THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Twelfth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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TWELFTH EDITION

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CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. This year, we read with particular interest the discussions of activity in many jurisdictions regarding digital platform competition issues.

We also continue to see the evolution and refinement of general approaches to competition law enforcement in several jurisdictions. For example, The International Competition Network, which is a group of national and multinational competition authorities, adopted a Framework on Competition Agency Procedures, and 62 agencies have signed on. Mexico adopted 'regulations related to client–attorney privilege protection in the context of antitrust investigations'. Japan has also introduced an 'attorney–client privilege [which] will apply to administrative investigation procedures against' cartels, and the discussion in that chapter of how this privilege will be applied will be of interest to many. The chapter from Belgium discusses that country's newly modified competition law, and in this edition we welcome to the *Review* a new chapter from Nigeria, which provides an informative overview of that country's new competition law. Before this law was enacted, our authors write, 'Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues'.

In the past year, antitrust compliance featured prominently on several enforcers' agendas. In 2019, the US Department of Justice (DOJ) notably focused on encouraging compliance efforts: the agency announced a new policy allowing, under certain conditions, companies to receive credit for antitrust compliance programmes when the DOJ considers criminal charges. Elsewhere, the Taiwan Fair Trade Commission has made efforts in the past year to assist Taiwanese business organisations in their antitrust compliance efforts. Poland implemented an online whistle-blower platform and Brazilian authorities issued a whistle-blower protection ordinance.

The policing of cartels remains a focus of competition agencies around the globe. The chapter from Greece notes an increase in cartel enforcement activity in 2019. Authorities there conducted their largest dawn raid yet, and they have also updated the manner in which they prioritise particular cases. The authors of that chapter note that 'it appears that the [Hellenic Competition Commission] has taken a turn toward more pre-emptive action against cartels, by emphasising dawn raids and *ex officio* investigations and by acting swiftly on complaints and news publications about price increases in specific sectors'. Portuguese authorities are reported to have imposed their largest fines to date. The contribution from Japan notes an aggregate level of penalties that is higher than in recent years, which, the authors note, is partly attributable 'to the record-breaking surcharge imposed in the asphalt cartel case' there.

That country is implementing a revised leniency programme. Meanwhile, the chapter from Mexico notes a decline in the number of leniency applications there.

As noted above, online platforms – and the 'digital economy' more generally – continue to be the subject of regulatory scrutiny, including in Brazil, France, India, Japan, Mexico, Poland and the United States. For example, both United States competition enforcement agencies are investigating large platforms, and the UK Competition and Markets Authority (CMA) has launched a market study of online platforms and digital advertising. Taiwan has also begun to prioritise this area. In addition to platform issues, there have been several other notable developments in the areas of restrictive agreements and dominance. Authorities in Canada concluded an inquiry into several pharmaceutical companies without taking action but 'confirmed that healthcare remains a top enforcement priority'. The United States authorities remained active in this area. In addition, Belgian authorities conducted a dawn raid in the pharmaceutical sector. Several jurisdictions took enforcement actions against resale price maintenance (RPM) practices: the UK's action involved guitars; an action in Poland involved online sales of printers and was the result of a whistle-blower complaint; and Japanese authorities took action against manufacturers of various baby products. China concluded four RPM matters.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors. The chapter from Argentina discusses the Antitrust Commission's new merger control guidelines and the chapters from France and India report on streamlined merger control procedures there.

Once again this year, the chapter from the United Kingdom is particularly informative. In addition to describing a busy year of merger and conduct enforcement activity for the CMA, the chapter discusses the effect of Brexit on the competition enforcement regime there, including the transition period and how competition law may factor into the negotiation of a trade agreement between the UK and the EU. Our contributors discuss the future of the CMA and potential consequences of various possible future scenarios. We will continue to watch with interest to see how competition enforcement in the United Kingdom evolves in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2020

Chapter 4

CANADA

Michael Koch, David Rosner and Justine Johnston[1]

I OVERVIEW

Enforcement of competition law in Canada remains vigorous and high profile more than a year into Commissioner Matthew Boswell's tenure. In addition, the Competition Bureau (the Bureau) continues to encourage compliance with competition laws, promote pro-competitive public policy and regulatory outcomes (including with respect to telecommunications, big data, consumer protection and gender), modernise its policies (including its abuse of dominance and intellectual property enforcement guidelines) and establish and improve working relationships with law enforcement in other legal areas and other jurisdictions.[2]

II CARTELS

Enforcement against cartel and bid-rigging, especially for infrastructure contracts, continues to be an area of priority for the Bureau. The cartel (Section 45) and bid-rigging (Section 47) provisions of the Competition Act (the Act) are indictable offences with serious monetary and jail penalties for convicted offenders. There is no limitation period for these offences.

The Bureau has consistently identified the detection and remedying of cartels and bid-rigging as among its most important commitments.

i Significant cases

In 2017, the Bureau conducted dawn raids at the offices of seven bread wholesalers and grocery retailers in a criminal investigation tied to the alleged price-fixing of packaged bread products. In court filings, the Bureau alleged that bread wholesalers Canada Bread and Weston Bakeries communicated with one another to set bread prices that retailers than agreed to pass through to consumers. Retailers subject to the dawn raids were Loblaw Companies Ltd (whose parent company, George Weston Ltd, owns Weston Bakeries), Walmart Canada Corp., Sobeys Inc., Metro Inc. and Giant Tiger Stores Ltd.

In December 2017, George Weston and Loblaw publicly admitted to their participation in what the companies say has been an industry-wide arrangement over the past 14 years to coordinate and fix the price of bread, and identified themselves collectively as the immunity applicant in this case. According to documents released by the Ontario Superior Court of

1 Michael Koch and David Rosner are partners and Justine Johnston is an associate at Goodmans LLP.

2 Competition Bureau, *2019–20 Annual Plan: Safeguarding the Future of Competition*, 25 July 2019. This document is available on the Competition Bureau's website at www.competitionbureau.gc.ca.

Justice, the investigation alleged that prices were increased at least 15 times over this time period, in a pattern known as the 7/10 convention – seven cents more at wholesale and 10 cents more for consumers in stores.

Of the remaining companies implicated in the alleged price-fixing, Walmart has declined to comment, while the others have denied contravening any provisions of the Act. The Bureau has not offered a timeline for when charges may be laid, and in early 2018, publicly clarified that there was no conclusion of wrongdoing at that time. At the time of writing, class action lawsuits have been launched against the implicated companies seeking more than C$5 billion in damages.

Another significant case that the Bureau recently concluded involved an alleged conspiracy to rig bids for 21 infrastructure contracts for the City of Gatineau, Quebec between 2004 and 2008. In 2018, four individuals who held senior positions at the implicated engineering firms were charged, and in 2019, all four individuals pleaded guilty for their roles in the scheme. Cumulatively they received conditional sentences totalling five years and 11 months, and court-ordered community service totalling 260 hours.

ii Trends, developments and strategies

In 2018, the Bureau published revised immunity and leniency programmes under which a party that reveals the existence of criminal conduct and cooperates may be granted immunity or leniency from prosecution. Under the revised programmes, immunity is withheld until the applicant's cooperation and assistance is no longer required. In practice, this would result in applicants only benefiting from a provisional grant of immunity (instead of a final grant of immunity) for the long periods of time typically associated with cartel investigations, and potentially up until the applicant has testified at the trial of alleged co-conspirators. This change addresses the risk that, following the initial application, the applicant may reduce or cease the extent of its cooperation. Prosecutors faced this challenge in a prior bid-rigging trial where a cooperating witness who benefited from the Bureau's programmes provided testimony that was different from what the Bureau expected.

In addition, the programmes no longer automatically protect directors, officers and employees of the immunity or leniency applicant. Instead, such individuals need to demonstrate their personal knowledge of the alleged wrongdoing and their willingness to cooperate with the Bureau's investigation to obtain protection. The directors, officers and employees of the leniency applicants are offered more narrow protections than those of the immunity applicants. Another significant change allows the Bureau to interview witnesses under oath and to video or audio-record those interviews (as well as corporate proffers). Finally, all applicants are now required to provide confidentiality waivers allowing the Bureau to communicate with agencies in other jurisdictions where the applicant is applying for immunity or leniency.

While the immunity and leniency programmes provide incentives for parties to unlawful conduct to self-report, these changes may render the Bureau's premier cartel detection tool less attractive, particularly for potential applicants who are attempting to balance varying cooperation requirements of agencies operating across different jurisdictions. In combination, with the general decline in the perceived attractiveness of immunity and leniency programmes around the world, international companies (in particular) should consider carefully the advantages and risks associated with availing themselves of the Bureau's updated immunity and leniency programmes.

iii Outlook

Given the Bureau's continued focus on the detection, investigation, prosecution and punishment of cartels and bid-rigging matters, companies should continue to give significant attention to ensuring compliance with applicable laws and treating all possible violations very seriously. Companies should note that the Bureau considers having a corporate compliance programme, which conforms to its *Corporate Compliance Programs* bulletin, to be a mitigating factor in sentencing and will recommend a reduced sentence for companies with such a programme.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. This is particularly relevant for cross-border conduct as Canada has a mutual legal assistance treaty and extradition treaty with the United States, which can be used in relation to cross-border criminal investigations.

Above all else, it is critical for companies considering possible international conduct to understand the operation of the Bureau's immunity and leniency programmes, and what the operation of these programmes might entail for the companies' interests under the programmes of non-Canadian agencies and in respect of possible civil suits.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Act contains non-criminal provisions relating to abuse of dominance (Section 79), restrictive agreements among competitors (Section 90.1) and various distribution practices (Sections 75–77). These provisions, which are collectively known as 'reviewable practices', permit the Commissioner to seek an order from a specialist court, the Competition Tribunal (the Tribunal), where the Commissioner can show that the reviewable practice is, or is likely to have an anticompetitive effect.

i Significant cases

The Bureau has made enforcing the reviewable practices provisions of the Act a significant priority. A summary of recent notable cases are set out below.

The Commissioner of Competition v. Vancouver Airport Authority

In 2019, the Tribunal dismissed the Commissioner's application against Vancouver Airport Authority (VAA) under the abuse of dominance provision of the Act. The Commissioner subsequently announced that he would not appeal the Tribunal's decision.

In 2015, the Commissioner initiated an inquiry into, and in 2016, the Commissioner brought an application against, VAA before the Tribunal alleging that VAA engaged in anticompetitive conduct because it decided not to grant a licence to a firm that wished to begin supplying in-flight catering to airlines at the Vancouver airport (YVR). VAA denied the Commissioner's allegations; VAA explained that it decided not to permit additional in-flight caterers at YVR to maintain healthy competition between the two full-service caterers already operating at the airport, and that it believed the decision was justified under the Act. The Commissioner sought orders from the Tribunal requiring VAA to grant additional licences to in-flight caterers.

In advance of the hearing, the Commissioner was required to produce documents to the defendant. In this matter, the Commissioner produced a large volume of documents, but asserted 'public interest privilege' over a subset and refused to produce them to VAA. In series

of a pre-hearing motions, the Tribunal determined that, in non-criminal proceedings before the Tribunal, the Commissioner did not have to produce any documents or information gathered from third parties in the course of the investigation by relying upon a blanket 'public interest privilege'. VAA successfully appealed the Tribunal's decision at the Federal Court of Appeal. The Federal Court of Appeal abolished class-based public interest privilege. The decision – which will apply in all contested proceedings before the Tribunal in the future – only allows the Commissioner to assert public interest privilege on a document-by-document basis. Such assertions of privilege, which will be fact-specific, are more likely to result in a fair process before the Tribunal.

In 2019, the Tribunal dismissed the Commissioner's application. The Tribunal determined that the Commissioner could not meet two of the three prongs of the abuse of dominance test, namely that VAA had not engaged in a practice of anticompetitive acts and that the Commissioner did not prove that VAA's conduct resulting in any substantial lessening of competition (in terms of both price and quality).

The decision is also significant because the Tribunal, for the first time, considered and opined on the regulated conduct defence (which is similar to implied antitrust immunity and the state-action immunity doctrine in the United States).

The decision is notable for two reasons.

First, the decision sheds light on whether a firm that supplies inputs to competitors in a market (but does not itself operate in that market) can be held to have abused a dominance position in that market. In a prior case, the Tribunal had held that a prerequisite to finding an abuse of dominance was that the firm have a 'plausible competitive interest' in the market (as distinguished from a 'garden variety' refusal to supply). The Tribunal's latest decision sheds light on the concept of 'plausible competitive interest' in an impugned market. VAA acted as a market gatekeeper – exercising control over and setting the rules of a market – but did not compete in the market for in-flight catering. The Tribunal's decision sets a low bar for the competitive interest that a market gatekeeper must have for the Commissioner to pursue enforcement action, which suggests that many platform operators could face scrutiny about their business decisions from the Commissioner. The Tribunal decision could also have implications for the essential facilities doctrine in Canada; the same analytical framework could theoretically be applied to digital platforms to ensure that the competition they manage on their platforms is consistent with standards under the Act (which have yet to be articulated).

Second, the decision sheds light on the application of the regulated conduct defence to non-criminal actions under the Act. In theory, the regulated conduct defence allows businesses to justify their conduct because it was required or compelled by law. While the regulated conduct defence has been used in criminal matters under the Act, the Tribunal determined that the defence could not be extended to the abuse of dominance provision of the Act because the provision does not contain the type of 'leeway' language that courts in other circumstances have identified when deciding that federal law should not operate to impugn conduct authorised by provincial or other federal law. Despite this finding, the Tribunal also concluded that the regulated conduct defence would not apply because the VAA's governing legislation did not specifically require or compel VAA to limit the number of in-flight caterers operating at the airport.

The Commissioner of Competition v. Celgene, Pfizer and Sanofi

In 2018, the Bureau announced that it had discontinued a multi-year inquiry into the policies and practices of Celgene, Pfizer and Sanofi, which were alleged to restrict generic drug manufacturer's access to samples of their branded products contrary to the abuse of dominance provision of the Act. The Bureau's inquiry focused on two types of conduct: (1) alleged restrictions imposed by Celgene, Pfizer and Sanofi on wholesalers and other distributors that may prevent them from supplying drug samples to generic drug manufacturers and (2) how Celgene, Pfizer and Sanofi dealt with direct requests for drug samples from generic drug manufacturers.

The Bureau concluded that Celgene's risk management program was not anticompetitive because the restrictive distribution elements of the policy were legitimate measures to ensure safe use and other regulatory requirements and there was insufficient evidence to conclude that Celgene's approach to dealing with direct requests for drug samples would result in a substantial or lessening of competition. In respect of Pfizer and Sanofi, the Bureau did not find sufficient evidence to conclude that either had policies or practices that would inhibit generic drug manufacturers from obtaining drug samples and substantially delay or prevent their entry. In announcing its conclusions, the Bureau confirmed that healthcare remains a top enforcement priority and that it will continue to investigate conduct in the pharmaceutical industry.

The Commissioner of Competition v. The Toronto Real Estate Board

The Supreme Court of Canada denied the Toronto Real Estate Board's (TREB) leave to appeal, ending seven years of abuse of dominance litigation. TREB is a professional organisation of real estate agents in Toronto. It operates the local multiple listing service (MLS), which permits agents to post their listings in a single website, viewable to all other agents. The MLS also contains other data concerning property sales that are not readily available to the public, including historical sales prices for individual properties. Some agents began operating with new business models, which made significant use of the data from the MLS, including displaying historical sales prices online to consumers. TREB disapproved of these potentially disruptive business models, and prevented these agents from using MLS data.

At trial, the Tribunal found that TREB, through its operation of the MLS and its membership rules, controlled the market for residential real estate brokerage services in the Greater Toronto Area (GTA), had a 'plausible competitive interest in adversely impacting competition' in the market for residential real estate brokerage services in the GTA because it wished to shield its traditional members from new and innovative competitors (and to exclude these new competitors), and the MLS rules were intended to insulate existing members from innovative new competition which had the effect of substantially preventing non-price competition (preventing innovation). The Tribunal ordered TREB to remove restrictions on member access and use of MLS data.

TREB appealed, arguing that the Tribunal was required to quantify the alleged competitive effects (which the Tribunal had not done). The Federal Court of Appeal rejected TREB's appeal, explaining that under Canadian law, the requirement to quantify competitive effects applied only in the merger review context. TREB sought leave to appeal from the Federal Court of Appeal's decision to the Supreme Court of Canada, but that request was denied.

ii Trends, developments and strategies

The Bureau continues to seek document and data production, witness examinations and other orders under Section 11 to investigate reviewable practices. For example, in 2019, the Commissioner sought and obtained orders for production and written returns to investigate whether BNSF continued to comply with the terms of a prior consent agreement that were intended to prevent future anticompetitive conduct in the market. The Commissioner also obtained orders for detailed financial and pricing records and an interview a high-level executive in connection with an investigation into alleged predatory pricing by WestJet Airlines Ltd.'s low-cost carrier, Swoop.

Responding to Section 11 orders can be an invasive and time-consuming process that requires the target company and others involved in an inquiry to make extensive documentary production. The use of this investigative tool clearly raises the costs for businesses of responding to Bureau inquiries. It also increases the likelihood of greater public attention and interest to the Bureau's inquiry, given the public filings in the Court's record.

iii Outlook

The Bureau will continue to investigate and bring enforcement actions for reviewable matters in all sectors of the economy, with a particular focus on innovative and consumer facing sectors. The Bureau continues to focus on the digital economy, and is carefully selecting matters for investigation (and potential enforcement action) that involve or implicate digital economies.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Bureau conducts market studies to examine an industry or business sector from a competition perspective to identify relevant laws, policies, regulations or other factors that may impede competition.

i Significant cases

Canada's broadband industry

In 2019, the Bureau released its report following a year-long study to better understand competition for residential broadband internet services. Broadband internet services are the type of high-speed connections that Canadians typically use to access the internet in their homes.

In Canada, most internet users in Canada access broadband internet services through wired networks deployed by telephone and cable companies. Canada's telecommunications regulator imposes a mandatory wholesale access obligation that allows independent competitors to access parts of existing networks at regulated wholesale rates, and in turn use these connections to serve consumers in direct competition with network owners.

A key goal of the study was to assess the performance of the wholesale access regime. Among other reasons, this was to ensure the Bureau could meaningfully participate in the Canadian Radio-Television and Telecommunications Commission's (CRTC) review of Canada's wireline wholesale regulation and other related matters. The study made four factual findings: (1) wholesale-based competitors (using the wholesale access regime to serve customers), currently provide services to more than 1 million Canadian households;

(2) consumers who are served by wholesale-based competitors report higher satisfaction with their provider than those who use traditional providers; (3) wholesale-based competitors act as a competitive alternative to traditional providers, and their presence is used to negotiate lower prices and other inducements; and (4) several facilities-based competitors that provide services using their own underlying physical networks, have launched fighter brands, at least in part, as a competitive response to wholesale-based competitors. The Bureau has relied on its findings to make submissions to the CRTC in respect of its wireline wholesale regulation review, which the CRTC, in turn, relies on to make significant decisions about Canada's broadband regulations.

Fintech

In 2018, the Bureau released a progress report following the implementation of its market study into technology-led innovation in the Canadian financial services (fintech) sector. As expected, the Bureau adopted an advocacy approach and organised a number of outreach events. In the nine months since the publication of the study, the Bureau made formal submissions to advise Canadian decision-makers on issues such as the modernisation of payment systems, anti-money laundering and counter-terrorist activity financing regimes, and updating securities law frameworks so that they apply to virtual currencies.

The market study focused on payments and payment systems, different forms of lending, including crowdfunding and advice in respect of investing. The report gives an overview of the regulatory and competitive landscape of these areas, and makes broad recommendations for policymakers and regulators, industry participants and customers. These recommendations are intended to help modernise the financial services regulation system in Canada and foster innovation through technology-neutral, principles-based regulation.

ii Trends, developments and strategies

In 2018, the Bureau published its final form Market Studies Information Bulletin.[3] The Bulletin sets out and explains how the Bureau conducts a market study, including identifying potential topics, selecting a study and clarifying its scope and how it treats confidential information.

The Bureau does not have the ability to compel third parties to provide information for a market study. The Bureau relies on publicly available information, information already in its possession and information provided by stakeholders on a voluntary basis. If a third party voluntarily provides information to the Bureau, the information is protected by the confidentiality provisions in Section 29 of the Act (which protects information from disclosure except under certain limited circumstances), and is subject to the Bureau's Communication of Confidential Information under the Competition Act bulletin.

iii Outlook

The Bureau will continue to use market studies as a tool to understand how competition can be increased in a given industry or sector. The Bureau can be expected to focus market studies on those markets that may be held back by a lack of competition, including the telecommunications sector and those that directly impact Canadian consumers.

3 Competition Bureau, 'Market Studies Information Bulletin', 19 September 2018. This document is available on the Competition Bureau's website at www.competitionbureau.gc.ca.

V MERGER REVIEW

The Bureau's Mergers and Monopolistic Practices Branch reviews a wide range of mergers, including acquisitions of assets or shares, amalgamations and other combinations to determine whether a merger is or is likely to substantially lessen or prevent competition in Canada. With certain limited exceptions, the parties to a proposed merger that exceeds certain financial thresholds are required to notify the transaction to the Commissioner. The Commissioner retains the jurisdiction to substantively review all mergers, including those that fall below the financial thresholds. The Commissioner may challenge a merger for up to one year after it has been completed by filing an application with the Tribunal requesting an order to dissolve the merger or divest assets or shares or, with the consent of the merging parties, any other action.

As noted above, the Act contains certain financial thresholds, which must be exceeded to trigger a pre-merger notification filing. These thresholds are colloquially referred to as the 'size of the acquired person' and 'size of parties' thresholds.[4] For 2019, the size of the acquired person threshold is C$96 million, and is adjusted annually for inflation. In general, the 'size of the acquired person' threshold is applied by determining the aggregate value of the assets in Canada that are to be acquired or the gross revenues from sales in or from Canada generated from those assets, and checking whether those figures exceeds the threshold. The 'size of parties' threshold is exceeded where the parties to the proposed merger, together with their respective affiliates, have either assets in Canada, or have had gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value. The 'size of parties' threshold requires that the vendor's assets and revenues, even if not included in the transaction, be counted.

If a proposed merger is notifiable, then it may not be completed until the parties file their complete notifications, and the applicable waiting period has expired, been terminated early or the Commissioner has provided waived the obligation to submit a notification. The initial waiting period is 30 days after the day on which the parties submitted their respective notifications. The merger may be completed at the end of the first waiting period unless the Commissioner notifies the parties that additional information is required and issues a supplementary information request (SIR). If a SIR is issued, then the merger cannot be completed until 30 days after the parties comply with the SIR, and provided that the Tribunal has not issued an order prohibiting the parties from completing the transaction. SIRs are typically issued in complex matters where the Bureau must conduct an in-depth analysis of the likely anticompetitive effects. As a result, the Commissioner's substantive assessment of a proposed merger may extend beyond the statutory waiting period and the parties may choose not to complete the transaction until after the Commissioner's review is complete.

4 If the proposed merger is by way of an acquisition of shares, an additional shareholder threshold must also be exceeded. To exceed this threshold, the buyer, together with its affiliates, must hold (1) more than 20 per cent of the voting shares of a publicly traded company or (2) more than 35 per cent of the voting shares of a company that is not publicly traded. The threshold is also exceeded if the buyer, together with its affiliates, already holds more than 20 or 35 per cent of the voting shares as applicable, and as a result of the proposed transaction would hold more than 50 per cent of the voting shares of the target company.

i Significant cases

The Bureau reviews all types of transactions, including domestic and multinational transactions, where there are significant assets or sales in Canada. Many of these reviews have resulted in consent agreements requiring the divestiture of assets or other behavioural commitments. Recent notable cases are summarised below.

The Commissioner of Competition v. American Iron & Metal Company

At the end of 2019, the Commissioner and American Iron & Metal Company Inc (American Iron) entered into an agreement to preserve specific assets in respect of American Iron's acquisition of Total Metal Recovery. American Iron and Total Metal Recovery each operate scrap metal facilities in the Montreal area.

The Bureau was conducting an investigation into the proposed merger when American Iron represented that it was necessary to immediately close the transaction because Total Metal Recovery was in serious financial difficulty and significantly reduced its operations. Due to the Commissioner's concerns that the transaction may result in a substantial lessening of competition in the purchase, collection and processing of scrap metal and the supply of processed scrap metal in Quebec, the Commissioner and American Iron entered into the preservation agreement while the Bureau continues to investigate.

The preservation agreement, which has the effect of a court order, requires American Iron to preserve the assets it acquired from Total Metal Recovery for 60 days, commencing upon the completion of the transaction. During the preservation period, among other things, American Iron must not sell, and must maintain the viability and marketability of, these assets.

At the time of writing, the Commissioner continues to investigate the transaction and the order remains in place.

Commissioner of Competition v. Thoma Bravo

In 2019, Thoma Bravo, a US private equity firm, whose portfolio company Quorum Business Solutions supplies software to oil and gas companies, including the MOSAIC Reserves Software (MOSAIC), acquired Aucerna, a software supplier to oil and gas companies, including Value Navigator (Val Nav) software.

In reviewing the transaction, the Bureau found that MOSAIC and Val Nav competed directly for the business of Canadian oil and gas companies. The Commissioner found that the merger would have resulted in a monopoly for the supply of this type of software to Canadian and noon-Canadian oil and gas companies, and expressed concern that that the price and non-price benefits of competition between the parties would be lost as a result of the transaction. The Bureau further found that it was unlikely that there would be timely or effective entry or expansion sufficient to constrain the market power of the merged entity.

The Commissioner issued SIRs to the parties, and following the expiry of the 30-day waiting period following compliance, the parties closed the transaction despite the Commissioner's concerns. The Commissioner subsequently filed an application before the Tribunal seeking that Thoma Bravo divest either MOSAIC or Val Nav. While the application was pending, the Commissioner and Thoma Bravo entered into a hold separate agreement under which Thoma Bravo was required to hold the MOSAIC business separate and apart from the rest of its business. Ultimately, the Commissioner and Thoma Bravo negotiated and entered into a consent agreement whereby Thoma Bravo agreed to divest MOSAIC.

Parmalat Canada Inc's acquisition of the Kraft Heinz Canada's cheese business

In 2018, Parmalat Canada announced its proposed acquisition of Kraft Heinz Canada's (KHC) natural cheese business. Parmalat Canada produces and supplies dairy and food products in Canada, including cheese, table spreads, cultured products and beverages. KHC manufactures and markets a wide range of food and beverage products in Canada, including natural cheese. The Commissioner cleared the transaction in 2019.

The Bureau's review of the transaction is significant because the Bureau sought and obtained a Section 11 order from the Federal Court compelling representatives of Parmalat Canada and KHC to submit to oral examinations under oath or solemn affirmation so that the Bureau could gather information. The Bureau stated that the oral examinations provided additional insight into the industry and the merging parties' businesses that otherwise would not be available to the Bureau, and that it will consider using oral examinations in mergers on a case-by-case basis in the future.

ii Trends, developments and strategies

In 2019, the Bureau changed the name of its Merger Notification Unit to the Merger Intelligence and Notification Unit (MINU), and expanded its role to include active intelligence gathering on non-notifiable merger transactions that may raise competition concerns. The Bureau has already identified, and is investigating, at least two potentially anticompetitive transactions that were not subject to pre-merger notification.[5]

Going forward, companies may have a valuable opportunity to close transactions even though a portion of the transaction may potentially be anticompetitive. *Thoma Bravo* and *American Iron & Metal Company* are two examples where the Bureau was notified of the proposed merger, allowed it to close and then took enforcement action in respect of the portion of the merger that it alleged was anticompetitive.

In Canada, the efficiency defence continues to be a powerful tool for firms seeking to engage in strategic transactions that may have competitive effects. Firms seeking to obtain the benefit of the efficiencies defence should engage in careful and early planning and seek the assistance of experts able to organise and marshal the evidence necessary to support efficiencies claims.

The Bureau continues to closely cooperate with competition authorities in other jurisdictions, including the United States Federal Trade Commission and the Antitrust Division of the Department of Justice. Competition counsel in the different jurisdictions where a proposed merger is subject to review should work collaboratively to facilitate consistent outcomes and efficient reviews.

iii Outlook

The Bureau will continue to treat merger review as one of its top priorities, particularly as the number of strategic transactions remains high. Accordingly, firms should continue to expect that the Bureau will thoroughly review and investigate all mergers that have or are likely to

5 Remarks by Commissioner of Competition Boswell, 'No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age', 7 May 2019. The remarks are available on the Competition Bureau's website at www.competitionbureau.gc.ca.

have significant competitive effects. Parties to smaller transactions should be cognisant of the expanded role of the MINU and carefully consider whether their proposed mergers should be voluntarily notified to the Commissioner.

VI CONCLUSIONS

Recent developments are likely to reverberate for some time in Canadian competition law. The Bureau's review and enforcement actions continue to be directed at furthering competition and fostering innovation across all segments of the Canadian economy. Going forward, the Bureau can be expected to focus its efforts on innovative and consumer-facing industries to ensure all Canadians reap the rewards of competition.

Appendix 1

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