COMPETITION POLICY COUNCIL

COMMUNIQUÉ

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Mergers and Inquisitions? Competition Bureau's Merger Review Needs Improvement

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The *Competition Act* provides for reviews of mergers by the Commissioner of Competition, who heads the Competition Bureau, to determine whether such transactions are likely to prevent or lessen competition substantially. The Commissioner may seek to challenge before the Competition Tribunal any merger that is likely to have anticompetitive effects. The Tribunal is a quasi-judicial body comprised of Federal Court judges and lay members.

The process through which the Competition Bureau reviews transactions and ultimately determines whether to seek remedies can be done in a quicker, more transparent and more predictable manner. Merger review is taking longer now than in the past, although part of the delay may be due to matters outside of the Bureau's control. Nevertheless, the majority of the Council agreed that much could be done to expedite the Bureau's process in respect of the vast majority of mergers that do not raise any material competition concerns. Similarly, for more complex mergers, the Council concluded that the Bureau can improve its review process, particularly with respect to the transparency, consistency, and predictability in conducting reviews. The Council was also of the view that the Competition Tribunal should continue efforts directed at expediting litigated proceedings, particularly in contested merger cases given the unique timing constraints involved in such proceedings. This is the consensus of the C.D. Howe Institute's Competition Policy Council, which held its fourteenth meeting on October 17, 2017.

Council members could not agree on the merits of stricter statutory requirements or on exemptions from merger notification for certain sectors (such as exemptions for acquisitions of commercial real estate or upstream oil and gas transactions), which encompass a large number of cases that normally do not raise any material competition concerns. A majority of Council members agreed that the Competition Bureau needs to triage cases more effectively and not waste limited resources on transactions that do not raise any substantive competition issues. The Bureau should also be more transparent with merging parties so as to identify potential issues and concerns at various points during a normal review period. As described below, certain Council members also identified potential legislative changes that could be directed at expediting merger reviews and contested proceedings before the Competition Tribunal.

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The Competition Policy Council comprises top-ranked academics and practitioners active in the field of competition policy. The Council, co-chaired by Benjamin Dachis, Associate Director, Research, at the C.D. Howe Institute and Adam Fanaki, Partner, Competition and Foreign Investment Review and Litigation at Davies, Ward, Phillips & Vineberg LLP, provides analysis of emerging competition policy issues. Professor Edward Iacobucci, Dean at the University of Toronto Faculty of Law and Competition Policy Scholar at the Institute, advises the program. The Council, whose members participate in their personal capacities, convenes a neutral forum to test competing visions and to share views on competition policy with practitioners, policymakers and the public.

At Issue: Does the Competition Bureau approach its review of proposed mergers in a consistent, transparent and procedurally fair manner?

Background

Amendments to the *Competition Act* in 2009 created a new merger review process. The parties subject to a merger or acquisition that exceeds certain financial thresholds – including the size of the parties and size of the transaction – must notify the Competition Bureau prior to closing. When companies file their notification with the Bureau, the parties must include information related to the operations of the parties, a description of the transaction, studies they have done on the competitive effects of the transaction and other information, together with a $50,000 filing fee.[1] After the Bureau is notified, there is a 30-day waiting period in which the parties may not complete their transaction to allow the Competition Bureau to conduct its initial review. In addition to, or in lieu of, a notification, the parties may submit a written submission requesting that the Commissioner provide an advance ruling certificate or a "no-action" letter confirming that the Commissioner does not intend to challenge the transaction (in which case there is no statutory waiting period). The Bureau approves the vast majority of mergers during the initial 30-day period, allowing parties to complete the transaction at that time.

For the limited number of mergers where the Competition Bureau has identified potential substantive competition issues, the Commissioner may issue a supplementary information request ("SIR"), which contains a wide range of questions and typically requires the merging parties to produce a large volume of documents and data. The issuance of an SIR triggers a second waiting period that expires 30 days after compliance with the SIR.

Following the completion of its investigation, the Competition Bureau notifies the parties whether the Commissioner has concluded that the transaction will substantially lessen or prevent competition, whether

1 For more details on the merger review process, see the Competition Bureau's Merger Review Process Guidelines at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html or Addy, George, John Bodrug, and Charles Tingley. 2017. "Fulfilling the Promise: Proposals for a More Efficient Merger Review Process in Canada." Davies Ward Phillips & Vineberg. September.

such concerns may be remedied (such as through divestitures of assets of operating segments), or whether the Commissioner will seek an order from the Competition Tribunal to block all or part of the merger. The merging parties may oppose the Commissioner's application to the Tribunal through a contested proceeding that often takes at least one year to be completed, with a further delay to issue a decision and resolve any appeals. As discussed below, merging parties may abandon a transaction or accept a consensual resolution rather than litigating because of the uncertainty and the reality that mergers can rarely be delayed for the extended period required to complete a fully litigated proceeding before the Tribunal.

The Increasing Length and Investigative Burden of Merger Reviews

There was consensus among the Council members that there has been a lengthening of the Bureau's merger review process and more mergers subject to increasingly broad SIRs. The total number of mergers reviewed each year has stayed largely the same since the implementation of the revised merger process in 2009. However, there were only five mergers in 2009/10 that were subject to SIRs and four mergers in 2010/11 that were subject to SIRs.[2] In the 2016/17 fiscal year, the number of mergers subject to SIRs increased dramatically to 21 mergers, representing nearly 40 percent of all complex mergers reviewed by the Bureau during that year. There has been a decline in SIRs so far this year, but it is too soon to tell whether this reflects a reversion to more modest reliance on this process.

The Bureau has also not been meeting its own timing predictability performance target of providing an answer on its view of a merger within the established service standards for complex merger reviews. Although it has been meeting its service standard for non-complex mergers, in 2016/17 and in the first quarter of 2017/18, the Bureau met its performance target in less than 75 percent of complex mergers reviewed, below its timing predictability service standard of 85 percent. The average time to respond regarding complex mergers has increased from approximately one month a few years ago to 52 days as of 2016/17 and over 77 days in the first quarter of 2016/17.[3] This is an average number – in reality, more complex cases take far longer for the Bureau to review and outline findings, often taking numerous months or even a year.

Although merger review is taking longer, part of the delay may be due to matters outside of the Bureau's control. For example, the recent Supreme Court decision in the *Tervita/Complete Environmental* merger case requires the Bureau to quantify anti-competitive effects and perform a trade-off analysis when

2 Until November 2010, the Competition Bureau used a 'complex' and 'very complex' category of mergers. This analysis combines the two groups under 'complex.' Thanks to Richard Annan for compiling these statistics from the Competition Bureau's past Annual Reports here: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00097.html#annual-reports and the Competition Bureau's Performance Measurement and Statistics Report here: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04300.html#sec04-9

3 See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04300.html#sec04-9

evaluating efficiency claims. Such empiricism is time-intensive and requires that the Bureau have the necessary information to estimate costs. However, as this is a recent development, Council members mostly agreed that it is only one factor contributing to the increased delay of merger reviews. While evolving jurisprudence will undoubtedly require the Bureau to adapt its internal practices, it also points to the need for further dialogue with the parties and greater opportunities to seek interim decisions from the Tribunal on questions of law or mixed law and fact that could expedite matters.

Competition law enforcement, like other areas of the law, is facing increasing complexity and delays in the adjudication process. Mergers have also become more complex over time, with multiple overlapping products and geographic areas, resulting in lengthier reviews – a trend that is not specific to Canada. While there may be an increased burden on the Bureau, there are a number of steps the Bureau itself can take to improve the merger review process.

Improving Merger Reviews in Canada

To improve the merger review process, the Bureau can improve on its case triage and how it communicates with parties during reviews, while the government should consider a broader review of the Competition Tribunal.

Improving the Bureau's Case Triage

Many Council members thought the Bureau is frequently engaging in extensive reviews, such as contacting customers and suppliers, in respect of mergers that clearly do not raise any competition issues. Although the Bureau must do some due diligence on even the simplest of notifications, in areas where the Bureau has significant experience, such as with acquisitions in the retail sector (e.g., retail gasoline operations), the Bureau should be able to quickly identify any local market issues.

Council members also discussed whether certain industry sectors could be exempted from notification. Approximately 30 to 40 percent of the transactions notified each year involve the acquisition of commercial real estate assets or oil and gas assets, two sectors where substantive competition concerns rarely arise. One proposal is to exempt from notification acquisitions of assets in these sectors that do not typically raise any competition issues. However, many Council members were of the view that such sector-specific exemptions would not solve the issue of delays in other (non-exempted) merger reviews, given delays arise largely from internal Bureau practices. In addition, exempting a large number of transactions from notification would create a resource problem for the Competition Bureau given its reliance on filing fee revenue. A large share of the merger filing fees that merging parties pay to the Bureau, currently $50,000 per transaction, comes from these simple cases. These fees finance the cost of Bureau merger reviews.

There was no consensus on whether creating exemptions from notification for certain sectors was a sensible legislative approach. Most on the Council agreed that the problem of delays for simple cases are a symptom

of the Bureau misallocating resources to cases that the Bureau should not be investigating in the first place, as well as the issues discussed below.

Let's Talk: Improving Communication and Accountability

Most Council members agreed that the Bureau should look to meet more often, and earlier, with merging parties to discuss the scope of their initial concerns for complex mergers. In the past, the Bureau would hold a meeting with merging parties to present its initial work on potential concerns relating to complex transactions. Such presentations provided an opportunity to discuss information from both sides and gave parties more direct access to senior management at the Bureau right up to the Commissioner, if necessary. These discussions often focused and expedited the review of a transaction. Although these still occur, and are useful when they do, many on the Council thought this practice is becoming more selective and less common. Council members believed that the transparency and communication during merger review was being reduced and was a significant factor in contributing to the delay of merger reviews.

The Council also reached a consensus that by the end of the 30-day waiting period in cases where an SIR has been issued, the Bureau should provide a position statement to the parties articulating the concerns and economic theories that the Bureau has identified and will pursue as it continues to examine the transaction. Such information would allow parties to decide whether to proceed to attempt to close their transaction, in whole or in part, with more knowledge regarding the issues identified by the Bureau.

Other Council members made the case for legislative reforms that would require the Bureau to complete its review of any complex transaction by the end of the 30-day waiting period following compliance with an SIR. Under this model, if the Bureau failed to take steps to oppose a transaction within the waiting period, the transaction would be deemed to be approved. There was no consensus on whether such a "bright line" time limit for the Bureau to come to a decision on a merger case was appropriate. Some Council members noted that 30 days is not an adequate period for the Bureau to review the extensive documents and data supplied in response to SIRs and that timeliness concerns can be more effectively addressed through timing agreements with the Competition Bureau. Others noted that the information load was largely due to the issuance of overly broad and unfocussed SIRs. In any event, in the absence of an order from the Tribunal, the parties currently have the ability under the *Competition Act* to proceed to close a transaction following the expiry of the waiting period, albeit with the risk of a post-closing challenge that can create unacceptable commercial uncertainty.

Let's Fight: Improving the Role of the Competition Tribunal in Merger Reviews

Mergers can rarely be delayed for the extended period required to complete a fully litigated proceeding before the Tribunal. Because of the length of time that litigation of a merger case takes through the Competition Tribunal, the Council felt that the Commissioner often becomes the *de facto* decisionmaker

on merger review cases. Most Council members agreed that it would be beneficial for merging parties to be able to litigate challenges before the Competition Tribunal under an expedited schedule.

In this regard, Council members noted that in the United States, a preliminary determination on the merits of a contested merger can often be completed in approximately four months after a complaint is filed. Although such proceedings relate to requests for preliminary injunctions and are not a full determination of the merits, such proceedings often involve an in-depth review of a merger and the outcome is often determinative of the case. One proposal is to have merger cases resolved through an expedited proceeding using a timeline and process similar to preliminary injunctions in the United States. Alternatively, some Council members suggested that the standard for issuing interlocutory injunctions under section 104 of the *Competition Act* be amended to require the Tribunal to determine whether the Commissioner would have a likelihood of success on the merits, as opposed to only finding that there is a serious issue to be tried at this stage. This would require the Tribunal to engage in a more fulsome review of the merits of a merger challenge at an earlier stage of the process. Council members thought that an expedited Tribunal ruling is a realistic possibility, as the similarly designed Canadian International Trade Tribunal provides rulings within 120 days under a statutory mandate to do so.

A second area of discussion among Council members was the need for potential reforms to the Competition Tribunal. Some Council members believe the Tribunal should be abolished entirely, replaced by simply having cases heard before the Federal Court. Others thought that a specialized Tribunal was sensible and recognized that the Tribunal has engaged in recent measures directed at reducing the length of contested proceedings, such as by facilitating early mediation of contested cases, engaging in active case management, reducing schedules for hearings and considering other potential reforms. Regardless of the exact restructuring, most on the Council agreed that the Tribunal should continue to explore options to promote timeliness in contested proceedings.

Conclusion

There is no single factor that is responsible for the increasing length of time taken for reviews of mergers in Canada; rather, it is a combination of various factors, some of which are outside of the Bureau's control. To help address these issues, both the Bureau and the government should consider the potential reforms outlined above, such as greater transparency and improved case selection by the Bureau, to improve the efficiency, consistency, and predictability of the Canadian merger review process.

Members of the C.D. Howe Institute Competition Policy Council

Members of the Council participate in their personal capacities, and the views collectively expressed do not represent those of any individual, institution or client.

George N. Addy, Partner, Head of Competition and Foreign Investment Review, Davies Ward Phillips & Vineberg LLP. Director of Investigation and Research, Competition Bureau, 1993-1996.

Marcel Boyer, Research Fellow, C.D. Howe Institute. Professor Emeritus of Industrial Economics, Université de Montréal, and Fellow of CIRANO.*

Tim Brennan, International Fellow, C.D. Howe Institute. Professor of Public Policy and Economics, University of Maryland Baltimore County. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2006.

Neil Campbell, Co-Chair, Competition and International Trade Law, McMillan LLP.

Jeffrey R. Church, Professor of Economics, University of Calgary. T. D. MacDonald Chair of Industrial Economics, Competition Bureau, 1995-1996.*

Renée Duplantis, Principal, The Brattle Group. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 2014.

Brian Facey, Chair of Competition, Antitrust & Foreign Investment Group, Blake, Cassels & Graydon LLP.*

Adam F. Fanaki, Partner, Competition and Foreign Investment Review and Litigation, Davies Ward Phillips & Vineberg LLP.

Peter Glossop, Partner, Competition/Antitrust, Osler, Hoskin & Harcourt LLP.

Calvin S. Goldman, Head of Competition, Antitrust and Foreign Investment Group, Goodmans LLP. Director of Investigation and Research, Competition Bureau, 1986-1989.*

Lawson A. W. Hunter, Q.C., Senior Fellow, C.D. Howe Institute. Counsel, Stikeman Elliott LLP. Director of Investigation and Research, Competition Bureau, 1981-1985.

Susan M. Hutton, Partner, Stikeman Elliott.*

Edward Iacobucci, Dean, and James M. Tory Professor of Law, Faculty of Law, University of Toronto. Competition Policy Scholar, C.D. Howe Institute.

Madeleine Renaud, Partner, Competition Group, McCarthy Tétrault.

The Hon. Marshall Rothstein, Former Puisne Justice of the Supreme Court of Canada.*

Margaret Sanderson, Vice President, Practice Leader of Antitrust & Competition Economics, Charles River Associates.*

The Hon. Konrad von Finckenstein, Senior Fellow, C.D. Howe Institute. Commissioner of Competition, Competition Bureau, 1997-2003.*

Omar Wakil, Partner, Competition and Antitrust, Torys LLP.

Roger Ware, Professor of Economics, Queen's University. T.D. MacDonald Chair of Industrial Economics, Competition Bureau, 1993-1994.

The Hon. Howard I. Wetston, Senior Fellow, C.D. Howe Institute. Director of Investigation and Research, Competition Bureau, 1989-1993.

Lawrence J. White, International Fellow, C.D. Howe Institute. Robert Kavesh Professor of Economics, Stern School of Business, New York University.*

Ralph A. Winter, Canada Research Chair in Business Economics and Public Policy, Sauder School of Business, University of British Columbia.*

*Not in attendance, October 17, 2017.