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Blakes Bulletin

Competition, Antitrust & Foreign Investment

Class Actions – Direct and Indirect Purchasers Gain Leverage in Certification of Competition Cases

On June 3, 2010, the Supreme Court of Canada denied the defendants' application for leave to appeal of the decision of the B.C. Court of Appeal (BCCA) in the DRAM class action. In November 2009, the BCCA overturned a lower court decision and certified an alleged price-fixing case involving computer memory chips for both direct and indirect purchasers. The Supreme Court of Canada's denial of leave to appeal means the BCCA decision now stands as the leading appellate authority on the certification of antitrust class action cases in Canada, paving the way for the certification of combined direct and indirect purchaser class actions, especially in international conspiracy cases. Indeed, Ontario and British Columbia courts – relying on the BCCA decision – have recently certified direct and indirect purchaser class actions.

The BCCA decision in DRAM:

- establishes a relatively low threshold for showing a methodology for establishing harm on a class-wide basis at the certification stage, even in complex indirect purchaser cases;
- suggests that both liability and damages may be determined at the same time by relying on gains based or restitutionary remedies and with proof of a criminal conviction (including one in the United States);
- departs from earlier decisions, most notably the Ontario Court of Appeal decision in *Chadha v. Bayer*, which had denied certification in similar circumstances;
- gives broad scope for the application of the use of aggregate damages to overcome difficulties in establishing harm on a class-wide basis; and
- gives greater recognition to waiver of tort as a possible cause of action.

To view the B.C. Court of Appeal's decision, click here.

New Policy Could Breathe Life into Antitrust Poison Pills

On June 2, 2010, the Canadian Competition Bureau (Bureau) published its policy on information sharing in the context of hostile or unsolicited take-over transactions. To view the policy relating to hostile transactions, click here. The new policy has the potential to fuel the use of "antitrust poison pills" in hostile take-over bids. It should be noted that like other Bureau policies, the new policy is not law, but rather summarizes the Bureau's current views on this issue.

To frame the issue: on the one hand, bidders often wish to commence a Bureau review as soon as possible to take competition-related bid conditions off the table. On the other hand, targets often wish to know the status of the Bureau's review, both to evaluate possible competing bids, and in some – albeit rare – circumstances to fuel take-over defences or create regulatory delays, known as an "antitrust poison pill".

From the enactment of the merger review provisions of the *Competition Act* in 1986, the Bureau has articulated a strong policy of not interfering in the public market for corporate control. In this regard, the *Competition Act* places limits on the length of time for a merger review, and the information that the Bureau can disclose to a target. Moreover, the only obligation on the Bureau in terms of information sharing with a target is to immediately advise of the date upon which the Bureau received a filing from a bidder, so as to enable the target to submit its required half of the merger filing within the period of time set out in the *Competition Act*.

The Bureau's new policy, however, provides that where the Bureau shares "pertinent" information with the bidder, it will strive to disclose such information "equitably" to the target as well (subject to statutory restrictions on the disclosure of confidential information). Information the Bureau considers to be "pertinent" includes:

- information on the complexity rating of a proposed transaction (see article on draft Handbook);

CONT'D ON PAGE 2

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CONT'D FROM PAGE 1

- the date upon which the parties have made various filings;
- the Bureau's preliminary and final views on market definition and other factors relevant to its assessment; and
- its preliminary and final conclusions on whether the proposed transaction is likely to prevent or lessen competition substantially.

The Bureau notes that hostile transactions "can give rise to particularly complex considerations that may impact the straightforward application" of this policy (e.g., in circumstances involving multiple competing bids) such that a case-by-case assessment may be required.

What does this mean for businesses? For bidders in unsolicited take-over bids, the new policy increases the importance of identifying and addressing any competition issues with the Bureau as soon as possible since the new policy may lead targets to be more proactive in the merger review process than traditionally has been the case. For targets, it means that they should receive a greater degree of transparency from the Bureau than in the past. Depending on the facts, this could be of importance in respect of any possible defence strategies and perhaps in respect of discussions with a white knight, particularly where the white knight does not pose similar competition issues.

Merger Timing Guidelines Released for Comment: Something Old, Something New

What? The Competition Bureau published its draft *Fee and Service Standards Handbook For Merger-Related Matters*. According to the Bureau, the draft Handbook is intended to provide insight into how, under the amended merger review process enacted on March 12, 2009, the Bureau determines the length of time it will need to review a merger transaction (the service standard). The length of time, according to the Bureau, depends on the complexity of the transaction under consideration. To view the draft Handbook, click here.

When? The draft Handbook was published for comment on May 31, 2010. Interested parties may provide comments on the draft Handbook until August 2, 2010.

Commentary. Notwithstanding the new merger regime adopted in Canada on March 12, 2009 (which creates an initial statutory waiting period of 30 days for the review of mergers), the draft Handbook suggests that "complex" and "very complex" transactions could require up to 60 days and 120 days, respectively, for the Bureau to complete its substantive review of a proposed transaction.

With respect to mergers in which the Commissioner of Competition (Commissioner) issues a supplementary request for information (SIR), the draft Handbook provides a 30-day service standard, within which the Bureau endeavours to complete its review after certification, which aligns with the 30-day statutory waiting period that is triggered upon filing a materially complete SIR response. A SIR should only be issued in cases where the Bureau requires additional information. These cases are likely to be those the Bureau feels are "very complex". Thus, it is not clear in the draft Handbook how the "very complex" 120-day time-frame relates to the 30-day SIR time-frame; this issue ought to be clarified in the final version of the Handbook.

The draft Handbook also introduces a "pull and re-file" policy in respect of notification filings, arguably bringing the Canadian system more in line with a practice which has emerged in the U.S. in this regard.

CONT'D ON PAGE 3

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CONT'D FROM PAGE 2

It should be noted that notwithstanding the above draft service standard policy, the Competition Act actually contemplates that parties may close a transaction immediately 30 days after submitting an initial merger filing, unless a SIR (which is equivalent to a "second request" in the United States) is issued, in which case the parties may close 30 days after compliance with the SIR regardless of the status of the Commissioner's review. This is the practice in the United States. It had been hoped that the new law, which was supposed to bring Canada in line with the United States, would lead to almost all mergers being cleared within the initial 30-day period, and with only a few being subject to the second request or SIR process. In this sense, the proposed time-frames in the draft Handbook remain misaligned with the statutory framework. No doubt this will form part of the commentary on the draft Handbook in the next two months.

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