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In this edition: Rogers/Shaw merger under the microscope, new foreign investment policy in response to Russia's invasion of Ukraine, Bureau to monitor "national fuel market," and more…

No Freedom to Merge?

- Rogers' proposed C$26-billion deal to acquire Shaw has come under the regulatory and political microscope recently. Here's the latest:
  - The government will block the transfer of Shaw's wireless licences to Rogers, the Minister of Innovation, Science and Industry has pledged, citing fundamental incompatibility with the government's policies surrounding spectrum and mobile market competition. Rogers needs government approval to acquire those licences.
  - While the Minister's statement does not affect the Competition Bureau's ongoing review of the merger (including Shaw's wireless business), past telecom merger reviews point towards the Bureau seeking divestiture of Shaw's Freedom Mobile subsidiary.
  - Multiple news reports suggest that Rogers is seeking a buyer for Freedom Mobile.
  - The House of Commons Industry and Technology Committee wants the government to make affordability and accessibility a priority in reviewing the merger, and ensure that any conditions attached to the merger are fully enforceable.
  - The committee is also recommending that the government consider splitting up phone companies to create a structural separation between companies that provide telecommunications infrastructure from those that provide services to consumers.
  - The CRTC has finished hearings into the broadcasting aspects of the merger but has not yet issued a decision.

Other News You Need to Know

- WestJet Airlines Ltd.'s proposed deal to acquire Sunwing Vacations and Sunwing Airlines will be reviewed by the Bureau. The deal, announced on March 2, brings together Canada's second-largest airline with Canada's largest package vacation seller.
- The Bureau plans to share information with competition authorities from the US, Australia, New Zealand, and the UK through a recently-formed working group aimed at identifying and preventing potentially anti-

competitive conduct in the global supply and distribution of goods. The formation of this group may signal increased enforcement on a global scale.

- The US Department of Justice is getting tougher on monopolization. The DOJ has indicated that it may pursue criminal sanctions for certain violations of the Sherman Act's monopolization provision (Section 2). Deputy Assistant Attorney General Richard Powers recently signalled this, reversing a long-standing policy of pursuing these cases civilly. Earlier, Assistant Attorney General Jonathan Kanter called for more enforcement to remedy the "dearth of Section 2 case law addressing modern markets," and warned that the DOJ would seek structural remedies whenever possible, instead of behavioural ones. Structural remedies involve breaking up companies. This tough new approach heightens risks for companies doing business in the US.

Foreign Investment Update

- In response to Russia's invasion of Ukraine, the Canadian government has announced a new policy that foreign investment in Canada with ties to Russian entities and/or Russian investors will be subject to elevated national security and net benefit scrutiny. Until further notice, any ties, direct or indirect, to an individual or entity associated with, controlled, or subject to influence by the Russian state, will be sufficient to support a finding that an investment of any size could be injurious to Canadian national security. In effect, the involvement of any Russian entity or individual may be sufficient (without more) to trigger a national security review under Part IV.1 of the *Investment Canada Act* (ICA). For any investments by direct or indirect Russian investors that exceed prescribed financial thresholds for a pre-closing net benefit to Canada review, the policy prescribes that the Minister of Industry (or the Minister of Canadian Heritage, in the case of investments in Canada's cultural sector) will find the acquisition of control of a Canadian business to be of net benefit to Canada (such that it will be permitted under the ICA) on an exceptional basis only.
- Non-Canadians investing in Canadian businesses may be able to make voluntary filings under proposed amendments to the *National Security Review of Investments Regulations* of the ICA. Foreign investors acquiring minority interests and making other investments in new or existing Canadian businesses that do not trigger a filing obligation under the ICA, will be able to file before closing to obtain a determination within 45 days as to whether their investment raises national security concerns. Where no filing is made, the government will have up to five years after closing (up from the current 45 days) to review the investment under the national security regime.

Bureau Business

- The Canadian government has instructed the Bureau to monitor the "national fuel market" for collusion in light of gas price increases since Russia invaded Ukraine.
- The Bureau has published a draft Information Bulletin on Transparency. The draft bulletin explains what

the Bureau will tell the subjects of its investigations and other stakeholders, including complainants, industry participants, and members of the public, when it is conducting an investigation. Interested parties have until May 6 to comment on the draft bulletin.

Back to Basics

- The *Competition Act* requires that parties to proposed merger transactions which exceed prescribed thresholds (which vary, in part, depending on the type of transaction) notify the Competition Bureau in advance of closing and observe a 30-day waiting period or obtain a waiver. *For share acquisitions*, each of the following thresholds has to be met: (a) the value of the assets in Canada of the corporation whose shares are to be acquired (the Target) and any entities it controls *or* the value of the gross revenues from sales in or from Canada generated from those assets exceed C$93 million; (b) the aggregate value of the assets in Canada *or* the gross revenues from sales in, from or into Canada of the Target, the purchaser and their respective affiliates exceeds C$400 million; *and* (3) the purchaser's voting interest following the transaction exceeds 20% (public company) or 35% (private company) or, if that threshold is already exceeded, the voting interest must exceed 50% following the transaction.

Cassels on Competition is brought to you by the Competition & Foreign Investment Group at Cassels and is edited by Tegan O'Brien, Olivia Ells, and Alec Hoy.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.