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Merger Review In Canada - An Update

Anita Banicevic, Jim Dinning and Mark Katz

A superior line of thought

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Merger review in Canada

An update

*by **Anita Banicevic, Jim Dinning** and **Mark Katz****

In March 2009, the Canadian Competition Act's merger review process was amended to align it more closely with US 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 to issue what is known as 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 US "second requests" in terms of the cost and delay imposed on merging parties. After 10 months of experience, it is possible to offer some preliminary insights on how the new merger regime has performed in practice. Broadly speaking, the worst fears have not materialised – at least, not yet. That said, the dynamics of the system are different, with the Bureau now much more able to control timing than before. Moreover, even if used responsibly, the SIR process still holds the potential for greater costs and related burdens for merger participants.

Frequency of SIRs

One of the concerns raised about the Competition Act's amended merger review process was that the Bureau would 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 was likely to issue SIRs in only "four to six" mergers per year.

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, 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 utilised them for transactions that raised complicated issues.

None of this should be too surprising. As a relatively small agency, with limited resources, the Competition Bureau is not equipped to cope with a significant number of SIRs. Indeed, we are aware of several situations in which the Bureau has utilised different mechanisms to avoid the issuance of SIRs. In particular, the Bureau has shown a willingness to enter into timing agreements with merging parties in lieu of issuing an SIR. Under these agreements, the initial 30-day waiting period is allowed to expire, but the parties agree to delay closing the transaction so that the Bureau can complete its review in accordance with an agreed-upon timetable.

We also understand that the Bureau has permitted the merging parties in at least one transaction to pull and refile their notifications, consistent with the practice that has developed in the US under the HSR review process. As in the US, the intention (or, at least, 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. One issue that apparently remains unresolved in Canada is whether the parties will have to pay a second filing fee when they refile the notification.

Scope of SIRs

Another concern about the new Canadian process was that the Bureau would issue broad and unfocused information requests (the proverbial fishing expedition).

Again, the Bureau tried to lower the level of anxiety by emphasising 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.

For the most part, our understanding is that the Bureau has been 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 the Canadian process will be pain free; a great deal of information may still be required and the cost of locating, reviewing, organising and assessing the data on a timely basis may be significant.

One situation in which the Bureau may be most amenable to limiting the scope of SIRs is where the transaction is also being reviewed by other competition enforcement agencies – particularly the US agencies – and the parties are able to offer the Competition Bureau access to responsive documents that have been produced to these other agencies. Of course, the utility of this approach will be limited if the Bureau is most interested in obtaining documents and information relating to Canada-specific issues that are not covered by the foreign information requests.

Timing of reviews

The length of time required to clear a transaction was another worry about the new merger review process.

One concern was that the Bureau might take the full 30-day initial waiting period to clear non-controversial (or, in the

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Bureau's parlance, "non-complex") transactions, rather than the typical 14 days under the old merger regime. In our experience, however, 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 an SIR and whether the Canadian experience would mirror that of the US, 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. In one case (the merger of Suncor Energy Inc and Petro-Canada), the Bureau was able to complete its review and reach a settlement with the merging parties in only four months. On the other hand, the reviews of other transactions that involved SIRs took longer to complete (for example, 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 co-ordinate remedies with the US and other jurisdictions).

Regardless of the track record for specific mergers, it is inescapable 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 had expired (a maximum of 42 days), unless the Bureau obtained an 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 can 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 an SIR in order to obtain a favourable timing agreement from the parties.

Recent settlements involving international mergers

Several recent mergers illustrate the extent to which the Bureau is committed to co-operating with foreign competition authorities when assessing international mergers affecting Canada, particularly with respect to the design of remedies. These mergers also illustrate the spectrum of approaches that the Bureau may adopt when negotiating suitable remedies, ranging from a unique "made in Canada" resolution to complete reliance on the remedies negotiated by foreign authorities. On the whole, the goal seems to be to adopt the most efficient course possible.

"Made in Canada" remedies

In November 2009, the Bureau announced that it had entered into a consent agreement with Agrium Inc to resolve competition concerns related to Agrium's proposed acquisition of CF Industries Holdings Inc. Both bidder and target are major international fertiliser companies. The Bureau's review determined that the transaction would probably lead to a substantial lessening and/or prevention of competition in the wholesale supply of certain nitrogen fertiliser products in the provinces of Alberta and Saskatchewan. The remedy package agreed to by the Bureau and Agrium addresses this likely substantial lessening and/or prevention of competition in the event that Agrium is ultimately successful in its substantial bid for CF Industries.

The Bureau's press release concerning the proposed transaction notes that it co-operated closely with the US Federal Trade Commission during the course of its review. The FTC announced its conclusion in December 2009, which requires Agrium to make divestitures in northern Illinois and the Pacific Northwest region of the United States if it succeeds in acquiring CF Industries.

Reliance on foreign authorities' remedies

At the other end of the remedies spectrum, the Competition Bureau announced in April 2009 that commitments made by BASF SE to US and European competition authorities also resolved the Bureau's concerns about the effect of BASF's acquisition of Ciba Holding AG on competition in Canada for the supply of indanthrone blue and bismuth vanadate pigments. These pigments are used in products such as paints and automobile coatings.

The divestitures announced by BASF formed part of BASF's agreements with the FTC and the European Commission's Competition Directorate to divest Ciba's global indanthrone blue and bismuth vanadate businesses. No separate consent agreement was entered into in Canada, even though some of the divested assets (including intellectual property rights and customer accounts) were located in Canada.

Similar remedies in Canada and abroad

In late October 2009, the Bureau entered into a consent agreement with Schering-Plough Corporation and Merck & Co Inc concerning their proposed merger. The agreement imposed three major requirements on the merging parties. First, Schering-Plough was required to divest a new drug (currently in development) for the treatment of chemotherapy-induced and post-operative side effects, which will compete with a similar product already offered by Merck. Second, Merck was required to divest its interest in animal health company Merial Ltd to its joint venture partner, Sanofi-Aventis. Third, any contemplated future combination of the assets of Merial with the animal health business of the combined Merck / Schering-Plough entity will be subject to prior review and approval by the Bureau.

The Canadian consent agreement requires essentially the same remedies as those required by the FTC (although different from the remedies agreed to in Europe). From an efficiency perspective, one may question why the Bureau required a separate consent agreement to be concluded in Canada if the remedies it negotiated were essentially the same as required by the US.

The remedies announced by the Bureau in connection with Pfizer Inc's acquisition of Wyeth were also largely similar to those secured by the FTC. Specifically, the parties agreed with both the Canadian and US authorities to divest a number of animal pharmaceutical and vaccine products to Boehringer Ingelheim Vetmedica Inc, although there were slight differences in the products subject to divestiture – for example, certain equine products under development do not appear to be subject to the Canadian consent agreement. The Bureau also required that Pfizer amend the terms of its existing arrangement with Paladin Labs Inc governing the distribution, marketing and sale in Canada of a hormone replacement product, which was not part of the FTC settlement.