CANADA

Mergers

Recent Developments in Canadian Merger Law

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Competition Bureau Concerned About Mergers and Information Exchanges

In March 2006, the Competition Bureau released a "Technical Backgrounder" outlining its analysis with respect to a merger involving Quebecor Media Inc. and Sogides Ltee, a publisher of French language trade books in Quebec.[1]

According to the Backgrounder, the Bureau was not concerned that the merger would result in a substantial prevention or lessening of competition in the publishing and distribution of French language trade books. However, in the course of its review, the Bureau learned that the president of Sogides (a Mr. Lesperance) had an interest in, and was a director of, a Quebec-based bookstore chain (Renaud-Bray) which competed against another chain of bookstores owned by Quebecor. The Bureau was concerned that this could lead to potentially anti-competitive information exchanges between the two bookstore chains, with Mr. Lesperance serving as the intermediary. Accordingly, the parties agreed (in a consent agreement registered with the Competition Tribunal) that: Mr. Lesperance would resign as a director of Renaud-Bray; an independent agent would assume this position; and limitations would be placed on the type of information that could be communicated to Mr. Lesperance about Renaud-Bray.[2]

On June 23, 2006, the Competition Bureau announced that it had entered into an agreement to resolve its concerns arising from the merger of the electronic television audience measurement operations of BBM Canada and Nielsen Media Research Limited.

It is noteworthy that the Bureau's Backgrounder does not contain any analysis of the bookstore market in Quebec to support its view that Mr. Lesperance's board position could have resulted in anti-competitive effects following the merger. Obviously, however, the parties preferred to agree to the Bureau's demands rather than incur the time and expense to contest them. That is not unusual in circumstances such as these, where the priority is to get the merger completed.

As a result, until the Bureau's theories on competitive harm are challenged, merging parties can expect that (i) Canadian merger review will involve a probing assessment of director, officer and minority shareholder relationships between the merging parties and other firms that compete with them; and (ii) where such relationships exist, the Bureau may seek commitments to eliminate the linkages or restrict the exchange of competitively sensitive information between the parties in respect of markets in which they compete, even in the absence of the type of thorough analysis that the Bureau would normally conduct in respect of areas of direct competition between the merging parties.

Competition Bureau Explains Decision in Whirlpool/Maytag Merger

On May 31, 2006, the Competition Bureau released another merger-related "Technical Backgrounder", this one summarizing the main findings from its review of the acquisition of Maytag Corporation ("Maytag") by Whirlpool Corporation ("Whirlpool").[3]

Two key points emerge from the Bureau's analysis.

First, one of the interesting market share questions raised by the transaction was how to account for the fact that Whirlpool, Maytag and other appliance manufacturers sell their products both under their own brand names and to retailers for sale under "house brands". In other words, should market shares be calculated on a "brand" basis (i.e., limited to the manufacturer's own-brand sales at retail) or on a "manufacturing" basis (i.e., incorporating sales of all products manufactured, regardless if sold under another brand). The Bureau resolved this issue by deciding that shares should be calculated on a "brand" rather than a "manufacturing" basis. Among other things, the Bureau noted that (i) house brands are owned and controlled by the retailer, which is solely responsible for all pricing and marketing decisions; and (ii) retailers are also often responsible for their own warehousing and distribution and provide their own warranties and servicing. This should provide a helpful precedent for other industries in which there are also high levels of controlled label manufacturing. Second, the Bureau concluded that the proposed transaction would result in market shares exceeding 35% in two relevant markets: the "laundry" market (consisting of all washers and dryers) and the narrower market for top-load washers. The Bureau uses a 35% market share threshold as a general indicator for mergers that may create potential competition issues. Nonetheless, the Bureau concluded that grounds did not exist for opposing the transaction in this case. In particular, the Bureau found that: (i) effective competition would remain in the market from a combination of foreign and North American-based manufacturers; (ii) there was evidence over the past few years of numerous new entrants whose market shares had increased noticeably since their entry, in part because of support from national big-box retailers; (iii) Canadian retailers would continue to have relatively strong bargaining and purchasing power post-merger; and (iv) there was no evidence that the transaction would increase the likelihood of coordinated behavior on the part of remaining manufacturers.

The Bureau's conclusions on market share are important because statements under the prior Commissioner's administration had created some concern that the Bureau was moving towards a more rigid approach in assessing the impact of market shares in its merger review process. Thus, in the context of evaluating several transactions, the Bureau had intimated that it would likely presume a merger to be anti-competitive if it led to post-merger market shares exceeding certain thresholds (e.g., 55% +), regardless of other factors. The Whirlpool/Maytag decision signals that there no longer needs to be the same degree of concern about this type of approach to merger review still holding sway at the Bureau. Consistent with the clear intent of the *Competition Act*, the Bureau's analysis recognizes that market shares ought not to be the defining consideration in merger review and that other factors must be examined before deciding whether a transaction is likely to have anti-competitive effects.

Competition Bureau Agrees to Long-Term Behavioral Remedies

On June 23, 2006, the Competition Bureau announced that it had entered into an agreement to resolve its concerns arising from the merger of the electronic television audience measurement ("TAM") operations of BBM Canada ("BBM") and Nielsen Media Research Limited ("NMR"). BBM and NMR are the only providers of TAM services in Canada.[4]

Following an apparently detailed investigation, which included interviews with broadcasters, advertisers and advertising agencies, the Bureau concluded that the BBM/NMR merger would likely prevent or lessen competition substantially in respect of electronic TAM services in Canada. Unfortunately, the Bureau's Information Notice on the transaction did not explain the nature of this likely anticompetitive effect. Indeed, the Information Notice said that the Bureau had found strong industry support for the creation of a standard TAM system in Canada, which is already the norm in the United States, Britain and Australia. The Bureau also found that the merger would likely result in a decrease in the overall cost of TAM services for the majority of purchasers.

Notwithstanding the foregoing, the Bureau sought and obtained BBM/NMR's agreement to a series of behavioral remedies as a condition for allowing the merger to proceed. The terms of this settlement are contained in a consent agreement filed with the Competition Tribunal, which is to remain in effect for 15 years or until another person establishes an electronic TAM operation in Canada.[5]

One of the obligations imposed by the consent agreement is that the merged entity undergo independent audits if and when it (a) implements new electronic TAM technology, (b) makes major adjustments to such technology and/or (c) considers providing electronic TAM in new markets in Canada. The results of any such audits must be forwarded to the Bureau and made available to BBM's members upon request (BBM's members consist of broadcasters, advertisers and advertising agencies). According to the Bureau, these audits will provide BBM's members with access to the impartial information required to determine whether the new services meet their needs or whether the system requires improvement.

The consent agreement also requires that the merged entity follow BBM's current processes for choosing new technology and deciding whether to enter new markets, which processes may be modified from time to time with notice to the Bureau.

Finally, the consent agreement requires that BBM treat all persons eligible for membership in the same manner, i.e., services should be available to similarly situated BBM members at comparable rates and terms, whether or not they were BBM members prior to the merger.

The use of behavioral remedies to alleviate the Bureau's concerns about the BBM/NMR merger, without requiring any divestitures, is noteworthy because it is still unusual for the Bureau to agree to a merger remedy that consists of stand-alone behavioral measures. (The Bureau's official position is that it will accept stand-alone behavioral remedies only "rarely".) It may be that the Bureau's willingness to agree to stand-alone behavioral remedies in this case was influenced by the strong industry support for the merger and the efficiencies associated with it.

Industry-Specific Proposals to Alter Merger Review Process

As described in the May 15, 2006 issue of *NAFTIR*, an expert panel established to review Canada's telecommunications industry issued a report in March 2006 recommending the creation of a new Telecommunications Competition Tribunal ("TCT"), whose mandate would include, among other things, the review of mergers involving telecom companies. The TCT would draw resources and staff from the Competition Bureau and the Canadian Radio-television and Telecommunications Commission ("CRTC"), which currently share concurrent jurisdiction over telecom mergers.

There have been several additional proposals since then which, if implemented, would alter the review processes for mergers in other key Canadian industries. In particular, these proposals would significantly affect – and limit – the Bureau's role in reviewing these mergers.

For example, in May 2006, the federal government introduced proposed amendments to the *Canada Transportation Act* which include provision for a new "public interest" review process for mergers involving federally regulated transportation services.[6] Although the Competition Bureau would continue to examine these mergers from a competition perspective, a concurrent "public interest" review process would be undertaken by the federal Canadian Transportation Agency ("CTA") if so directed by the Minister of Transport. The Minister would then receive and consider the views of both the Bureau and the CTA, including with respect to remedies if appropriate, before providing his/her recommendation to the federal Cabinet on whether to grant or deny approval. Currently, only airline mergers are subject to this type of review process. The goal of the amendments is to extend "public interest" review more broadly to mergers involving all types of transportation undertakings falling under federal jurisdiction.

Similarly, in June 2006, a Committee of the Canadian Senate issued a report on the Canadian news media in which it recommended that "public interest" considerations form part of the review of mergers in media industries.[7] The Committee criticized the Bureau's current analytical approach to media mergers, which focuses on the potential impact on the price of advertising. The Senate Committee stated that the Bureau's approach misses the "critical dimension" of how media concentration affects diversity in the provision of news and information. The Senate Committee contrasted the Bureau's approach with that of regulatory regimes in other countries – such as France, the U.K., Germany, Australia and the United States – which, the Committee said, attempt to "foster a plurality of owners within specific markets and to ensure that a diversity of news and information sources is available".

To address this perceived failing, the Senate Committee recommended that the *Competition Act* be amended to incorporate a new section dealing specifically with media mergers. Among other things, this new section would (i) authorize both the federal Minister of Industry and the federal Minister of Canadian Heritage to order the mandatory review of a media merger if either Minister is of the view that the proposed merger might adversely affect the "public interest"; and (ii) provide for the appointment of an expert panel to conduct the merger review, which would include representatives of the Bureau (and the CRTC where broadcasting is involved), but also at least two members with working experience in the type of media businesses that is the subject of the merger. The final decision about the fate of the merger would then be made by the federal Cabinet.

Both of these proposals reflect the view that mergers in key industries should not be reviewed on the basis of competition law principles alone, but should be subject to a broad "public interest" scrutiny. Members of the competition community in Canada tend to disparage these views as attempting to inject "political" considerations into what should be an "objective", efficiency-driven analysis. However, as can be seen from the various proposals described above, this opinion is not necessarily shared outside of the competition law universe, at least insofar as key industries are concerned.

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[1] Competition Bureau, Technical Backgrounder, *Acquisition of Sogides Ltee by Quebecor Media Inc.* (March 6, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2032&lg=e.

[2] A copy of the consent agreement is available at http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=219&CaseID=264#369.

[3] Competition Bureau, Technical Backgrounder, *Acquisition of Maytag by Whirlpool* (May 31, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2113&lg=e.

[4] Competition Bureau, Information Notice, *Competition Bureau fine-tunes BBM-Nielsen merger* (June 23, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2140&lg=e.

[5] A copy of the consent agreement is available at http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=219&CaseID=274#379.

[6] Transport Canada, News Release, *Canada Transportation Act Amendments Introduced in Parliament* (May†4, 2006), http://www.tc.gc.ca/mediaroom/releases/nat/2006/06-h025e.htm

[7] Standing Senate Committee on Transport and Communications, *Final Report on the Canadian News Media* (June 2006), http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/tran-e/rep-e/repfinjun06vol1-e.htm

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