Competition Act Reform

THE REVISED MERGER REVIEW PROCESS – A NEW ERA IN MERGER REVIEW OR MUCH ADO ABOUT NOTHING?

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Introduction and Background

In June 2008, the Competition Policy Review Panel (the "Panel") issued its much anticipated report, *Compete to Win* (the "Panel Report"), setting out an array of recommendations for the enhancement of Canada's industrial competitiveness and economic prosperity.[2] Among the recommendations made by the Panel were amendments to the *Competition Act*. One such recommendation was "to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the U.S.", and which would "separate merger cases into two categories: those cases that are concluded (and effectively cleared) within 30 days of the initial filing, and 'second stage' cases that raise complex competition issues".[3] This recommendation was based, at least in part, on "concerns [that] were expressed about the time taken to review complex merger transactions and the use of formal investigative processes by the Competition Bureau, both of which can be time consuming and costly for the merger parties and other market participants".[4]

On March 12, 2009, the Act was substantially amended.[5] Included among the amendments were significant revisions to the merger notification and review regime consistent with the recommendations set out in the Panel Report. While many aspects of the amendments to the Act had been the subject of significant consultation and dialogue between the Competition Bureau and stakeholders prior to their enactment,[6] the changes to the merger review process were not among them. As such, the amendments to the merger notification and review regime caught many businesses and their legal counsel (and, presumably, many at the Bureau) by surprise.

On September 19, 2009, the Bureau issued its *Merger Review Process Guidelines* (the "Guidelines").[7] The stated purpose of the Guidelines is to "describe the Bureau's general approach to administering the Act's two-stage merger review process", and to "outline the [supplementary information request] process, including a description of the practices and procedures that the Bureau will follow to ensure that the potential burden on parties in responding to a [supplementary information request] is no greater than necessary, while at the same time enabling the Bureau to obtain information required to conduct its review".[8]

The Bureau should be applauded for its issuance of guidelines, bulletins, backgrounders and speeches as a means of articulating its views on the administration and enforcement of the Act. This holds true for the Guidelines, particularly as they relate to managing the potential scope of supplementary information requests ("SIRs"). Unfortunately, however, the Guidelines appear to create a divergence between the goals of efficiency and predictability espoused in the Panel

Report, and the process which will be followed by the Bureau in administering the new merger regime. This is particularly the case as regards the significance given to the initial 30-day waiting period, the maintenance of the existing administrative service standards, the continued issuance of "no action" letters, and the use of voluntary information requests and interim injunctions.

The Significance of the Initial 30-Day Waiting Period and the Maintenance of the Administrative Service Standards

According to the Guidelines, "[t]he Act provides an initial 30-day review period during which the vast majority of notified mergers will be cleared" (emphasis added).[9] Clearance of most mergers during the initial 30-day waiting period, as opposed to the receipt of a letter from the Bureau indicating that while the initial waiting period has expired its review is ongoing, is consistent with the goals of the new merger review process as recommended in the Panel Report. As is generally the case in the U.S., the parties to a merger should be able to conclude that if the initial 30-day waiting period is allowed to expire without the issuance of an SIR, their transaction will not be challenged by the Bureau. While the Bureau retains the statutory right to challenge a merger within a year of its completion under section 97 of the Act, this power should generally be limited to situations where: (i) the facts and circumstances surrounding the merger have changed in a material respect from those prevailing at the time the merger was initially reviewed; (ii) the merger was consummated without the parties having notified the Bureau; or (iii) the merger was completed prior to the expiry of the statutory waiting period.[10]

However, according to the Guidelines, the Bureau will continue its practice of reviewing mergers pursuant to non-binding administrative service standards which do not accord with the statutory waiting periods set out in the Act. The Bureau's *Fee and Service Standards Handbook* defines three categories of transactions, each of which has an applicable service standard: "non-complex" – 2 weeks, "complex" – 10 weeks and "very complex" – 5 months. While service standards are the product of a federal government policy intended to enable those who pay a fee for a government service to hold the government accountable, and as such they must be retained by the Bureau in one form or another, the service standards employed by the Bureau in its review of mergers should be revised to reflect the timing realities contemplated by the Panel under the amended Act. Adherence to service standards which do not correspond with the new statutory waiting periods will undermine the important objective of increased predictability underlying the new merger review process.[11]

Issues with predictability are not likely to frequently arise in relation to "non-complex" cases, since the Bureau should be able to complete its review of most "non-complex" transactions during the initial 30-day waiting period. Issues with predictability are also unlikely to present a significant issue in "very complex" cases, since the parties to such a transaction should generally expect to receive an SIR and to undergo a lengthy review.[12] Rather, should the Bureau utilize administrative service standards which are inconsistent with the review periods set out in the

amended Act, conflict with the goal of predictability will likely be most apparent in the meaningful number of cases which the Bureau classifies as "complex" (and in particular, those cases which are on the border between "complex" and "very complex").[13]

While the 14- and 42-day waiting periods under the former merger review regime may have necessitated a more lengthy service standard in order for the Bureau to have sufficient time to complete its review of a transaction, this is not the case under the new regime. In fact, one of the key objectives of the amendments to the merger review provisions of the Act was to provide the Bureau with a greater amount of time and the tools necessary to review those few mergers that may create legitimate competition law concerns. In particular, unlike under the prior regime where the Commissioner of Competition was required to apply to a court in order to extend the review period, under the new merger review regime the ability to issue an SIR, and thus to extend the review period, is entirely within the Commissioner's discretion.

In order for the new merger review process to work as intended by the Panel, the Bureau will need the resources necessary to quickly separate those transactions in which there is a reasonable prospect of issuing an SIR, from those where there is not. Transactions falling into the latter category should be cleared, whereas transactions falling into the former category should be subject to a more detailed review. To the extent that the Bureau does not already have the information it reasonably needs to conduct the review (often having received it from the parties or from market contacts), [14] the Bureau should as early as possible during the initial 30-day period request it from the parties on a voluntary basis. The parties and the Bureau should then, through open dialogue, work toward narrowing and resolving any issues identified by the Bureau,[15] with the parties making further targeted submissions where necessary. Failure of the parties to respond in a timely manner to a voluntary information request during the initial waiting period should result in the issuance of an SIR, unless the Bureau is otherwise able to obtain the necessary information.

The Role of ARC Requests and "No Action" Letters

As noted in the Guidelines, the amendments to the merger review process do not alter the ability for the parties to a transaction to request an advance ruling certificate ("ARC") or "no action" letter. This is not to say, however, that the justification for the parties to request an ARC or "no action" letter remains unchanged following the amendments.

Under the prior merger review regime the Bureau's ability to extend its review of a transaction beyond the initial waiting period required an order of the court, which in turn required the Bureau to meet a number of statutory criteria. This hurdle, when combined with the former 3-year post-closing review period available to the Bureau under the Act, meant that the parties to a transaction could often not take meaningful comfort from the absence of a challenge by the Commissioner during the initial 14- or 42-day waiting period. Accordingly, under the former

regime merging parties typically waited to receive affirmative comfort from the Bureau in the form of an ARC or "no action" letter before completing their transaction. Under the new regime, however, the ability to extend the review period is at the Commissioner's discretion. As such, the Bureau's choice not to issue an SIR during the initial waiting period should, except in the limited circumstances discussed below, generally represent all the comfort that merging parties need to close their transaction without fear of a subsequent challenge (absent a material change in facts and circumstances within one year of closing). That is, the expiry of the initial 30-day waiting period without the issuance of an SIR should become, both from the perspective of the Bureau and the business community, the new "no action" letter.[16]

Under the new regime, it is arguably the case that ARC requests should generally be limited to transactions where: (i) there are no material competitive overlaps or vertical relationships between the parties, and as such the parties submit an ARC request without a pre-merger notification;[17] or (ii) a higher degree of certainty than expiry of the initial waiting period is required by one or both of the parties before completing their transaction (for example, in the context of an auction, public takeover bid or proceedings under the *Companies' Creditors Arrangement Act*).[18] Since the Bureau's information requirements in order to affirmatively issue an ARC or "no action" letter are arguably greater than what is needed for the Bureau to simply allow the initial 30-day waiting period to expire, requesting an ARC or "no action" letter as a matter of routine practice (which was often the case under the former regime) may, under the new system, expose merging parties to additional requests for information and delays in the termination of the Bureau's review.

The Use of Voluntary Information Requests and Interim Injunctions

According to the Guidelines, "[f]or those few transactions that give rise to potentially significant issues, the Bureau may issue a 'supplementary information request', or 'SIR', for additional relevant information."[19] This captures the intent of the Panel in recommending the adoption of the revised merger review process. However, the Guidelines go on to state that "for those transactions that raise competition issues that cannot be reviewed adequately within the initial 30-day waiting period, but in respect of which the Bureau determines that an SIR is not the preferred method to gather the information required to complete the transaction", the Bureau's "preferred approach is to allow the initial waiting period to lapse on the understanding (as may be embodied in a timing agreement) that: (1) the Bureau is continuing to review the proposed transaction; (2) the parties will work cooperatively with the Bureau to address additional information requests from the Bureau through a voluntary process; and (3) the parties will not close the transaction for an agreed-upon period of time to allow the Bureau to complete its review".[20]

Where additional information is required from the parties at the end of the initial waiting period in order for the Bureau to determine whether a transaction is likely to result in a substantial prevention or lessening of competition, the appropriate step for the Bureau is to issue an SIR. It will significantly undermine the efficiency and predictability of the new merger review process

for the Bureau to issue voluntary information requests outside the initial 30-day waiting period in lieu of an SIR, except in exceptional cases. One example would be where there is a narrow issue which remains to be resolved nearing expiry of the initial waiting period which can be dealt with in short order, such that the additional 30-day waiting period upon compliance with an SIR would constitute an unnecessary delay.[21]

There is no reason why an SIR need be broader in scope than a voluntary information request. While concerns have been expressed about the potential overuse of SIRs and about the Bureau's ability to efficiently oversee multiple SIRs at the same time given its available resources, these concerns somewhat miss the point. There is no reason why the amount of information sought by the Bureau in a voluntary information request and that sought in an SIR cannot be precisely the same. At least with an SIR, there would be procedures in place to limit the scope of the information requested, as described in the Guidelines.

It is possible that the Bureau's stated expectation of limiting the number of SIRs it issues on an annual basis to between four and six[22] stems, at least in part, from the likelihood that the Bureau will be expected to report to Parliament on the number of SIRs it issues, whereas that may not be the case with voluntary information requests. If this is true, then the Bureau would arguably be better served by issuing an SIR instead of a voluntary information request, since reliance on the latter may have the effect of understating the resources the Bureau requires in order to effectively administer the new merger review regime. Parliament should be aware of the true cost of its legislative pronouncements, and the Bureau should be provided with the resources it needs in order to administer them.

The goal of predictability in the revised merger review process would also arguably be undermined if the Bureau were to resort to applications under section 100 of the Act in order to extend the review period. According to the Guidelines, "[s]ection 100 of the Act ... remains available to the Commissioner to address circumstances where the Commissioner has obtained all necessary information from the parties in respect of a proposed transaction, but requires additional time to complete the review".[23] This is inconsistent with the intent of the Panel Report. Under the new regime, it is incumbent upon the Bureau to effectively and efficiently deploy its resources so as to be able to determine within the initial 30-day waiting period whether a transaction is likely to require more time to review. If so, the appropriate route to follow would be to issue an SIR. As the two-stage merger review regime is new to Canada, until such time as the Bureau is able to develop the processes needed to make it work, it is to be expected that the Bureau will issue a proportionately greater number of SIRs than the number of second requests issued by the U.S. Federal Trade Commission and Department of Justice.

If the Bureau is of the view that it does not currently have sufficient resources to make the necessary determinations during the initial 30-day waiting period, it should take the appropriate steps to obtain additional resources. These resources could be used, for example, to broaden what I understand to be the Bureau's existing practice of developing its base of knowledge

in key industries, so that it will be better equipped to triage and review filings expeditiously. The Bureau may also want to consider, to the extent it does not already do so, the use of internal databases organized by industry or market so that institutional knowledge can quickly be accessed by and shared among Bureau personnel.

Similarly, if the Bureau is of the view that it will be unable to review the substantial amount of information which it may receive in response to an SIR within 30 days, before resorting to section 100 the Bureau should first attempt to obtain the agreement of the parties to submit information on a rolling basis (during which the Bureau should continue to advance its analysis as far as possible by utilizing information previously obtained from the parties and through market contacts).

Conclusion: A Brief Note on Transparency in the Merger Review Process

The Guidelines provide, on numerous occasions, that the Bureau will engage in ongoing dialogue with the parties in order to facilitate transparency in the new merger review process.

A high degree of transparency is a worthy objective for the Bureau to embrace,[24] and it is undoubtedly the case that the Bureau, the business community and legal counsel will each play an important role in facilitating such transparency. If the Bureau is to be able to complete its review of most transactions within the initial 30-day waiting period, or to limit the scope of the SIRs it issues to that information which is reasonably necessary, all those involved in the merger review process will need to work closely together in a climate of trust.

The amendments to the Act make this a very exciting time in the evolution of Canada's merger review regime, and I am optimistic that the Bureau, the business community and legal counsel can work together to develop a two-stage merger review process which effectively and efficiently protects competition in Canada.

Notes

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[2] *Compete To Win*, Government of Canada, June 2008 [Panel Report]. Available online at www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

[3] *Ibid* at 56.

[4] *Ibid*.

[5] Bill C-10, *Budget Implementation Act, 2009*.

[6] For example, the repeal of several of the pricing provisions, the creation of a dual track system for reviewing agreements among competitors, and the imposition of administrative monetary penalties under the abuse of dominance provisions.

[7] *Merger Review Process Guidelines*, available online at http://www.competitionbureau.gc.ca/ eic/site/cb-bc.nsf/eng/03135.html [Guidelines].

[8] *Ibid* at Preface.

[9] *Ibid* at 3.

[10] In addition, pursuant to section 103 of the Act, the Bureau retains the ability to challenge a transaction in respect of which it has issued an advance ruling certificate ("ARC") where new information comes to light which was not included by the parties in their ARC request, such that a subsequent challenge by the Commissioner could not be said to be based on the same or substantially the same information as that upon which the ARC was based.

[11] According to its annual reports, the Bureau is able to meet its service standard in the vast majority of cases. While this is certainly to be commended, it is important to note that the service standard period under the prior regime did not necessarily commence at the time a complete notification was submitted (which is when the statutory waiting period was triggered). The result was that the service standard period did not necessarily reflect the amount of time it actually took the Bureau to complete a review. As such, reliance on service standards which are inconsistent with the waiting periods set out in the amended Act, whether in terms of their duration or commencement, will likely have the effect of clouding the predictability of the new merger review process.

[12] It is worth noting, however, that because it may be difficult for merging parties to accurately estimate, *ex ante*, the likely scope of an SIR, and thus to assess the amount of time it will likely take to respond to any such SIR, there will likely be a degree of timing uncertainty in respect of some "very complex" transactions.

[13] According to the Bureau's Annual Report for the year ended March 31, 2007 (at section 5.3.3), between 2002 and 2007 approximately 10% (116 of 1185) of the transactions notified to the Bureau were classified as "complex"

[14] As was the case under the prior merger review regime, the Bureau should continue to expect that the parties to a transaction will submit a competitive effects brief commensurate with the scope of the substantive competition issues raised by the transaction, and which provides the Bureau with the information it reasonably requires in order to determine whether there is likely to be a need for an SIR. Failure of the parties to do so would be to risk receiving an SIR and undergoing an extended review.

[15] As soon as review officers have had a reasonable opportunity to assess the information before them, and to develop a plausible theory of competitive harm based on the material facts and evidence, they should share their views with the parties and their counsel, with the objective of running any material issues to ground. That way, when preparing their report to senior Bureau management, review officers can point to the fact that specific issues were raised with the parties, and that based on the ensuing discussions and/or submissions made by the parties, as well as any other available information, conclusions were drawn supported by the facts and circumstances of the case.

[16] In this regard, it is important to recall the initial impetus for the use of "no action" letters by the Bureau, which was the presence of 7- and 21-day statutory waiting periods under the Act, giving the Bureau very little time to properly review a transaction. As the review periods are now materially longer, and the initial review period can be extended at the Bureau's discretion, it is arguably the case that the underlying reason for the use of "no action" letters no longer exists.

[17] Where the Bureau is unable or unwilling to issue an ARC in respect of such a transaction, the Bureau should continue its practice of issuing a "no action" letter and waiver of the obligation to notify.

[18] I note that the "higher" degree of certainty represented by an ARC as compared to a "no action" letter is principally a distinction in theory as opposed to practice. This is based on my understanding that the Bureau has not subsequently challenged a transaction in respect of which it has issued a "no action" letter, except in circumstances where the material facts and circumstances surrounding the transaction had changed.

[19] Guidelines, at 3.

[20] Guidelines, at 7.

[21] In such cases, the parties may also choose to "pull and refile" their notification in order to avoid the possibility of an SIR, thereby giving the Bureau additional time to complete its review.

[22] See, for example, Proceedings of the Standing Committee on National Finance, March 11, 2009, a copy of which is available online at www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/fina-e/03evb-e.htm?Language=E&Parl=40&Ses=2&comm_id=13. In this regard, it is my understanding that the Bureau has already issued five SIRs in the first few months following the amendments. I am also aware of a number of very detailed voluntary information requests having been issued by the Bureau during this period.

[23] Guidelines, at 8.

[24] In my view, transparency and open dialogue between the Bureau and counsel will be critical in order for the new merger review process to work. As such, to the extent it does not do so already, the Bureau should consider making transparency a component of the report prepared by review officers and of their evaluation, such that it becomes a metric against which the Bureau evaluates its performance in reviewing transactions.