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Canada's New Merger Review Regime: A Progress Report

Anita Banicevic and Mark Katz

A superior line of thought

DAVIES

Canada's New Merger Review Regime: A Progress Report

By Anita Banicevic and Mark Katz

In March 2009, the Canadian *Competition Act's* merger review process was amended to align it more closely with U.S. merger review under the *Hart-Scott-Rodino Antitrust Improvements Act*. Under the new Canadian process, the Competition Bureau (the "Bureau") must decide within 30 days of receiving a complete filing whether to clear a notifiable transaction or issue a "supplementary information request" ("SIR"). If SIRs are issued, the parties cannot close until 30 days after all of the requested information has been provided to the Bureau.

The enactment of the *Competition Act's* new merger review process generated significant debate in Canada. In particular, concerns were expressed that the Canadian SIRs would come to resemble U.S. "second requests" in terms of the cost and delay imposed on merging parties.

As we approach the end of 2009, sufficient time has passed (close to nine months) to be able to offer some preliminary insights and practical advice on how Canada's new merger review process has performed so far. Any lessons learned to date, though, must be tempered with the caveat that the Canadian system remains a "work in progress" whose definitive character is yet to take shape.

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Frequency of SIRs

One of the concerns raised about the *Competition* Act's amended merger review process was that the Bureau would be overly eager to exploit its shiny new investigative tool, and resort to SIRs as an automatic default in any merger that raised issues, no matter how minor or limited. The Bureau tried to allay these concerns by stating that it would be judicious in its use of SIRs. For example, a Bureau representative testified before a committee of Canada's Parliament that the Bureau was likely to issue SIRs in only "four to six" mergers per year.[1]

As it turned out, the Bureau issued five SIRs within the first six months of the new merger review process being enacted. To be fair, though, it seems that each of these transactions involved strategic mergers between competitors that raised material substantive issues. In fact, three of the mergers in question were cleared only after the parties agreed to a negotiated remedies package (to our knowledge, the other two reviews remain pending). In other words, the new merger regime has not generated a pandemic of SIRs and the experience so far is that the Bureau has utilized them for transactions that it would classify as "very complex," *i.e.*, transactions that require substantial investigation and analysis by the Bureau because of the complicated issues they raise.[2]

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[1] C. Downie, Testimony before the Standing Senate Committee on Banking, Trade and Commerce, May 13, 2009, available at http://www.parl.gc.ca/40/2/parlbus/commbus/ senate/com-e/bank-e/07eva-e.htm?Language=E&Parl=40&Ses=2&comm_id=3.

[2] See the Competition Bureau's *Fee and Service Standards Handbook* (2003), available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01338.html. The Bureau estimates that approximately 5% of merger transactions fall within the "very complex" category.

None of this should be too surprising. As a relatively small agency, with comparatively limited resources, the Bureau is simply not equipped to cope with a significant number of SIRs. Indeed, we are aware of several situations in which the Bureau has accepted, or proactively encouraged, different mechanisms to avoid the issuance of SIRs.

For example, we understand that the Bureau has agreed to enter into "timing agreements" with merging parties in lieu of issuing a SIR. Pursuant to these agreements, the initial 30 day waiting period is allowed to expire, but the parties agree to delay closing of the transaction so that the Bureau can complete its review in accordance with an agreed upon timetable. According to the Bureau's new *Merger Review Process Guidelines* (the "Process Guidelines"), key milestones that may be addressed in a "timing agreement" include specifying deadlines for when:

- the parties produce the information requested by the Bureau and any witnesses the Bureau wishes to interview;
- the Bureau provides updates on the status of its investigation;
- the Bureau discloses its interim and final assessments of the transaction; and
- the transaction can close, subject to any challenge by the Bureau.[3]

Similarly, although not addressed in the Process Guidelines, we also understand that the Bureau has permitted merging parties to "pull and re-file" their notifications, consistent with the practice that has developed in the U.S. under the HSR review process. As in the U.S., the intention/hope in Canada is to avoid SIRs by giving the Bureau an additional 30 days to complete its review beyond the original 30 day waiting period.

Scope of SIRs

Another concern about the new Canadian process was that it would allow the Bureau to ask merging parties for the proverbial "kitchen sink" through broadly drafted and unfocused SIRs. Again, the Bureau has tried to lower the level of anxiety by emphasizing its availability – both before and after the issuance of SIRs – to discuss the scope of the information requested and the custodians whose records would have to be reviewed.[4]

For the most part, our understanding is that the Bureau has carried through on this issue and has been generally open to narrowing the scope of SIRs after discussions with the merging parties (although not in all cases). Parties should not be misled into believing, however, that this means

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[3] Canadian Competition Bureau, *Merger Review Process Guidelines* (September 2009), available at: http://competitonbureau.gc.ca/eic/site/cb-bc.nsf/eng/o3128.html. According to the Process Guidelines, the Bureau is most likely to utilize "timing agreements" in the case of "complex" transactions, which (according to the Bureau's non-statutory "service standard periods") the Bureau generally tries to review within a maximum 10 week period. See also, the Bureau's *Fee and Service Standards Handbook* at p. 8.

[4] Process Guidelines at pp. 8–9.

that the Canadian process will be pain free; a great deal of information may still be required and the cost of locating, reviewing, organizing and assessing the data on a timely basis will be significant. One situation in which the Bureau may be most amenable to limiting the scope of SIRs is when the transaction is also being reviewed by other competition enforcement agencies – particularly the U.S. agencies – and the parties are able to offer the Bureau access to responsive documents that have been produced to these other agencies. According to the Process Guidelines, the Bureau will generally agree to such an arrangement provided that:

(a) the parties have provided appropriate confidentiality waivers to the foreign antitrust agency to permit sharing of information with the Bureau;
(b) the parties do not impose restrictions unacceptable to the Bureau with respect to its use of the data and records; and
(c) the data and records received in this manner will be treated for all purposes "as if" provided directly to the Bureau.[5]

Giving the Bureau access to documents and data produced to other enforcement agencies can obviously help cut down on costs to the merging parties and increase the speed with which the parties are able to respond to the SIR. In our experience, parties are also better off delivering the information directly to the Bureau, rather than relying on the other agency to do so. Not only is this usually more expeditious, but it also allows the parties to supplement the information with their own Canada-specific submissions.

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Of course, this strategy is dependent on the Bureau seeking the same or similar information as its counterpart agencies in other jurisdictions. While the Bureau will usually consult closely with other agencies, there can be no guarantees that it will agree in all cases to limit itself to the same information sought by other jurisdictions. Indeed, this is unlikely to be true if the Bureau has identified Canada-specific issues that it considers must be addressed.

The need to mitigate the scope of anticipated SIRs may also increase the number of merging parties in Canada who decide to engage the Bureau in substantive discussions even before the filing of their notifications and the triggering of the initial 30 day waiting period. This avenue was always open to merging parties, even under the old regime, but it was far more typical for parties to file their materials and engage the Bureau at that point rather than *vice versa.* Provided that deal timing makes it feasible, and absent significant concerns about confidentiality, merging parties in Canada may now see a greater advantage to European-style pre-notification discussions with the Bureau (including making substantive submissions and providing information and data), in order to provide the Bureau with as much lead time as possible to conduct its review and limit potential areas of concern and inquiry.

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[5] Process Guidelines at p.13. One restriction that the Bureau will not agree to is any requirement that it use the information obtained from other agencies only for the purpose of reviewing the transaction at issue. The Bureau's position is that it can use information obtained in a merger context for any other purpose under the *Competition Act*, e.g., investigating an alleged cartel offence.

Timing of Reviews

The length of time required to clear a transaction was another concern raised regarding the *Competition Act*'s new merger review process. One particular concern was that the Bureau might take the full 30 day initial waiting period to clear non-controversial (or in the Bureau's parlance "non-complex") transactions, rather than the typical 14 days under the old merger regime. To date, however, this has not been an issue. In our experience, mergers which raise no substantive issues continue to be cleared within 14 days of notification.

An additional concern related to the time required to respond to a SIR and whether the Canadian experience would mirror that of the U.S., where transactions that are subject to "second requests" take on average six to seven months to clear.

The jury is still out on this issue. The Bureau has tried hard to show that the SIR process will not result in significant delays. In particular, the Bureau has held up the Suncor Energy Inc./Petro-Canada merger as proof of the relative speed with which it can still review and clear "very complex" mergers that raise significant substantive issues. The Suncor/Petro Canada merger was the first merger to be subject to a SIR and it took the Bureau four months in total to clear the transaction, including the negotiation of significant divestitures and a consent agreement.[6] This is consistent with the Bureau's target "service standard" period for reviewing merger transactions of this nature, i.e., within five months of notification. By contrast, the reviews of certain other transactions that involved SIRs took longer to complete (e.g., seven months for Merck/Schering Plough and nine months for Pfizer/Wyeth, although the duration in these cases may have been tied at least in part to the need to coordinate remedies with the U.S. and other jurisdictions).[7]

In short, it is too early to tell if Suncor/Petro Canada will come to represent the rule in cases of this nature or only the exception to the rule. What seems certain, though, is that it will require significant legal and management resources in order to respond to SIRs in such a timely manner.

It also seems clear that the new merger review process has given the Bureau much greater leverage in dealing with timing issues. Under the previous merger review regime, if parties were not concerned about waiting for Bureau sign-off, they could close their transactions once the statutory waiting period (a maximum of 42 days) had expired, unless the Bureau obtained an

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6 Canadian Competition Bureau, "Competition Bureau Acts to Preserve Competition in Suncor/Petro-Canada Merger" (July 21, 2009) available at www.bureaudelaconcurrence.gc.ca /eic/site/cb-bc.nsf/eng/03103.html. A copy of the registered consent agreement is available at http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=314.

7 Canadian Competition Bureau, "Competition Bureau Requires Significant Divestitures in Merger of Wyeth/Pfizer (October 14, 2009) available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03141.html; and Canadian Competition Bureau, "Competition Bureau Resolves Issues in Merger of Merck and Schering-Plough" available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03146.html.

injunction to prevent closing. Now, if the Bureau wants to extend its review beyond the initial waiting period, it does not need to obtain an injunction; it only needs to unilaterally issue the SIR, thereby placing all timing pressure on the merging parties to respond as quickly as possible. Alternatively, the Bureau can threaten to issue a SIR in order to obtain a favourable "timing agreement" from the parties in exchange for not going the formal SIR route.

Allocation of Risk in Deal Documents

Merging parties must also now consider how to account for the SIR process in their transaction agreements. This can be of particular concern to sellers, whose obvious interest is to get the deal done as quickly as possible and with minimal burdens. For instance, sellers may try to insist that the cost of any SIR process be borne entirely by the purchaser; or that the purchaser initiate remedy negotiations with the Bureau in the event that it issues a SIR; or even that the seller be allowed to walk from the transaction if a SIR is issued, perhaps even with the payment of a "reverse break fee." For their part, purchasers want to consider obtaining the utmost cooperation from sellers in order to complete the SIR process as quickly as possible, and also limiting any negative repercussions for the transaction should a SIR in fact be issued. Of course, as with all negotiations, the results will differ in any given case based on the relative bargaining strengths and positions of the merging parties.

Conclusion – So Far So Good

After approximately nine months of experience, prospective merging parties can take comfort in the fact that the nightmare scenarios for the *Competition Act*'s new merger regime have not materialized. To date, the Bureau appears to be using its new enhanced authority responsibly and, by all accounts, has generally co-operated with merging parties in narrowing the scope of SIRs and negotiating alternative arrangements where appropriate. That said, it must be recognized that the dynamics of the system are different, with the Bureau now much more able to control timing than previously. Moreover, even if used responsibly, the SIR process still holds the potential for greater costs and related burdens for merger participants.

Anita Banicevic is a Partner in the Toronto office of Davies Ward Phillips & Vineberg.

Mark Katz is a Partner in the Toronto office of Davies Ward Phillips & Vineberg.