Blakes Competition, Antitrust & Foreign Investment Group

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CANADIAN LAWYERS

2011

Year in Review and Key Trends for 2012

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Blakes Competition, Antitrust & Foreign Investment Group

2011 Year in Review and Key Trends for 2012

Table of Contents

EXECUTIVE SUMMARY AND KEY TRENDS FOR 2012 1

MERGERS 2

CARTELS 5

SINGLE-FIRM CONDUCT 6

CLASS ACTIONS 6

FOREIGN INVESTMENT 7

ABOUT BLAKES COMPETITION, ANTITRUST & FOREIGN INVESTMENT GROUP 9

2011 Year in Review and Key Trends for 2012

EXECUTIVE SUMMARY AND KEY TRENDS FOR 2012

In this report, the Blakes Competition, Antitrust & Foreign Investment Group outlines the key Canadian developments in the areas of competition and foreign investment law during the year of 2011 and sets out the key trends to watch for in 2012.

- **Mergers** – This year, the Competition Bureau has taken an increasingly active approach to its review of strategic mergers.
  - In addition to issuing new merger enforcement guidelines in October, Bureau staff sought an increasing level of documentary and data production as part of most merger reviews, both formally through Canada's new second request procedure and through informal voluntary information requests.
  - This year witnessed the first two merger challenges since 2005 by the Commissioner of Competition.
  - The Bureau increased its focus on identifying and reviewing non-notifiable transactions.
  - In the context of merger planning and the negotiation of transaction agreements, this regulatory environment has increased the use of covenants and, in some cases, reverse break fees, to allocate regulatory risk, and has placed heightened focus on issues such as gun-jumping and integration planning protocols.
- **Cartels** – The Commissioner has signalled a renewed focus by the Bureau on enforcement with respect to cartels. This has resulted in increased enforcement activity with respect to domestic cartels and bid-rigging arrangements, an effort to resolve past cases, and a more circumspect approach to leniency applications.
- **Single-Firm Conduct** – The Bureau has been active in the areas of abuse of dominance, price maintenance and misleading advertising, having commenced litigation and, in some cases, secured consent orders and administrative monetary penalties.
- **Class Actions** – The British Columbia Court of Appeal found that there is no pass-on defence and that indirect purchasers do not have a claim for damages resulting from cartel conduct. More recently the Quebec Court of Appeal ruled that indirect purchaser claims are available in Quebec.
- **Foreign Investment** – The application of the *Investment Canada Act* to acquisitions by non-Canadians continues to be at the forefront of deal-making involving non-Canadian buyers in Canada.

KEY TRENDS TO WATCH FOR IN 2012

- New jurisprudence on mergers (e.g., the CCS/Complete merger, Air Canada/United Continental joint venture), single firm conduct (e.g., Visa/MasterCard case), and cartels and bid-rigging.
- Application and interpretation of new merger guidelines, as strategic mergers are likely to be the focus of enforcement in 2012.
- Clarity on class action certification jurisprudence, as the Supreme Court of Canada has granted leave to appeal in two British Columbia Court of Appeal decisions involving indirect purchaser claims.
- Focus on the review of increased foreign direct investment, in particular from SOEs, and the role of the Minister of Industry under the *Investment Canada Act*.

MERGERS

Revised Merger Enforcement Guidelines

- On October 6, 2011, the Commissioner released the final version of the Bureau's revised Merger Enforcement Guidelines (MEGs).[1] The MEGs represent an important development in the Canadian approach to merger review and provide some guidance on the Bureau's current enforcement approach, which has evolved since the previous MEGs were issued in 2004.
- The MEGs reflect similar changes to those embodied in the U.S. Horizontal Merger Guidelines, which were revised in 2010. These changes de-emphasize the role of market definition in merger review.
- In addition, the MEGs:
  - Take an expansive view of what constitutes a "merger" under the *Competition Act*[2] (the Act) (such that, for example, contracts and interlocking directorates could be viewed as "mergers" even without any cross-ownership being acquired)
  - Shift the Bureau's interpretation of the efficiencies defence away from that found in its past guidance (and established by case law)
  - Focus the assessment of non-horizontal mergers on the issue of foreclosure
  - Discuss the upstream effects of a merger on suppliers
  - Increase the economic complexity of the anticompetitive effects analysis
  - Focus on more direct assessments of the potential anticompetitive effects of a merger or proposed merger
- The net effect of the new MEGs is to reduce business certainty with respect to the Bureau's review process in strategic mergers and to increase the need for advance legal and economic analysis of potential merger scenarios.[3]

B.C. Landfill Merger Challenge

- On January 24, 2011, the Commissioner challenged the completed acquisition of Complete Environmental Inc. (Complete) by CCS Corporation (CCS).[4] This transaction was not notifiable under the Act.
- This matter is noteworthy in part because the Commissioner is seeking dissolution rather than divestiture as the primary remedy and, in this regard, has named the shareholders of CCS as defendants. The individual shareholders challenged the availability of dissolution as a remedy.[5] However, in an order dated November 3, 2011, the Competition Tribunal dismissed this objection, ruling that it is the role of the Tribunal to determine the appropriate remedy in a given matter.
- In addition, since Complete had not yet commenced operations, the merger is being challenged as a "prevention of competition" case, and the Commissioner is alleging it likely will foreclose future competition rather than lessen existing competition.
- The case is currently (as of December 2011) being argued before the Tribunal and a decision is expected in the first quarter of 2012.

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[1] Competition Bureau, "Competition Bureau Issues Final Merger Enforcement Guidelines", October 6, 2011, available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03422.html.

[2] RSC 1985, c C-34.

[3] The MEGs are discussed in further detail in our October 7, 2011 Blakes Bulletin *Competition Bureau Issues Revised Merger Enforcement Guidelines.*

[4] *Commissioner of Competition v. CCS Corporation et al.*, 2011 Comp. Trib. 23, CT-2011-002, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=336.

[5] Response of CCS Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., CT-2011-002, available online at: http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Response%20of%20CCS%20Corporation,%20Complete%20Environmental%20Inc.and%20Babkirk%20Land%20Services%20Inc.%20_21_38_3-11-2011_9075.pdf.

- At this stage, key takeaways from this case are: (i) non-notifiable and completed transactions still may be challenged by the Bureau and vendors may need to consider this risk in transaction planning and negotiations; (ii) internal company documents may impact the outcome of a governmental investigation significantly (as they did in this case); and (iii) pre-transaction antitrust review is essential to minimize later complications even for transactions that do not require a formal notification.[6]

Section 90.1 and the Air Canada/United Continental Case

- On June 27, 2011, the Commissioner challenged a proposed joint venture between Air Canada and United Continental Holdings, Inc. under the merger provisions of the Act. In addition, under section 90.1, the Commissioner is seeking to prevent the respondents from implementing certain provisions in three existing "co-ordination agreements" to which they are parties, one of which dates back to 1995.
- Amendments to the Act that came into force in March 2010 allow for the review of agreements between competitors. The new section 90.1 provides for the review of joint ventures and strategic alliances, and allows the Tribunal to remedy agreements between actual or potential competitors that prevent or lessen competition substantially.[7]
- 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. The challenge highlights a key difference between merger reviews and those pertaining to competitor collaboration under the civil provisions of the Act — while the Bureau must challenge a merger within one year of closing, there is no express limitation period applicable to the challenge of agreements under section 90.1.

Bureau Has Increased Scrutiny of Non-Notifiable Transactions

- Both the CCS/Complete merger acquisition and the Air Canada/United Continental joint venture, discussed above, were non-notifiable transactions.
- The Bureau has devoted new resources to identifying non-notifiable transactions for review. In a recent speech, the Commissioner noted that the Bureau is "proactively monitoring closed and non-notifiable transactions."[8] We at Blakes have observed an increased level of scrutiny with respect to non-notifiable transactions as a result of the Bureau's focus in this area.

Merger Review Procedural Changes and Updates

- **Supplementary Information Requests** – On March 12, 2009, the *Budget Implementation Act*[9] came into force, enacting several significant amendments to the Act. The amendments include a revised merger review process that provides the Commissioner with the authority to issue Supplementary Information Requests (SIRs) where the Commissioner's review has not been completed within an initial 30-day statutory waiting period. These SIRs are akin to second requests in the U.S. To our knowledge (the issuance of SIRs are not made public), the Commissioner has now issued 13 SIRs to date. Early lessons regarding the use of SIRs include the following:
    - The issuance of an SIR does not mean that a remedy is inevitable. Indeed, among the transactions in which the Bureau completed its review after issuing an SIR, we understand that roughly one-half proceeded without any remedy at all.

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[6] The B.C. Landfill merger challenge is discussed in further detail in our January 2011 Blakes Bulletin *Competition Bureau Challenges B.C. Landfill Merger*.

[7] These amendments are discussed in further detail in our March 2010 Blakes Bulletin *New Competition Laws in Force March 12, 2010: Criminal Conspiracy and Civil Provisions Address Competitor Collaborations*.

[8] Remarks by Melanie L. Aitken, Commissioner of Competition, Canadian Bar Association 2011 Fall Conference (October 6, 2011), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html.

[9] SC 2009, c 2.

- o In our experience, the likelihood and scope of an SIR depends on 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
  - the extent to which specific issues have been addressed to the Bureau's satisfaction during the initial 30-day statutory waiting period
- o The burden of complying with an SIR 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.
- o Parties should comply with an SIR as quickly as possible to avoid continuing or "refreshing" production obligations (which typically arise if the SIR response has not been completed within 90 days of issuance). Such obligations can add considerable cost and delay to the SIR process.

- **Mergers Registry** – In October 2011, the Bureau announced its intention to establish a public mergers registry.[10] This registry would identify all completed merger reviews involving transactions that are notifiable under the Act, in respect of which the Bureau issues either an advance ruling certificate (ARC) or a no-action letter. It would also identify all non-notifiable transactions in respect of which the parties request, and receive, either an ARC or no-action letter. The registry would disclose the names of the parties involved in the transaction, the relevant industry, and the outcome of the review. The proposal is not without controversy and the Bureau delayed its implementation for this reason. The controversy relates to concerns regarding whether the mergers registry would be in line with the statutory confidentiality protections under the Act.
- **Merger Remedies Study** – In August 2011, the Bureau released a summary of an internal study on the effectiveness of merger remedies obtained between 1995 and 2005 (the Study).[11] The Study found that structural remedies were the most common type of remedy. The Study also observed an increasing number of behavioural remedies. The Bureau will be updating its *Bulletin on Merger Remedies* and its standard consent agreement (the starting point for transaction-specific remedy negotiations) in the near future.
- **Commitment to Publish Position Statements** – In October, the Commissioner announced that the Bureau "intend[s] to publish more position statements that describe the Bureau's analysis of complex merger cases."[12] These statements provide a description of the Bureau's approach to various aspects of its analysis, including, for example, market definition and entry conditions. Most recently, the Bureau issued such a statement in the Canadian Tire/Forzani case.[13]

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[10] Remarks by Melanie L. Aitken *supra* note 8.

[11] Competition Bureau Bulletin, "Competition Bureau Merger Remedies Study Summary", August 11, 2011, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03392.html.

[12] Remarks by Melanie L. Aitken *supra* note 8.

[13] Competition Bureau, "Canadian Tire/Forzani Position Statement", October 5, 2011, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03421.html. Blakes represented Forzani in successfully clearing the case.

CARTELS

- This year, the Commissioner indicated that there would be a renewed focus by the Bureau on cartel enforcement.[14] With respect to criminal conduct, this has translated into: (i) an increased focus on domestic cartels and bid-rigging arrangements; (ii) a concerted effort to complete current active investigation; and (iii) a crack-down on leniency applicants.
  - **Domestic Cartels and Bid-Rigging** – Cartels and bid-rigging continue to be an area of focus for the Bureau. To this end, the Bureau's enforcement efforts over the past year have resulted in pleas in connection with several domestic cartels and bid-rigging schemes (e.g., the Quebec gasoline price-fixing cartel; the bid-rigging scheme relating to private-sector ventilation contracts for residential high-rise buildings in the Montréal area; and the bid-rigging scheme relating to specialized sewer services in the Montréal area).[15] Additionally, the Commissioner has indicated that in both cartel and bid-rigging cases, the Bureau will be "appropriately aggressive"[16] when dealing with individuals, which has not been a priority in the past.
  - **Past Cases** – The Commissioner has expressed a commitment to advancing cases "in a timely manner and following them through to the end."[17] To this end, we have seen an effort by the Bureau to "clean up" a number of criminal matters, which have been ongoing for several years.
  - **Leniency** – Parties participating in the Bureau's immunity or leniency programs will be required to fulfill their obligations in a timely manner. The Commissioner has indicated that the Bureau will insist on leniency applicants engaging in settlement discussions very shortly after applying for leniency and, notwithstanding past experience, the Bureau intends to require compliance with its clearly stated policies. To this end, the Commissioner has begun to revoke markers where there has not been a sufficient proffer of information within the 30-day time period set out in the Bureau's Immunity and Leniency Guidelines.[18] This new approach will add pressure on applicants to move quickly in providing sufficient information to perfect their markers.
  - **Conditional Sentencing** – Bill C-10, introduced on September 20, 2011, if passed, will amend the Criminal Code to remove judges' ability to sentence a defendant to community supervision (also called a conditional sentence, equivalent to probation or house arrest), as opposed to prison time for indictable offences with a maximum prison term of 14 years or life, such as exist for sections 45 (cartels) and 47 (bid rigging) of the Act. To date, individuals convicted under these provisions have only received conditional sentences (if any jail time was imposed at all). Should Bill C-10 become law and survive constitutional scrutiny, any Canadian court that imposes jail time (as opposed to merely a fine alone) under ss. 45 or 47 of the Act may have to require that the defendant serve the sentence in a correctional facility.

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[14] Remarks by Melanie L. Aitken, Commissioner of Competition, 2011 Competition Law and Policy Forum - Northwinds Professional Institute (February 24, 2011), available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03377.html.

[15] With respect to the specialized sewer services bid rigging scheme, one of the six accused companies pleaded guilty in the Québec Superior Court on November 22, 2011; the remaining charges, including charges against five individuals, are pending before the courts. Competition Bureau, "Competition Bureau Exposes Sewer Services Cartel in Quebec," November 22, 2011, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03430.html.

[16] Remarks by Melanie L. Aitlan *supra* note 14.

[17] *Ibid.*

[18] *Ibid.*

SINGLE-FIRM CONDUCT

- The Bureau has shown a willingness to bring contested proceedings in respect of the civil provisions of the Act. Three recent examples of note are as follows:
  - **TREB** – The Commissioner commenced proceedings against the Toronto Real Estate Board (TREB) alleging that TREB is engaging in conduct that constitutes an abuse of dominance under section 79 of the Act.[19] Section 79 allows the Tribunal to issue an order where one or more firms that dominate a market engage in anticompetitive acts that prevent or lessen competition substantially. The Commissioner has alleged that TREB is engaging in anticompetitive practices that deny consumer choice and prevent real estate agents from introducing innovative real estate brokerage services over the Internet. The matter is ongoing.
  - **CREA** – The TREB action follows the Commissioner's 2010 proceedings against the Canadian Real Estate Association (CREA), in which she alleged that CREA was engaging in conduct that constituted an abuse of dominance under section 79 of the Act, by imposing certain restrictions on real estate agents who listed residential properties using the Multiple Listing Service (MLS) system.[20] The matter settled in the fall of 2010.
  - **Credit Cards** – In 2010, the Commissioner commenced proceedings against MasterCard and Visa before the Tribunal under the price maintenance provisions of the Act (section 76).[21] The matter remains ongoing.
  - **Misleading Advertising** – The Bureau has actively enforced the misleading advertising under its civil review powers both through consent resolutions as well as contested cases.[22]

CLASS ACTIONS

- The most significant developments in class actions in 2011 are the British Columbia Court of Appeal's twin decisions in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, in which it 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.[23] (On December 1, 2011, the Supreme Court of Canada granted leave to appeal.)
- The decisions, while only binding in British Columbia, were considered likely to be persuasive to courts across Canada because the Court of Appeal based its decision on two prior decisions of the Supreme Court of Canada holding that defendants cannot raise a pass-on defence in either tort or restitutionary actions.[24] A subsequent decision by the Quebec Court of Appeal has ruled that indirect purchaser claims are available under Quebec law.[25]

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[19] *The Commissioner of Competition v. The Toronto Real Estate Board,* Competition Tribunal, CT-2011-003, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347.

[20] *The Commissioner of Competition v. The Canadian Real Estate Association, Competition Tribunal,* CT-2010-002, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=325.

[21] *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al;* CT-2010-010, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333.

[22] Also, in January 2011, an individual was arrested in Edmonton, Alberta, in relation to the alleged contravention of a registered consent agreement and the operation of an allegedly fraudulent website containing false or misleading representations regarding employment opportunities in the oil and gas industry. See Competition Bureau, "Alberta Man Arrested for Breach of Consent Agreement", January 31, 2011, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03348.html.

[23] 2011 BCCA 186; 2011 BCCA 187. Section 36 of the Act provides the private right of action for damages suffered as a result of violations of the criminal provisions of the Act – e.g., price fixing and bid rigging.

[24] *British Columbia v. Canadian Forest Products Ltd.,* [2004] 2 S.C.R. 74*; Kingstreet Investments Ltd. v. New Brunswick (Finance),* [2007] 1 S.C.R. 3.

[25] *Option Consommateurs v. Infineon Technologies AG*, No. 500-09-018872-085 (Que. C.A., Nov. 16, 2011). The Québec Court of Appeal reversed the lower court judge's conclusion that indirect claims could not be made, but note that as Quebec is a civil law province with distinct class action rules, its holding is not necessarily persuasive in other provinces.

- The B.C. Supreme Court has reiterated that foreign defendants are subject to the jurisdiction of Canadian courts for cartel conduct where harm is sustained in Canada. In its June 1, 2011, decision in *Fairhurst v. Anglo American PLC*,[26] the Court found that its jurisdiction extended to a group of foreign defendants in a proposed class action claiming that the defendants conspired to increase the price of diamonds. It was sufficient that harm was suffered in B.C. and that the defendants knew or should have known the diamonds would be shipped to B.C. in the ordinary course of distribution.
- Another area of importance in class actions is plaintiff access to materials that have been filed with a regulatory body in connection with an application for immunity or leniency. Concerns regarding the production of written documents in private litigation have caused parties in Canada to be cautious about the information that is provided to competition agencies in writing.
    - Following the U.S. decision *In re Vitamins Antitrust Litigation*,[27] wherein a district court granted private litigants discovery of statements from a European Commission application for leniency, there is a risk that information provided to competition agencies may be subject to disclosure. Since this case was heard, plaintiffs have continued to push for access to Commission materials.
    - The risk has resurfaced as a result of the recent *Pfleiderer AG v. Bundeskartellamt* case in Germany, where the European Court of Justice (ECJ) held that, as a matter of European law, third parties that have been adversely affected by an infringement of European Union competition law and are seeking to obtain damages are not precluded from accessing a company's leniency application file. However, the ECJ ruled that national courts must address the issue on a case-by-case basis.
    - As a practical matter, once leniency materials have been disclosed in one jurisdiction, plaintiffs involved in similar actions in other jurisdictions will seek access to those materials. Thus, to reduce the risk that information provided to the Canadian authorities in the context of a proffer is discoverable, it is essential for leniency applicants to employ appropriate safeguards.

FOREIGN INVESTMENT

- The Investment Review Division of Industry Canada continues to be at the forefront of public policy debate, with reviews of several high-profile transactions having garnered significant media attention. Investment Canada is headed by the Minister of Industry, although the Minister of Canadian Heritage has the authority to review and approve certain foreign investments related to cultural industries.
- While the Canadian government has not formally opposed any foreign investment this year, Prime Minister Stephen Harper caught the public's attention in late September when he gave an interview in New York expressing a more cautious approach to foreign investment than might have been expected.[28] Specifically, the Prime Minister noted that:
    - The government must "proceed with caution" when reviewing proposed foreign take-overs of important Canadian companies.
    - Although the government is considering ways to liberalize foreign investment in various industries, it is important to ensure that liberalization of foreign investment does not lead to the "loss of all Canadian presence in the sector" and that "Canada continue[s] to have head offices and some economic leadership in the world."

[26] 2011 BCSC 705.

[27] *In re Vitamins Antitrust Litigation*, No. 99-197 (THF) MDL No. 1285 (Apr. 4, 2002).

[28] Bloomberg, "Harper's Free-Market Views Tested by Canada's Capital Inflows," September 22, 2011, available online at: http://www.bloomberg.com/news/2011-09-22/harper-s-free-market-views-tested-by-canada-s-capital-inflows.html.

  - o The government must avoid a situation "especially one that might not be driven entirely by market forces, where the Canadian economy were entirely owned and operated essentially from headquarters and offices based in every place but Canada."
- In the same interview, however, the Prime Minister characterized the review of the abandoned BHP Billiton/ Potash Corp. transaction as unique and not indicative of Canada becoming less hospitable to foreign investment.
- Nevertheless, foreign investment in Canada likely is entering a period of heightened scrutiny and more intensive reviews. Investment Canada routinely monitors public announcements of transactions to confirm that foreign investors comply with the *Investment Canada Act* and regulations.
- Investment Canada now 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. Although there is no public registry of undertakings, investors increasingly are making their proposed undertakings public in a bid to win public support.
- SOEs, in particular, are often required to make additional undertakings in order to win Investment Canada approval.[29] Undertakings that may be required of SOEs include 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. Investment Canada may require an SOE to implement corporate governance and reporting requirements that are no less stringent than those imposed by major stock exchanges. Despite heightened scrutiny by Investment Canada, SOEs continue to show interest in making direct investments in Canada, including in the Canadian resource sector.[30]
- A recent European Commission decision, *DSM/ Sinochem/JV*[31] highlighted one of the key issues regulators face when reviewing acquisitions by SOEs – the extent to which SOEs are controlled by the state. In examining the effects of the proposed transaction, the European Commission considered whether Sinochem operated independently of the state, or whether there was scope for the state to coordinate the behaviour of its SOEs.[32] The extent to which the state controls the business activities of its SOEs is already an important theme in Investment Canada reviews and is sure to be revisited by regulators, including regulators in Canada.
- In the current environment, success is increasingly dependent on developing effective government, media and key stakeholder relations strategies — in addition to legal strategies — very early in the deal process.

[29] Industry Canada, "Investment Canada Act Guidelines — Investment by state-owned enterprises — Net benefit assessment", available online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html.

[30] Colin McClelland and Bradley Olson, "Sinopec Buys Canada's Daylight for $2.1 Billion to Gain Shale-Gas Assets", October 10, 2011, available online at: http://www.bloomberg.com/news/2011-10-09/sinopec-agrees-to-buy-daylight-energy-for-2-1-billion-to-meet-fuel-demand.html. See also Edward Welsch, Paul Vieira and Yvonne Lee, "Cnooc Sets Canadian Deal: Chinese Energy Firm to Pay $2.1 Billion for Alberta Oil-Sands Developer OPTI", July 20, 2011, *Wall Street Journal*, available online at: http://online.wsj.com/article/SB10001424052702303795304576457121216529368.html.

[31] Case No. COMP/M.6113, May 19, 2011.

[32] European Commission, "Mergers: Commission clears proposed joint venture between Dutch pharma company DSM and Sinochem", May 19, 2011, available online at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/617.

About Blakes Competition, Antitrust & Foreign Investment Group

Competition/Antitrust

The Blakes Competition, Antitrust & Foreign Investment Group, led by the former head of the Competition Bureau, Calvin S. Goldman, Q.C., and Co-chair Brian A. Facey, is repeatedly acknowledged as the largest and leading practice in Canada. We work with clients to facilitate their strategic objectives in compliance with the *Competition Act* and Canada's rules on foreign investment.

Blakes is frequently retained by major domestic and international companies and by international and domestic law firms to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters, antitrust class action defence and other competition issues. Blakes is also a leading firm with respect to securing merger approvals for non-Canadian purchasers under Canada's foreign investment laws, which are typically required in all transactions where a non-Canadian purchases a Canadian business.

Blakes has a proven track record of success in acting for clients on multinational transactions and investigations where co-ordination among counsel and agencies in the United States, Europe and other jurisdictions is a paramount objective. Blakes lawyers understand how competition laws fit within the broader context of complex corporate transactions and business affairs generally. Blakes can draw on the Firm's vast resources and leading expertise in related practice areas, such as litigation, securities and intellectual property.

Competition Litigation

Blakes is frequently at the forefront of high-profile competition litigation matters, including contentious mergers, advertising, abuse of dominance, reviewable trade practices and other civil matters before the Canadian Competition Tribunal and Canadian provincial and federal courts. Our lawyers also routinely appear before Canadian courts on major antitrust criminal matters and class actions.

Much of the Firm's work in this area involves strategic advice to best position matters for success in the event of litigation as well as preventing problems before they lead to litigation through prudent advice concerning the structuring of business transactions and the conduct of business affairs.

Foreign Investment Review

Blakes is a recognized leader in advising both international and Canadian clients on the application of the *Investment Canada Act* (ICA) with respect to securing merger approvals for non-Canadian purchasers under Canada's foreign investment laws. Blakes lawyers are experienced in navigating the complex maze of regulations governing investments by non-Canadians, including state-owned enterprises and sovereign wealth funds. Two Blakes lawyers, Cal Goldman and Brian Facey, are ranked as experts on Canadian regulatory issues relating to China and Chinese investors in Canada.

The Blakes team has extensive experience in all aspects of foreign investment review under the ICA and has represented numerous clients before the Investment Review Division of Industry Canada and the Cultural Sector Investment Review Branch of Canadian Heritage. Blakes lawyers have successfully cleared a number of high-profile transactions under Canada's foreign investment review regime, including those that involve industry sectors subject to special consideration and review under the ICA (i.e., cultural businesses and national security). Blakes is experienced with the national security provisions of the ICA and was successful in persuading the Minister not to invoke this power in one of Canada's most high-profile cases. Two Blakes partners, Brian Facey and Julie Soloway, are past chairs of the Foreign Investment Review Committee of the Canadian Bar Association.

Rankings and Recognition

Blakes is nationally and internationally recognized as having a gold standard competition law practice in Canada and is top ranked by legal directories and ranking publications such as *Chambers Global: The World's Leading Lawyers for Business 2011*; *PLC Which Lawyer? 2011*; Law Business Research's *The International Who's Who of Competition Lawyers 2011*; *The Canadian Legal Lexpert Directory 2011*; Legal Media Group's *Guide to the World's Leading Practitioners: China 2012; The 2011 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*; *The 2011 Lexpert Guide to the Leading US/Canada Cross-border Corporate Lawyers in Canada*; *The 2010 Lexpert Guide to the Leading US/Canada Cross-border Litigation Lawyers in Canada*; *The Best Lawyers in Canada 2011;* and Legal Media Group's *Guide to the World's Leading Competition and Antitrust Lawyers/Economists 2010*.

Competition, Antitrust & Foreign Investment Group Partners

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If you have any questions or comments regarding the developments outlined in this report, please do not hesitate to contact your usual Blakes contact or any member of the Blakes Competition, Antitrust & Foreign Investment Group.

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