Intelligence MEMOS

From: Peter Glossop

To: Canada's Competition Law Community

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Re: ***Competition Act*** **Does Not Need a Longer Challenge Period for Small Deals**

Ottawa's [Discussion Paper](#) on The Future of Competition Policy asks if there should be a longer period for the Competition Bureau to challenge a merger after it closes, where the merger is too small to trigger notice to the Bureau in advance of its completion.

The concern seems to be that small transactions – especially in the digital space – are closing without a pre-closing review by the Bureau, and they may later harm competition. The paper suggests there could be a voluntary procedure to flag a non-notifiable merger in advance of closing.

If implemented, this proposal would significantly complicate the assessment and timing of M&A transactions in Canada. The case for it has not been made. Instead, the Bureau's review process could be improved to better focus on transactions that may raise competition issues.

A limitation period is the statutory period within which a person must take action to initiate a legal proceeding. The *Competition Act* prescribes a one -year period after a transaction closes for the Bureau to bring an anti-competitive challenge at the Competition Tribunal. If the Bureau takes no action within a year, it loses its challenge right.

The Discussion Paper worries about the possibility a merged firm will simply avoid taking any provocative competitive actions (e.g., a price increase) during the limitation period and then be free to exercise its market power after the period expires.

It suggests the current one-year limitation period may allow "[n]on-notifiable, yet ultimately important acquisitions …[to] evade detection, while even known mergers may cause competitive harm that is too difficult to forecast with precision at the time of acquisition, yet too late to remedy once it becomes apparent."

To address these issues, the paper suggests lengthening the limitation period (at least for non-notifiable mergers) or making the expiration of the current one-year period conditional on filing a voluntary notification.

There are several problems with this approach.

First, the paper presents no evidence of numerous problematic non-notifiable mergers escaping timely review by the Bureau.

Second, implementing a longer limitation period would subject all non-notifiable mergers (most of which raise no competition issues whatsoever, and which inherently involve a smaller amount of commerce than notifiable ones) to a longer period of uncertainty post-closing.

Third, it is questionable whether merging parties would voluntarily flag their non-notifiable transactions and thereby essentially acknowledge that they might raise competition issues as well as allow a delay in closing of their deals, simply to obtain the benefit of a shorter limitation period. Even if they did notify, the Bureau would require additional resources to review these voluntary notifications.

In summary, the process should continue to focus on pre-closing reviews of large transactions involving large players. However, it should be fine-tuned so that it can better focus on the kinds of transactions that are more likely to raise competition issues.

Transactions that typically do not raise any competition issues (such as straightforward ones in very competitive industries such as upstream oil and gas and real estate) may still trigger notification obligations simply because they involve parties with large assets and revenues. As a result, they are notifiable, and their review occupies scarce Bureau resources. Instead, the simplest of these transactions should be exempt from pre-closing notification. The Bureau could then dedicate more resources to those transactions more likely to be problematic and charge their proponents higher filing fees to reflect the intensity of Bureau resources needed to review them.

Finally, if there is a problem with smaller, non-notifiable transactions having potentially significant competition issues escaping review, the current notification thresholds (based on the target company's historical assets and revenues) could be supplemented by an enterprise value threshold to capture the potential competitive significance of a large purchase price being paid for a business with relatively little in the way of assets or revenues. This type of test is used in the foreign investment review process administered under the *Investment Canada Act*.

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