions and Private Enforcement

- The *Competition Act* creates a right for private parties to sue for damages (in the provincial superior courts) for a breach of the criminal provisions of the *Competition Act*. These are most often used for breaches of the criminal conspiracy provisions.
- In Canada, plaintiffs can recover only single damages, not treble damages as in the United States.
- Generally speaking, civil class actions are becoming easier to certify in Canada. In 2013, the Supreme Court of Canada released a trilogy of decisions (see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57) in which the Supreme Court confirmed that indirect purchasers may bring an action to recover losses passed on to them by other purchasers in the distribution channel so long as there is a reasonable methodology to quantify those losses. The assessment of liability and damages in each case will be performed by the trial judge. As a result, Canadian class action proceedings are not likely to face certification challenges to the same degree as in the United States.
- Information obtained by government authorities during their investigation into cartel activity might become disclosable to plaintiffs in private class actions. In 2014, the Supreme Court of Canada in *Imperial Oil v. Jacques*, 2014 SCC 66, upheld a lower court ruling requiring the production of wire-tap transcripts to the class action plaintiffs. However, this disclosure was limited to the recordings that had already been disclosed to the accused in the related criminal proceedings.
- In addition to civil class actions, private complainants have the right to bring private enforcement proceedings before the Tribunal with respect to certain non-criminal matters under the *Competition Act*.
- To date, the Tribunal has not heard many direct applications. Goodmans LLP was recently successful in a private "refusal to deal" case in *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28. In that case, the Tribunal held that a private complainant has an onerous evidentiary burden to prove the requisite level of harm necessary to obtain leave to commence a direct application to the Tribunal.

About Goodmans

Goodmans LLP is internationally recognized as one of Canada's pre-eminent business law firms. Goodmans' Competition, Antitrust and Foreign Investment Group, together with our number one-ranked M&A practice, often advises on the largest and most complex deals in Canada. The group is led by Cal Goldman, a former Commissioner of Competition.