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Competition Act Regulates Mergers & Acquisitions by Foreign and Canadian Companies

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What is the *Competition Act*?

The Competition Act (“CA”) is a federal statute administered and enforced by the Canadian Competition Bureau (“CCB”) and the Public Prosecutions Service of Canada. The purpose of the CA is to encourage competition in the Canadian marketplace, thereby benefiting consumers.[1] The CA addresses issues related to: (1) mergers; (2) criminal matters; and (3) reviewable practices.

What are Mergers?

The CA defines merger as the acquisition of control over a significant interest in an operating business, e.g. by purchasing shares or assets, or amalgamation, or a combination of both.[2] The CCB indicated that the acquisition of less than 10 per cent of the voting shares of a corporation would generally not be considered as a merger. Acquisition of 10 to 50 percent would most likely be considered as a merger, if the purchaser will acquire the ability to materially influence the target company’s economic behaviour. Contractual arrangements, e.g. shareholders’ agreements, that stipulate control over all or part of a business can be considered as mergers.[3]

Challenges by the Canadian Competition Bureau

Unless the CCB has approved the merger by issuing an Advance Ruling Certificate (“ARC”), it can challenge any mergers before its completion and within one year of its completion.

Thresholds that triggers Pre-Notification

If both of the following thresholds are exceeded, the parties must notify the CCB about the proposed merger.

“Size of the Parties” threshold: When the parties to the merger, together with their affiliates, have either combined assets in, or combined gross annual revenues from sales in/from/into Canada exceeding $400 million.[4]

“Size of the Acquired Business” threshold: When the assets of the acquired business, or the gross revenues from sales in or from (but not into) Canada generated from such assets, exceed $88 million.[5]

<u>Thresholds for security interest:</u>

For share acquisitions of a public company, it will be notifiable if upon completion of the transaction, the purchaser owns more than 20 percent of the voting shares, or 50 percent if the purchaser already owned more than 20 percent prior to the transaction.[6]

For share acquisitions of a private company, it will be notifiable if upon completion of the transaction, the purchaser owns more than 35 percent of the voting shares, or 50 percent if the purchaser already owned more than 35 percent prior to the transaction.[7]

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[1] *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1
[2] *Competition Act*, R.S.C. 1985, c. C-34, s. 91
[3] Competition Bureau, *Merger Enforcement Guidelines* (2011, Oct 6). Retrieved from http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s1_0
[4] *Competition Act*, R.S.C. 1985, c. C-34, s. 109(1)
[5] *Competition Act*, R.S.C. 1985, c. C-34, ss. 110(7) -110(8)
[6] *Competition Act*, R.S.C. 1985, c. C-34, ss. 110(3)
[7] *Competition Act*, R.S.C. 1985, c. C-34, ss. 110(3)

Mergers that exceed the above-mentioned thresholds cannot be completed until at least one of the following occurs: (1) the statutory waiting period has expired and no order prohibiting closing of the transaction exists; or (2) the CCB allows the transaction to close upon review.[8]

The threshold analysis is based on the most recently audited financial statements. If they are unavailable, the threshold analysis will be based on unaudited financial statements and internal books and records.

Notification Procedure

Two ways that constitute notification are: (1) the filing of a prescribed notification form by each relevant party, and/or (2) making a request of an Advance Ruling Certificate (ARC).

Prescribed Notification Form

To file a prescribed notification form, the party should submit information about: (1) the business of the relevant parties and their associated affiliates; (2) a description of the operation of the business; (3) the financial statements; (4) customers; (5) suppliers; (6) marketing plans; (7) business plans; (8) board documents; and (9) competition analysis.[9]

Supplementary Information Request (SIR)

After the parties have submitted the prescribed notification form, it triggers a waiting period of 30 days during which the transaction cannot close unless it is approved by the CCB. If the transaction might involve anti-competitive practice, the CCB will issue a Supplementary Information Request (SIR) during the waiting period. The SIR is a request for additional information and the parties might need several months to gather the information in order to comply with the request. After the parties have submitted the requested information, the waiting period is extended by an additional 30 days.[10]

Advance Ruling Certificate (ARC)

To request an Advance Ruling Certificate (ARC), counsel for the parties (usually the purchaser) should submit information relevant to the transaction, e.g. the parties involved, the industry associated with the transaction, the reasons why the transaction complies with competition law. If the transaction is completed within one year of the issuance of the ARC, the CCB cannot later challenge the transaction.[11]

In the event that the CCB is not ready to either challenge or approve the ARC request upon receipt of sufficient information, it will typically issue a No Action Letter (NAL) and waive the parties' obligation to submit prescribed notification forms. The NAL informs the parties that the CCB has the right to challenge the transaction within one year of closing, even though it does not intend to challenge the transaction as of the date of the letter.[12]

Upon receipt of an ARC request, the CCB will try to process the request within 14 days for a "non-complex" transaction and within 45 days for a "complex" transaction. Transactions that involve minimal overlap between the parties are considered to be "non-complex", whereas transactions that involve elements associated with anti-competitive practice, e.g. the merger of competitors or the merger of customers and suppliers, are considered to be "complex". In general, if the combined market share of the parties is 35 percent or more after the merger, the transaction would be classified as "complex". If the combined share is between 10 to 35 percent, it may be considered as "complex" or "non-complex". If the combined share is less than 10 percent, it would generally be considered as "non-complex".[13]

Although parties can close a transaction once the statutory waiting period has expired, parties generally prefer to obtain either an ARC or a NAL before closing a transaction.

[8] *Competition Act*, R.S.C. 1985, c. C-34, ss. 123
[9] *Competition Act*, R.S.C. 1985, c. C-34, ss. 114(1)
[10] *Competition Act*, R.S.C. 1985, c. C-34, ss. 114(2) and 114(2.1)
[11] *Competition Act*, R.S.C. 1985, c. C-34, ss 102(1) and 103
[12] *Competition Act*, R.S.C. 1985, c. C-34, ss. 123(2)
[13] *Competition Act*, R.S.C. 1985, c. C-34, ss. 102(2)

Standard of Review

Upon review of the information submitted by the parties, the CCB will assess whether the transaction would enable the merged company to increase prices profitably after the merger is completed. Alternatively, the CCB will determine whether the merger would create, maintain or enhance the merged company's ability to exercise market power.[14]

Filing Fee

For merger reviews, the filing fee is $50,000 regardless whether prescribed notification forms or ARC requests were submitted. The parties should negotiate and specify the payee of the filing fee in the transaction's purchase agreement.[15]

Potential Outcomes

For most cases, the parties close their transactions without any delay and with permission from the CCB. In some cases, the CCB takes longer than expected to review the merger and the closing is delayed, but the terms of the transaction stay the same as agreed upon by the parties. In rare cases, the merger raises competitive issues and the parties agree to voluntarily amend the terms of the original agreement, e.g. selling off subsidiary businesses, in exchange for the CCB's approval. In extremely rare cases, the CCB seeks an order prohibiting the closing of the transaction at the Competition Tribunal. If the closing already took place, the CCB can request the Competition Tribunal to order part or all of the acquired business to be sold to a third party or other remedies as deemed necessary to undo the transaction.

Criminal Matters

Under the *Competition Act*, conspiracy and bid-rigging are criminal offences. These criminal acts are inherently illegal and the standard of proof is beyond a reasonable doubt.

Bid-rigging

Bid-rigging takes place when businesses conspire secretly to either not submit a bid or withdraw a bid in response to a call for bids. Alternatively, bid-rigging is when a business submits a bid that was arrived at by secret agreement between two bidders. The penalty for bid-rigging can be a substantial fine or an imprisonment term not exceeding 14 years or both.[16]

Conspiracy

Conspiracy is when competitors agree to fix, maintain, increase or control prices, including discounts, rebates, allowances and concessions. When competitors agree to allocate sales, territories, customers, or markets for the production or supply of the product, they are committing the offence of conspiracy. Conspiracy also means when competitors agree to fix or control the production or supply of a product. Competitor means a person who it is reasonable to believe would be likely to compete with respect to a product. The penalty for conspiracy is a fine not exceeding $25 million and/or an imprisonment term not exceeding 14 years.[17]

Matters Reviewable by Competition Tribunal

Restrictive Trade Practices

Competitor Agreements

If competitors propose or enter into an agreement that would have the effect of substantially preventing or lessening competition, the Competition Tribunal can order the termination or amendment of the agreement. The tribunal cannot make an order against an agreement that would likely bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.[18]

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[14] *Competition Act*, R.S.C. 1985, c. C-34, s. 93
[15] Competition Bureau. *Competition Bureau Fee and Service Standards Policy*. (2003, March) Retrieved from http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01388.html
[16] *Competition Act*, R.S.C. 1985, c. C-34, s. 47(1)
[17] *Competition Act*, R.S.C. 1985, c. C-34, ss. 45(1) & 45(2)
[18] *Competition Act*, R.S.C. 1985, c. C-34, s. 90(1)

Abuse of Dominant Position

Abuse of dominant position occurs when the following takes place: (1) one or more businesses have market power in one or more relevant markets. Market power is the ability to charge prices above the competitive levels for a sustained period of time; (2) the dominant business has engaged in anti-competitive practice. Anti-competitive practice includes acts that are exclusionary, disciplinary or predatory, and directed at one or more competitors; (3) the anti-competitive practice brings or will bring about the effect of preventing or lessening competition. The standard of review is whether prices in the market would be lower "but for" the conduct being evaluated.[19]

The penalty for abuse of dominant position is a fine not exceeding $10 million for a first transgression and up to $15 million for each subsequent transgression.[20]

Price Maintenance

When a supplier influences upward or discourages price reduction at which a seller sells, offers to sell or advertises a product, the supplier is engaging in price maintenance. Price maintenance also includes instances when a supplier refuses to supply a product to a seller due to the low pricing offered by the seller.[21]

Refusal to Deal

When a supplier refuses to supply a product, the supplier affects the potential customer's ability to carry on its business. Despite the fact that the potential customer is willing to meet the usual trade terms of the supplier and the relevant product is in ample supply, the supplier refuses to provide the product to the potential customer, thereby causing an adverse effect on competition in a market.[22]

Tied Selling

When a supplier agrees to supply a customer with a product only if the customer abides by the following conditions:

(1) acquire a second product from the supplier; or
(2) Stop distributing a product that is not manufactured or designated by the supplier.

Tie selling also includes enticing the customer to agree to one of these conditions by offering to supply them with a product on more favourable terms.[23]

Exclusive Dealing

Exclusive dealing occurs when a supplier requires a customer to deal only or primarily in products supplied by the supplier as a condition of supply. Alternatively, the supplier requires a customer to refrain from dealing in a specified product with other suppliers as a condition of supply. The supplier will usually entice the customer to agree with exclusive dealing by offering them more favourable terms.[24]

Vertical Market Restriction

A supplier requires a customer to supply a product in a defined market as a condition of supply. Alternatively, a supplier gives the customer a penalty if the customer supplies the product outside of the defined market.[25]

[19] *Competition Act*, R.S.C. 1985, c. C-34, ss. 78(1), 79(1)
[20] *Competition Act*, R.S.C. 1985, c. C-34, s. 79(3.1)
[21] *Competition Act*, R.S.C. 1985, c. C-34, s. 76(1)
[22] *Competition Act*, R.S.C. 1985, c. C-34, s. 75(1)
[23] *Competition Act*, R.S.C. 1985, c. C-34, s. 77(1)(a)
[24] *Competition Act*, R.S.C. 1985, c. C-34, s. 77(1)(a)
[25] *Competition Act*, R.S.C. 1985, c. C-34, s. 77(3)

Remedies

Under the CA, the Competition Tribunal can issue an order prohibiting conduct that substantially prevents or lessens competition or has an adverse effect on competition. The standard of proof is a balance of probabilities. If the tribunal finds the conduct to be an abuse of dominance, it can order divestiture.

Investment Canada Act* and *Competition Act

Depending on the nature and size of the proposed transaction, foreign investment in Canada will go through the review processes under the *Investment Canada Act* ("ICA") and the CA. While the ICA employs the net benefit analysis, the CA focuses on maintaining competition. The two reviews are separate, but they often run in parallel. Since the ICA's net benefit analysis takes into consideration the effect of foreign investment on competition in a Canadian industry, the CCB is often asked to provide input into the ICA review. The review by the ICA is unlikely to be approved, unless the CCB has determined that competition concerns do not exist or until such concerns have been dealt with.[26]

For more information, please call Barbara Hendrickson or Janny Cho at BAX Securities Law 416.601.1004.

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[26] Campbell, N., Meng, J. & Wortley, S. "Competition and Foreign Investment Reviews of Asian Investments into Canada" in *China International Institute of Antitrust and Investment, First Annual Antitrust Symposium*, (2013) at chapter 34