# 4. Competition/Antitrust Law

Matters related to competition are principally regulated in Canada by the federal government under the *Competition Act* ("the "Act"), which is administered by the Commissioner of Competition ("commissioner") and the commissioner's staff, the Competition Bureau.

The act has five principal categories of provisions: (a) merger provisions, including pre-merger notification; (b) criminal provisions, including those dealing with conspiracies/cartels, bid rigging, and certain deceptive marketing practices (criminal offences); (c) various restrictive trade practices provisions, including abuses of dominant position; (d) various deceptive marketing practices (civil offences); and (e) a provision establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the act or a breach of an order of the Competition Tribunal ("tribunal"). Criminal matters and claims for civil damages are adjudicated before the courts. Civil reviewable conduct is dealt with by the tribunal on application by the commissioner or, in some cases, a third party with the permission of the tribunal. The tribunal has the authority to issue a range of remedial orders and, in some cases, administrative monetary penalties.

## Mergers

A merger is defined broadly in the act as the acquisition of control over, or of a significant interest in, the whole or part of an operating business. Due to the breadth of this definition, foreign transactions often produce issues where the parties own or have a significant interest in a business in Canada.

Similarly, the mandatory pre-merger notification rules, which are applicable to certain merger transactions (discussed below), cover both direct and indirect acquisitions. The rules are the same irrespective of whether the acquirer is Canadian or foreign.

Generally speaking, mergers, whether or not they are subject to pre-merger notification, may be subject to review by the tribunal unless an advance ruling certificate (ARC) has been issued by the commissioner. If the tribunal finds that a merger is likely to prevent or substantially lessen competition, it may, among other things, order the merger's dissolution or the divestiture of its assets. In the case of a proposed merger, the tribunal may order that the merger not proceed in whole or in part. A merger may be challenged up to one year after it has been substantially completed.

If the merger is substantially completed within one year of the issuance of the ARC and the information upon which the ARC was based remains substantially unchanged, the merger may not be challenged under the provisions of the act.

## Mandatory Pre-Merger Notification

While mergers do not require advance approval under the act, certain mergers (i.e., asset acquisitions, share purchases, amalgamations, combinations, and acquisitions of interests in combinations) are subject to mandatory pre-merger notification and a waiting period prior to closing if the applicable "size-of-parties" and "size-of-transaction" thresholds are exceeded. Exemptions from pre-merger notification exist for certain specified transactions.

Subject to an applicable exemption, a merger is notifiable if:

(a) the following criterion is met:

- Taken as a whole, the merging parties and their affiliates have assets in Canada with an aggregate book value that exceeds, or have annual gross revenues from sales in, from, or into Canada that exceed, $400 million (in the case of an acquisition of shares, the parties are the purchaser and the corporation whose shares are being acquired, and in the case of an acquisition of an interest in a combination, the parties are the purchaser of the interest and the combination whose interest is being acquired).

**and**

(b) any one of the following criteria is met:

- In the case of an acquisition of assets, the aggregate book value of the assets of the operating business being acquired exceeds, or the annual gross revenues from sales in or from Canada generated from those assets exceed, a transaction-size threshold set at $92 million for 2018 and changed annually according to changes in Canada's GDP (the size-of-transaction threshold).
- In the case of a purchase of the shares of (i) a public company, the acquirer and its affiliates would hold more than 20% of the voting shares as a result of the merger, (ii) a private company, the acquirer and its affiliates would hold more than 35% of the voting shares as a result of the merger, or (iii) either a public or a private company, the acquirer and its affiliates would hold more than 50%, provided the acquirer already owns more than 20% or 35% of the voting shares, as applicable, and the corporation whose shares are being acquired and any corporations controlled by that corporation carrying on an operating business have assets in Canada with an aggregate book value, or annual gross revenues from sales in or from Canada generated from such assets, exceeding the size-of-transaction threshold.

- In the case of an amalgamation of two or more corporations, one or more of those corporations carries on an operating business or controls a corporation that carries on an operating business and the aggregate book value of the assets in Canada that would be owned by the continuing corporation that would result from the amalgamation or by corporations controlled by the continuing corporation, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the transaction-size threshold, and each of at least two of the amalgamating corporations, together with their affiliates, have assets in Canada with an aggregate book value, or annual gross revenues from sales in, from, or into Canada generated from such assets, exceeding the size-of-transaction threshold.
- In the case of a combination of two or more persons to carry on a business other than through a corporation (e.g., a partnership), one or more of those persons contributes to the combination assets that form all or part of an operating business carried on by those persons, or corporations controlled by those persons, and the aggregate book value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the size-of-transaction threshold.
- In the case of an acquisition of an interest in a combination that carries on an operating business other than through a corporation, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person or persons to receive more than 35% of the profits of the combination or more than 35% of its assets on dissolution or, where the person or persons acquiring the interest are already so entitled, to receive more than 50% of such profits or assets, and the aggregate book value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds the size-of-transaction threshold.

The pre-merger notification is potentially a two-step process that is commenced by submitting a notice containing the prescribed information to the commissioner together with a $72,000 fee. There is a 30-day waiting period, during which the transaction may not proceed, commencing on the date when all of the prescribed information is received by the commissioner. Furthermore, the commissioner may make a supplementary information request (SIR) at any time within that initial 30-day waiting period. An SIR triggers an additional 30-day waiting period commencing on the date that all of the SIR information is received by the commissioner.

In addition to the information required to be filed pursuant to a pre-merger notification or an SIR, the commissioner expects that the initial information filing will be accompanied by a statement that addresses the substantive competitive impact of the proposed transaction.

The foregoing waiting periods do not apply if an ARC has been issued. Additionally, as noted above, there is a provision in the act that allows the commissioner to waive the obligation to notify because substantially similar information was previously supplied in relation to a request for an ARC. The waiting period may also be terminated early if the parties receive a notice from the commissioner indicating that the commissioner does not currently intend to challenge the merger before the tribunal.

In addition to waiting periods, the commissioner observes "service standards" – the time within which the commissioner strives to complete a competitive assessment of a proposed transaction. In general, service standard periods run parallel to waiting periods. For non-complex transactions (i.e., those posing no substantive competition issues), the service standard is 14 days; for complex transactions, it is 45 days; and where an SIR has been issued, it is 30 days following satisfaction of the SIR.

Where the commissioner has commenced an inquiry into any merger or proposed merger and requires more time to complete the inquiry, the commissioner may, irrespective of whether the transaction is notifiable, seek an interim order from the tribunal to prevent the completion or implementation of the merger.

## Conspiracies and Cartels

A conspiracy agreement or arrangement between competitors to fix prices, allocate markets, and/or restrict output is a criminal offence. Proof of competitive harm is not required to establish the offence. Those convicted of such an offence may face up to 14 years in prison and/or a fine of up to $25 million.

## Abuse of a Dominant Position

The abuse of dominance provisions in the act provide that where one or more persons have market power and where such a person or persons engage in a "practice of anticompetitive acts" such that competition has been, is being, or is likely to be prevented or substantially lessened in a market, the tribunal may, on application of the commissioner, issue prohibition and other orders in respect of the conduct, including orders for administrative monetary penalties of up to $10 million for an initial order and up to $15 million for any subsequent order.

## Other Restrictive Trade Practices

Seeking to promote innovative pricing programs and enhance certainty for businesses, the Parliament of Canada repealed criminal provisions regarding price discrimination, predatory pricing, and promotional allowances in 2009. At the same time, the criminal price maintenance provision was also repealed and replaced with a civil resale price maintenance provision requiring proof of an adverse effect on competition.

Restrictive trade practice rules apply to refusals to deal, resale price maintenance, exclusive dealing, tied selling, and market restrictions. Where such a practice is viewed by the commissioner as likely to have a substantial anticompetitive effect in a market, the commissioner may make an application to the tribunal for an order to cease the practice. Subject to obtaining the permission of the tribunal, private litigants may also bring cases to the tribunal.

## Agreements or Arrangements that Prevent or Substantially Lessen Competition

The commissioner may apply to the tribunal for a review of an agreement or arrangement – whether existing or proposed – between parties who are competitors or potential competitors that prevents or lessens, or is likely to prevent or substantially lessen, competition. In particular, joint ventures, strategic alliances, and similar collaborations between competitors are often subject to review, prohibition, or other orders.

## Private Civil Actions for Damages

The act contains provisions establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the act or a breach of an order of the tribunal. Note that the act provides only for single, not treble, damages. There is also a provision for the recovery of the costs of any investigation and any civil proceedings.

## Deceptive Marketing Practices

The act contains both criminal and civil (reviewable) provisions to address deceptive marketing practices. For example, it is a criminal offence to knowingly or recklessly make representations to the public that are materially false or misleading and a civil offence to make representations to the public that are materially false or misleading or performance claims that are not supported by adequate and proper testing completed prior to making the claim. Other civil provisions include claims respecting ordinary selling price, testimonials, and promotional contests. As noted above, there is a private right of action for damages and the costs arising from conduct that is contrary to the criminal provisions of the act.