

COMPETITION & ANTITRUST BULLETIN

COMPETITION BUREAU STEPS-UP SCRUTINY OF MERGERS

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MARKETPLACE INQUIRIES BECOMING ROUTINE

The Canadian Competition Bureau is now making marketplace inquiries a routine part of its review procedure where transactions involve any degree of overlap. Such inquiries have long been standard-practice in "complex" and "very complex" cases. Going to the marketplace in straightforward cases, where market shares may be well-under safe harbours, is new. It may also represent a significant shift from the Bureau's long-established practice of clearing "non-complex" mergers quickly on the basis of informal competitive impact submissions from the parties. It means that stakeholders should expect Canadian processes to become longer and more formal, and that clearances in advance of a public announcement may be more difficult to obtain.

As the Bureau has not made a formal statement about its new approach, its prevalence is difficult to pin down. Nevertheless, the shift appears to have been stimulated by an unusually high number of "confidential" merger notifications. In non-complex cases, the merger parties would have sought clearance from the Bureau prior to a public announcement and asked that it rely on their representations about competitive effects when assessing the transaction. Given the lack of publicity, customers, suppliers and competitors with concerns might be unaware of the pending deal and not necessarily have the opportunity to contact the Bureau. The Bureau would either not have customer and supplier information or be requested by the parties not to make third party contacts given the confidential nature of the deal.

INQUIRIES NOT NECESSARY IN NON-COMPLEX CASES

There seems to a new level discomfort about clearing transactions solely on the basis of a competitive impact submission from the parties. This concern is arguably unfounded because the Competition Act explicitly permits the Bureau to challenge mergers within three years of closing. Indeed, the Bureau's standard practice is simply to close its file at the end of a review and advise that it has no present intention to seek an order from the Competition Tribunal. Reopening a file is always a possibility. This is also true where an "Advance Ruling Certificate" is issued: the Act only prevents a challenge that is based solely on the information used as the basis for issuing the ARC. If circumstances change or new information comes to light, the Bureau can seek an order from the Tribunal.

A policy of routine marketplace inquiries in "non-complex" cases may also be inconsistent with the Bureau's own review Guidelines, which currently suggest that a full, formal merger notification and / or customer and supplier information are not needed where the post-merger market shares of the parties is under 10%. In other words, competitive impact submissions should suffice.

Concerns about "midnight mergers" and an inability to secure effective remedies also seem out of place, given that these are non-complex mergers that do not give rise to material substantive issues. There is nothing on the public record to suggest that merger parties in these cases routinely misunderstand their competitive effects or are misleading the Bureau. Nor is there any reason to think that the Bureau has been clearing "non-complex" cases only later to realise that they were very complex, giving rise to significant substantive issues, and that an effective post-closing remedy was impossible to obtain.

IMPLICATIONS FOR THE FUTURE

If this new practice becomes established Bureau policy, as seems likely, it may mean that full blown pre-merger notification filings (or at least the voluntary provision of customer and supplier information) will become more common on non-complex deals and that complete confidentiality will be difficult to maintain. That would be regrettable. One of the great advantages of the Canadian system of merger notification has been its suppleness and adaptability. At a time when the International Competition Network is recommending practices that avoid the imposition of "unnecessary burdens on parties to transactions that do not present material competitive concerns" it would be disappointing to see Canada move in the opposite direction.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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