

### CLOSE MONITORING OF STRATEGIC MERGERS

The Competition Bureau will continue to closely assess strategic mergers, including transactions that are not subject to mandatory pre-merger notification in 2012. Where the Commissioner of Competition is of the view that a transaction would or would be likely to prevent or lessen competition substantially, she has the jurisdiction to challenge the merger (whether notifiable or not) at any time up to one year after the merger has been substantially completed. The willingness to exercise this jurisdiction was demonstrated in January 2011, when the Commissioner challenged the completed (and not notifiable) acquisition of Complete Environmental Inc. (Complete) by CSS Corporation (CSS). This merger challenge – the first in Canada since 2005 – is noteworthy not only because the transaction was not notifiable but also because the Commissioner is seeking dissolution rather than divestiture as the primary remedy. A decision is expected in the first quarter of 2012. The Competition Bureau's close scrutiny of non-notifiable transactions and increasing willingness to litigate was also underscored in June 2011, when the Commissioner challenged a proposed joint venture between Air Canada and United Continental Holdings, Inc. under the merger provisions of the *Competition Act* (the Act) and also sought to prevent the respondents from implementing certain provisions in three existing "co-ordination agreements" under section 90.1 of the Act, a provision that came into force in March 2010 and that provides for the civil review of joint ventures and strategic alliances. The Commissioner's challenge in connection with the co-ordination agreements represents the first use of the new civil review powers under section 90.1.

In addition to reviewing notifiable mergers, the Competition Bureau is expected to continue to actively monitor media reports, marketplace complaints and other public sources of information to identify non-notifiable mergers that may merit scrutiny.

### APPLICATION AND INTERPRETATION OF MERGER ENFORCEMENT GUIDELINES AND MERGER REVIEW PROCESS GUIDELINES

The Competition Bureau's recently revised Merger Enforcement Guidelines (MEGs) will likely add some uncertainty with respect to the Bureau's review process in strategic mergers, at least in the short term as the practical implications of the revisions are clarified. The MEGs include changes similar to those embodied in the U.S. Horizontal Merger Guidelines, which were revised in 2010 – in particular, these changes de-emphasize the role of market definition in merger review. Also, the MEGs take an expansive approach to what constitutes a "merger" under the

Act, shift the Bureau's interpretation of the efficiencies defence away from that found in its past guidance (and established by case law) and increase the complexity of the anticompetitive-effects analysis.

On January 11, 2012, the Competition Bureau issued its revised Merger Review Process Guidelines. These largely formalize the Bureau's recent practices in respect of information-gathering processes used during merger review, particularly with respect to supplementary information requests (SIRs) (discussed below). But the revised guidelines also appear to signal that the Bureau may intend to issue SIRs with greater frequency in the future.

For parties to a merger, the net effect of these changes is to increase the importance of advance legal and economic analysis of potential merger scenarios that may raise competition-related concerns.

### USE OF SUPPLEMENTARY INFORMATION REQUESTS

In 2012, the Commissioner's authority to issue an SIR (akin to a second request in the U.S.) where the Commissioner's review has not been completed within an initial 30-day statutory waiting period will continue to be an important factor in merger strategy. Since the introduction of the Commissioner's SIR authority in March 2009, experience suggests that the likelihood and scope of an SIR may be influenced by a number of factors, including the public and media profile of the deal; the complexity of the industry; whether the transaction is subject to review in other jurisdictions; the degree and nature of competitive overlap; the extent to which historical and current business documents support or refute the "theory of the case"; the likelihood and timing of complaints from market participants; and the extent to which specific issues have been addressed to the Bureau's satisfaction during the initial 30-day statutory waiting period. Parties can attempt to avoid an SIR where they are willing to enter into a timing agreement with the Commissioner, but the Bureau's willingness to enter into such agreements will largely depend on the circumstances of each case. Where an SIR is issued, the burden of complying can be reduced, in part, by educating the Bureau about custodians and the types of internal documents produced by the company, by making business people available to address questions from the Bureau early in the review process and by being responsive to potential Bureau concerns in parallel with the SIR compliance process.

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## INCREASED FOCUS ON CARTELS

In 2011, the Bureau stepped up its enforcement activities with respect to domestic cartels and bid-rigging arrangements, resulting in pleas in connection with several domestic cartels and bid-rigging schemes, including a Quebec gasoline price-fixing cartel, a bid-rigging scheme relating to private-sector ventilation contracts for residential high-rise buildings in the Montréal area, a bid-rigging scheme relating to specialized sewer services in the Montréal area, and a price-fixing cartel in the polyurethane foam industry. The latter plea, which resulted in total fines of C\$12.5-million, was the first conviction under Canada's amended conspiracy law, which came into effect in 2010 and which divides horizontal conduct into *per se* criminal offences (such as the conduct in question in that case) and rule of reason civil offences. The Commissioner described this investigation as one which "highlights the Bureau's reinvigorated mandate to stop consumer harm caused by price-fixing and to secure significant fines for these serious criminal offences." The Bureau's increased focus on cartels and bid-rigging schemes is expected to continue through 2012. With respect to leniency applications, the Commissioner has indicated that the Bureau will insist on leniency applicants engaging in settlement discussions very shortly after applying for leniency. This new approach will add pressure on applicants to move quickly in providing sufficient information to perfect their markers.

## SCRUTINY OF SINGLE-FIRM CONDUCT

The Bureau continues to be willing to bring contested proceedings in respect of the civil provisions of the Act. Over the last two years, the Commissioner commenced three notable proceedings – two in respect of alleged abuses of dominance in the real estate industry (Toronto Real Estate Board (TREB), Canadian Real Estate Board (CREA)), and the other in respect of the price maintenance provision of the Act (MasterCard, Visa). The CREA case resulted in a consent agreement that resolved the Commissioner's concerns regarding Multiple Listing Service rules imposed by CREA. The TREB and credit card matters are ongoing. Similarly, the Bureau has been actively enforcing the misleading advertising provisions under its civil review powers both through consent resolutions as well as contested cases. The trend of increasingly vigorous pursuit of unilateral conduct cases will likely continue in 2012.

## NEW JURISPRUDENCE ON CLASS ACTIONS

Increased clarity in the landscape pertaining to competition law class actions is expected, as the Supreme Court of Canada, in December 2011, granted leave to appeal in twin B.C. Court of Appeal decisions involving indirect purchaser claims: *Pro-Sys Consultants Ltd. v. Microsoft Corporation* and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*. In the twin decisions, the B.C. Court of Appeal held that indirect purchasers do not have a claim for damages in relation to the pass-on of overcharges resulting from hard-core cartel conduct that violates the Act. In contrast, a subsequent decision by the Quebec Court of Appeal ruled that indirect purchaser claims are available under Quebec law. By granting leave to appeal in these twin B.C. Court of Appeal decisions, the Supreme Court is expected to bring clarity to the issue of indirect purchaser claims in Canada as early as this year. The outcome of the appeal may have a significant impact on the scope of competition law class action litigation in Canada.

## FOREIGN INVESTMENT ENTERING PERIOD OF HEIGHTENED SCRUTINY

Investment Canada requires, almost as a matter of course, that all foreign investors, including state-owned enterprises (SOEs), agree to significant undertakings or commitments as a condition to receiving transaction approval for reviewable investments, and these undertakings are becoming increasingly onerous. Investment Canada can be expected to actively enforce these undertakings for the duration of the commitments, as demonstrated by U.S. Steel's dispute with the Minister of Industry. This dispute, which was ultimately settled in December 2011, arose in relation to undertakings U.S. Steel gave in order to secure regulatory approval of its acquisition of rival Stelco in 2007. Although there is no public registry of undertakings, there may be a growing expectation that investors make their undertakings public in a bid to win public support. There also seems to be a trend towards increasing scrutiny of SOE investments. In particular, SOEs are often required to make additional undertakings in order to win Investment Canada approval, including providing assurances that the investor will operate the Canadian business on a commercial basis and commitments relating to transparency and disclosure, independent audit committees and equitable treatment of shareholders. The development of effective government, media and key stakeholder relations strategies – in addition to legal strategies – very early in the deal process will continue to be crucial in order to successfully navigate investment review.