CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
September 2012 (1)

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Kevin Ackhurst
Norton Rose

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I. INTRODUCTION

Canada's Commissioner of Competition announced on June 28, 2012 that she would resign her position on September 21, 2012. Since her appointment as Interim Commissioner in January 2009, Melanie Aitken has overseen profound changes at the Competition Bureau, including adjusting to the passage of the most significant amendments to the Competition Act in the statute's history, as well as implementing a highly visible enforcement program. The Commissioner initiated judicial challenges in all main areas of the Act, including mergers, abuse of dominance, price-fixing, price maintenance, and misleading advertising. In addition to commencing a number of high-profile cases, the Commissioner introduced a number of new or updated policy documents to offer guidance to consumers, businesses, and their advisors.

This paper surveys the policy guidance issued by the Commissioner between January 2009 and July 2012, by topic. It does not include an analysis of the positions adopted by the Commissioner in case-specific contested enforcement proceedings or the settlement of civil or criminal matters, including mergers. That is, the focus is on broad, forward-looking policies issued by the Commissioner in the form of bulletins, enforcement guidelines, and interpretation guidelines.

The Commissioner and her staff are to be commended for quickly issuing guidance documents to assist practitioners in the wake of the passage of Bill C-10, which introduced, among other things, significant changes to the merger review process, the scope and burden of proof of the price-fixing provisions, and the addition of a civil review of competitor collaborations—all of which necessitated the publication of new policy guidance. The hefty increase in the fines and penalties (including the introduction of monetary penalties for abuse of dominance) for criminal and civil breaches of the Act led to various guidance documents being updated. However, certain of those policies, such as the *Fees and Service Standards Handbook for Mergers and Merger-Related Matters*, were criticized for lacking clarity and being inconsistent with the Act. Other policies, such as the second draft of the revised *Enforcement Guidelines on the Abuse of Dominance Provisions*, have been criticized as lacking sufficient meaningful guidance.

[1] Kevin Ackhurst is a partner in Norton Rose's Toronto office where he advises Canadian and international clients on all aspects of Canada's competition and foreign investment laws.

II. MERGERS

In large part due to the major changes introduced by Bill C-10, the topic covered by the most new or updated policies is mergers. Two weeks after the passage of Bill C-10, on March 24, 2009, the Bureau issued its draft *Merger Review Process Guidelines* for comment. The *Merger Review Process Guidelines* explain the two-stage merger review process and, in particular, the supplementary information request process, including a description of how the Bureau will strive to balance the potential burden on parties in responding to a SIR with the need to ensure that it can obtain the information required to conduct its review. Following stakeholder consultations, the document was issued in final form in September 2009.

The following year, in May 2010, the Bureau issued a draft *Fee and Service Standards Handbook for Merger-Related Matters*. In light of the amendments to the Act and the Notifiable Transaction Regulations, the *Handbook* updates how the Bureau determines the complexity of a proposed transaction, and outlines what information will be required by the Bureau to commence the applicable service standard and when the Bureau will suspend or terminate the service standard. The draft retained the existing three categories of complexity, but changed the corresponding service standards.

The final version of the *Handbook* was released in October 2010, together with the related *Fees and Service Standards Policy for Mergers and Merger-Related Matters* and *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*. The net impact of these documents saw the complexity designations changed to only non-complex and complex and the reduction in the service standards to more closely (but not exactly) correspond to the timelines established in the Act. The *Handbook* outlines a variety of criteria for assessing complexity, and a rather lengthy list of information required to commence the service standard. In certain cases, more information than is called for in the Notifiable Transaction Regulations in order to commence the statutory waiting period could be needed to commence the service standard. The Procedures Guide imposed timing deadlines on the submission of pre-merger notifications and requests for advance ruling certificates, and the Merger Policy clarified when additional filing fees must be submitted when a filing is pulled and re-filed.

Beginning in late fall 2010, the Bureau began consultations on the need to revise the *Merger Enforcement Guidelines*, ultimately concluding in February 2011 that relatively modest changes should be made. A discussion paper was released in September 2010, draft MEGs were released for comment in June 2011, and they were finalized in October 2011.

The MEGs set out the Bureau's analytical framework for reviewing mergers. The primary change relative to the 2004 version of the MEGs is the Bureau's decision that defining relevant product and geographic markets is merely one analytical tool of many, and it need not be undertaken in every case. This will afford both the Bureau and merging parties greater flexibility in crafting arguments about the merits of potential transactions. Another major change is that the Bureau has consolidated the merger-related guidance it previously provided in other

documents into the MEGs, providing a "one-stop shop" document for merger guidance. Also, the final version of the revised MEGs clarifies that its treatment of efficiencies takes precedence over the Bureau's 2009 Bulletin on Efficiencies in Merger Review (issued five weeks after Melanie Aitken's appointment as Interim Commissioner). The revised MEGs further provide greater detail on the Bureau's approach to transactions involving minority interests and interlocking directorates, to vertical mergers, and to monopsony power.

The Bureau also issued several interpretation guidelines and policies related to technical pre-merger notification procedural issues. In June 2010 the Bureau released its policy on hostile transactions that, in essence, provides that in appropriate circumstances, the Bureau will provide updates of pertinent information (including the complexity designation, timing benchmarks, and preliminary views on substantive matters) to both parties on an equitable basis, subject to the requirements of section 29 of the Act. In August 2011, the Bureau announced its decision to adopt standardized language in its "no-action letters" to more closely align the language used with section 123 of the Act. Finally, in March and April 2012, the Bureau issued draft pre-merger interpretation guidelines for comment on the calculation of pre-merger notification thresholds. The guidelines advised on when the Bureau would consider whether sales or assets are in or from Canada and when duplication from transactions among affiliates can be eliminated, as well as when a new filing may be required if a transaction is modified after a notification or ARC request has been filed. Various aspects of the guidelines were heavily criticized by members of the bar and it remains to be seen how these concerns will be addressed.

In an effort to increase transparency, the Commissioner announced in October 2011 that the Bureau would begin to publish a monthly list of completed merger reviews. The Bureau considered the objections raised by the bar that doing so could jeopardize the protections afforded by section 29 of the Act, but in the end the Commissioner launched the merger register in March 2012. The monthly list includes the names of the merging parties, the industry sector involved, and the outcome of the review. Also in 2012, the Bureau updated its *Merger Review Process Guidelines*, making relatively minor changes based on the experience gained to date with the two-stage merger review process. Finally, in June 2012 it was announced that Kelley McKinnon, formerly Deputy Director of Enforcement and Chief Litigation Counsel at the Ontario Securities Commission (OSC), would succeed Paul Collins as Senior Deputy Commissioner of the Mergers Branch.

III. CIVIL MATTERS

Although few in number, the policies announced during this time period affecting civil matters are significant. Four days after Aitken was named Interim Commissioner the Bureau released a draft of the revised *Enforcement Guidelines on the Abuse of Dominance Provisions*. The updated guidelines were intended to describe the Bureau's enforcement approach to the abuse of dominance provisions "in light of recent jurisprudence and economic thinking." They built on the existing guidelines in a number of areas, including anticompetitive intent and valid business

justifications; provided additional detail on the Bureau's approach to joint dominance; and addressed specific forms of anticompetitive conduct. Extensive comments were received from members of the bar, and the Bureau issued a further revised draft for comment in March 2012.

The 2012 draft is significantly shorter than the 2009 draft, and has been criticized for failing to provide sufficient guidance to businesses and their advisors. For example, the case summaries found in the 2001 guidelines and the detailed discussions of exclusive dealing, tying, bundling and bundled rebates, and denial of access to an essential facility found in the 2009 draft have been removed. The Bureau's approaches to joint dominance and valid business justifications continue to raise concerns, and the lack of any discussion of how the Bureau will evaluate whether to seek an administrative monetary penalty is a significant oversight. Likewise, when price discrimination and promotional allowances were repealed in 2009, it was expected that those matters would be dealt with under the abuse provisions. However, the 2012 guidelines do not address those issues.

The other significant policy affecting civil matters is the Competitor Collaboration Guidelines, issued in draft in May 2009 and finalized in December 2009. These important new guidelines were necessary to clarify the amendments to the criminal price-fixing provisions and the new civil provision regarding agreements among competitors, and to discuss where the line would be drawn between the two. The amendments to section 45 narrowed the scope of the provision to agreements between competitors to fix prices, allocate markets, or restrict output. A new civil provision was created that could subject other forms of competitor collaborations to review under the section 90.1 of the Act that prohibits agreements only where they are likely to substantially lessen or prevent competition. In conducting such an assessment, factors similar to those found in the merger provisions of the Act are to be used. Unlike the 2012 abuse of dominance guidelines, the Competitor Collaboration Guidelines provide extensive examples of how the Bureau believes the Act should apply to specific types of agreements.

IV. CRIMINAL MATTERS

As noted above, the changes to the conspiracy provisions introduced in 2009 and which came into force in 2010 led the Bureau to issue the Competitor Collaboration Guidelines. The 2009 amendments also substantially increased the fines for the criminal offenses in the Act. Accordingly, the Bureau updated various enforcement guidelines and fact sheets to reflect these new fines, including those dealing with corporate compliance programs, telemarketing, and deceptive notices of winning a prize. Also in 2009, the Bureau finalized its Bulletin on Multi-Level Marketing Plans and Schemes of Pyramid Selling. A draft of this bulletin had been issued in April 2008, and following extensive public consultations, the final bulletin describes the differences between a legitimate multi-level marketing plan and an unlawful scheme of pyramid selling, as well as the general principles and policies applied by the Bureau when enforcing these provisions.

In March 2009 the Bureau issued a draft bulletin on Sentencing and Leniency for criminal matters, which followed an initial round of public comments undertaken in April 2008. The draft bulletin outlined the factors considered by the Bureau when making sentencing recommendations to the Director of Public Prosecutions and the process for seeking a recommendation for a lenient sentence. The bulletin was issued in final form in September 2010, and was accompanied by a useful set of Frequently Asked Questions. The final Leniency Program bulletin and FAQs outline the process to secure leniency as well as the benefits thereof. The final bulletin addressed some of the shortcomings of earlier drafts in clarifying that full disclosure need only be made after a plea agreement has been reached.

V. FAIR BUSINESS PRACTICES

The 2009 amendments increased the monetary penalties and added tools to the Bureau's arsenal to combat fraudulent and deceptive conduct such as freezing orders and the ability to seek restitution for victims. The Bureau released updated guidance on the application of the Act to representations on the internet, ordinary price claims, and promotional contests. New guidelines were released on labelling goods as "product of Canada" and "made in Canada", as well as on consumer rebate promotions. Both of those publications were issued in final form in 2009 following extensive stakeholder consultations. The labelling guidelines describe the Bureau's approach in assessing "Product of Canada" and "Made in Canada" claims for non-food products under the false or misleading representations provisions of the Act, the Consumer Packaging and Labelling Act, and the Textile Labelling Act. The rebate bulletin provides the Bureau's approach to interpreting the false or misleading representations provisions of the Act, the Consumer Packaging and Labelling Act, and the Textile Labelling Act in the area of consumer rebate promotions. The bulletin also provides best practices that the Bureau recommends businesses follow when offering rebates, both to comply with the law and to help consumers make informed purchasing decisions.