



## Canada and the U.S.:

### Differences in Competition Law

#### **General**

- Competition Act is a federal statute administered by the Competition Bureau; there is no other related federal or provincial legislation.
- Act distinguishes between conduct which is criminal offence subject to fines, imprisonment and private actions for damages and conduct which is a civil reviewable practice subject only to a remedial order geared primarily to prohibiting conduct (i.e., no fines, imprisonment or private actions for damages).
- Criminal offences include agreements among competitors which unduly lessen competition, bid-rigging, price maintenance, predatory pricing, price discrimination and discriminatory promotional allowances; civil reviewable practices include mergers, abuse of dominant position (monopolization), refusal to deal, tied selling, exclusive dealing and vertical market restriction; criminal offences are dealt with by the Courts while civil reviewable practices are dealt with by the Competition Tribunal.
- Act provides for private right of action for actual damages only and only in respect of conduct prohibited by the criminal offences. An application to the Tribunal may only be instituted by the Bureau except for the civil reviewable practices of refusal to deal, tied selling, market restriction and exclusive dealing which may also be initiated by an affected party.

#### **Agreements Among Competitors**

- With the exception of bid-rigging, agreements among competitors (such as price fixing, market or customer allocation, profit sharing, output restriction and boycotts) are not per se unlawful, being subject to an undue lessening of competition (rule of reason) analysis; while the competitive effects test allows some flexibility in competitor joint ventures and strategic alliances, hard-core cartel activity should be treated as if it is per se unlawful.

- Maximum penalty is a fine of Cdn. \$10 million per count and individuals are subject to a fine and/or imprisonment up to five years.

### **Price Maintenance**

- Specific statutory provision defines price maintenance to mean the attempt, by agreement, threat or promise, to influence upward, or to discourage the reduction of, the price at which another person supplies or offers to supply or advertises a product within Canada; or, refusing to supply a product to or otherwise discriminating against another person because of their low pricing policy.
- Supplier is permitted to influence downward, or to discourage the increase of, prices of another person.

### **Price Discrimination**

- Supplier may discriminate on the basis of volume without cost justification.
- “Meeting competition” defence implicitly included within broader provision stating that no offence is committed unless the discrimination was part of a “practice” (which means more than once and for some duration of time).

### **Mergers**

- Act broadly defines a merger as the acquisition of control over or significant interest in the business of another.
- Bureau generally may only challenge a proposed or completed merger prior to or within 3 years of transaction completion.
- Substantive law as to whether a merger is likely to “substantially lessen competition” is similar. However, the Act provides an efficiency defence if the gains resulting from a merger would be greater than and offset its likely anticompetitive effects. The defence is potentially (but rarely) available in the case of a merger to monopoly.
- Merger pre-notification is procedurally different but is similar in practical terms. Basic threshold requirements for pre-notification are: (i) that the parties to the transaction, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada exceeding Cdn. \$400 million, (ii) the transaction involves a business that has an undertaking in Canada or controls a company

that carries on such an undertaking; and (iii) the Canadian assets directly or indirectly being acquired, or the annual gross revenues from sales in or from Canada generated from such assets, exceeds Cdn. \$50 million. There are additional thresholds and exceptions applicable depending upon the type of merger – share acquisition, asset acquisition, amalgamation or combination (other than through a company). The filing fee is Cdn. \$50,000. plus applicable taxes.

- Although the maximum statutory waiting period is 42 days after pre-notification filing, the Bureau may require an extension until its review is completed. The Bureau attempts to complete its review within 14 days for non-complex, 10 weeks for complex and 5 months for very complex transactions (depending upon the extent of competitive overlap).
- Act allows the Bureau to issue an advance ruling certificate in respect to a transaction which would have little or no effect on competition. Except for the filing fee, the pre-notification requirements for large transactions need not be complied with when a certificate has been issued.

### **Refusal to Deal**

- Specific civil reviewable practice whereby Tribunal may order one or more suppliers to accept person as a customer on usual trade terms (upon proof that person is substantially affected or precluded from carrying on business, insufficient competition among suppliers, product is in ample supply and refusal has or likely to have an adverse effect on competition).

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