What does CETA mean for EU and Canadian competition policy?

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Introduction

With the Comprehensive Economic and Trade Agreement (CETA) having finally been signed by the EU and Canada on October 30, 2016, it's worth exploring what it says about competition law and policy and how it may impact these issues on both sides of the Atlantic.

Competition provisions

Article 17 of CETA sets out the provisions that relate to competition policy. These provisions are meant to underscore that the benefits of trade liberalization secured by CETA are not to be offset or diminished by anti-competitive business conduct.

For example, the parties affirm the importance of free and undistorted competition in their trade relations. The parties also commit to take measures to prevent anti-competitive conduct that are consistent with the principles of transparency, non-discrimination, and procedural fairness. Where exclusions from the application of competition law exist, these must be transparent and the parties must make publicly available to each other information concerning these exclusions. Furthermore, although CETA's competition provisions apply to enterprises entrusted with the operation of services of general economic interest (such as the UK's National Health Service), they do so only in so far as these rules do not obstruct the fulfilment of the enterprises' functions.

CETA also reaffirms that Canada and the EU will continue to cooperate in competition law enforcement. Inter-agency coordination has emerged in the last 20 or so years as a fundamental element of international competition law enforcement. CETA recognizes this by providing that Canada and the EU will continue to operate in accordance with the 1999 EU/Canada Competition Cooperation Agreement. This agreement requires each party to notify the other party in respect of enforcement activities, including merger control and cartel investigations, that may affect important interests of the other party. The 1999 agreement also includes a framework for consultations between the parties, mutual assistance between competition authorities and provisions for information exchange. It also allows a party to request that the other party investigates a particular instance of anti-competitive conduct where it adversely affects important interests of the requesting party.

The approach taken to competition policy in CETA is similar to that contained in the 2009 EU-South Korea free trade agreement and may provide a model for future international trade agreements.

Subsidies and State aid

The CETA provisions for subsidies build upon the WTO Agreement on Subsidies and Countervailing Measures. They require the parties to notify each other every two years in relation to the form, legal basis and amount of certain subsidies that are maintained. Parties are also required to promptly provide information and respond to questions relating to particular instances of government support related to the trade in services where a party requests it. It contains a non-binding consultation mechanism, whereby parties must endeavour to minimise adverse effects of the subsidy on the complaining party's interests. CETA does not, however, require the parties to implement domestic subsidy legislation or for subsidies to be pre-authorised in the way that they are under EU State aid law.

Investor protection

CETA seeks to minimise barriers for Europeans and Canadians to invest in each other's markets. Among the measures adopted in this regard is a commitment by the parties to treat each other's investors and investments fairly, equitably and no less favourably than domestic or other foreign investors. It has also been agreed by the parties that neither of them will impose any new restrictions on foreign shareholdings. CETA also creates an independent investment court system, consisting of a permanent tribunal and an appeal tribunal, to allow investors to bring claims relating to certain violations of rights to non-discriminatory treatment and investment protection.

In addition, although CETA permits Canada to maintain certain restrictions on foreign ownership, such as are contained in the Investment Canada Act, Canada has committed to increase the principal threshold for review under the Investment Canada Act from its current level of CAD $600 million to CAD $1.5 billion for EU investors once CETA is implemented. There are certain limitations in this regard – for example, the higher threshold will not apply to acquisitions by state owned enterprises or to acquisitions of Canadian "cultural businesses" and will not exempt investments that raise national security concerns. That said, it is anticipated that the new threshold will lead to materially fewer reviews of EU investments under the Investment Canada Act.

Taken together, the above measures may lead to more cross-border investments which could also cause an increase in merger notifications and reviews in both jurisdictions. However, as noted above, the objective of increasing cross-border investments is not meant to come at the expense of robust competition law enforcement. It should also be noted that CETA provides that neither its competition policy provisions nor the subsidy provisions are subject to the dispute resolution mechanisms contained in the agreement and therefore companies will not be able to bring disputes on competition law or subsidies to investment courts or make use of the other dispute resolution mechanisms established by CETA.

Conclusion

Although CETA is meant to encourage EU/Canada investment, it does not do so at the expense of competition law enforcement. Indeed, CETA enshrines the principle that competition law enforcement is necessary to protect the benefits of greater trade liberalization. At a time when the UK and EU are assessing their future trading relations, and Canada is also exploring its options in light of threats to NAFTA emanating from the United States, CETA may provide an attractive template for a unified approach to promoting increased trade within the context of robust competition law enforcement.