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Small Mergers Loom Large on Canadian Competition Bureau's Radar

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Canada's Competition Bureau is actively seeking and reviewing smaller acquisitions that may not exceed pre-merger notification thresholds under the *Competition Act* but that may nonetheless raise substantive competition issues. The Bureau's demonstrated interest in evaluating smaller mergers (including non-notifiable transactions) is consistent with both its past enforcement practice and trending competition law issues. Specifically, concerns have been expressed by some commentators both here and abroad about the acquisition of innovative startups by "Big Tech" and the potential for such transactions to prevent future disruptive competition.

Talking the Talk

The Bureau has clearly telegraphed a new and more aggressive enforcement position with respect to small and/or non-notified mergers:

- In May of this year, the Commissioner of Competition announced that the Bureau had expanded its resources to monitor potentially problematic non-notifiable mergers and had established a Merger Intelligence and Notification Unit (MINU) to carry out these responsibilities. The Commissioner reported that after only two months in operation, the MINU had detected two transactions that raised potential competition issues.
- Earlier this month, the Bureau followed up with a formal media release noting the MINU's expanded responsibility for active intelligence gathering on non-notified merger transactions that may raise competition concerns and encouraging parties to such transactions to voluntarily engage with the MINU well in advance of closing. The Bureau's news release also links to a webpage describing the MINU's responsibilities, which include assisting parties on interpretive issues relating to whether a transaction may be notifiable under the *Competition Act*.

Walking the Walk

The Commissioner has backed up his tough talk on small merger monitoring and enforcement with a number of recent enforcement-related actions or initiatives:

- As we discussed in a prior bulletin, the Commissioner challenged the completed acquisition by private equity firm Thoma Bravo of Aucerna earlier this year, based on a concern that the acquisition would lead to an effective monopoly for the supply of specialized business software used by certain oil and gas producers in Canada. The Commissioner and Thoma Bravo subsequently entered into consent agreements requiring Thoma Bravo to hold separate and divest one of the two overlapping software businesses. Although the Commissioner clarified in a recent position statement that the transaction was notified to the Bureau in advance of closing and subjected to a three-month review (according to the Commissioner's position statement, the parties completed the transaction despite being advised of the Bureau's concerns), it is notable that the size of the relevant software market in Canada was referred to in the Commissioner's filings as being "relatively modest" with annual revenues in the "tens of millions" of dollars.
- More generally, Bureau personnel have been following up with parties to non-notified transactions to request confirmation of certain information, and the Commissioner has recently commenced at least one formal inquiry into a non-notified merger in connection with which he has obtained formal court orders to compel the production of relevant records.

- In addition, the Bureau issued a statement earlier this month requesting information from the public about potentially anticompetitive conduct in digital markets, including "creeping acquisitions" of actual or potential competitors.

Key Takeaways

In light of the foregoing, parties to proposed mergers of any size must assess whether they may have anticompetitive effects, even in small or niche markets in Canada, regardless of whether they are subject to mandatory pre-merger notification; parties must also consider whether to voluntarily seek clearance from the Commissioner or be prepared to address, or possibly contest before the Tribunal, any issues that the Commissioner may raise before or within one year of closing.

In conducting such an assessment, parties should bear the following in mind:

- Although resource-constrained, the Bureau is capable of reacting quickly to challenge proposed or completed transactions and seek interim relief. This was demonstrated in the Thoma Bravo/Aucerna matter, where the Commissioner was able to file a challenge within only two months of receiving the parties' responses to a supplementary information request (and within four months of being notified of the transaction).
- The relatively modest size of a relevant market should not be taken as a proxy for a low level of competition law risk – in some respects, the relative smallness of a market may itself raise threshold competition issues in some horizontal mergers, if it may act as a disincentive to future competitive entry, leading to a possible finding that barriers to entry and expansion are relatively high. Indeed, this was the case in the Thoma Bravo/Aucerna matter, in which the Bureau pointed to the relatively smaller market at issue as "limit[ing] the opportunities for entrants to recoup the sunk costs associated with the development and commercialization of a reserves software."
- Particularly in a digital context, acquisition targets operating in adjacent markets (vertical or otherwise) may be perceived by the Bureau as potential future competitors to the acquiring party, and consideration should be had of each party's future plans for potential expansion into new markets.
- As part of the competition risk assessment, in addition to standard overlap and market share analyses, any internal documents discussing the rationale for the acquisition (including efficiencies, which may form the basis of a defence to otherwise anticompetitive mergers in Canada) and the market positioning of the parties should be carefully reviewed.
- The potential costs of responding to a *Competition Act* investigation and/or a challenge before the Tribunal can be significant.

It is also possible that the Bureau's increased emphasis on monitoring smaller mergers may lead to future proposals by the Bureau to amend the *Competition Act*'s merger review regime to facilitate its ability to detect and seek timely remedies for small transactions that raise competition issues. However, the Commissioner's consistently active track record of enforcement with respect to small and non-notifiable mergers and the Bureau's renewed commitment of resources to this part of its mandate suggest that the current statutory regime in Canada is no impediment to the Bureau's ability to review potentially problematic non-notifiable mergers.

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