

Toronto

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Via E-mail and Courier

Ottawa

Patrizia Martino

Calgary

Competition Bureau

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Dear Ms Martino:

Comments on the Draft Enforcement Guidelines on the Revised Merger Review Process

Osler, Hoskin & Harcourt LLP welcomes the opportunity to comment on the draft *Enforcement Guidelines on the Revised Merger Review Process* (the “Draft Guidelines”) issued by the Competition Bureau (the “Bureau”). We commend the Bureau for its consultative approach to implementation of the new merger review process and for the commitment to ongoing openness and consultation with parties and their counsel, as reflected in the Draft Guidelines.

Specifically, we welcome the clarity provided in the Draft Guidelines on such matters as early consultations, hostile transactions, pre-issuance (of supplementary information request (“SIR”)) dialogue, and the scope of SIRs. We also welcome the Bureau’s stated commitment to “minimizing the parties’ burden in complying with a [SIR] by narrowing the issues and/or the requirements for additional data and records to the extent reasonably possible”. We are generally supportive of the approach set out by the Bureau on these issues and do not propose to comment on these aspects of the Draft Guidelines in this letter. Rather, we have focussed our comments on the critical issue of the Bureau’s non-binding service standards and the meaningfulness that will be associated with the expiry of the statutory waiting periods. In our view, the continued use of informal review periods that are longer than the statutory waiting periods will serve to undermine the purpose of the new merger regime.

Given the importance of the Bureau’s proposed practice in terms of review timelines and related matters, it is essential that the Bureau provide additional guidance on these issues, in keeping with the Government’s stated commitment to providing greater transparency to the Canadian public. To the extent that these issues are addressed in the Draft Guidelines at all, the implication from the guidance provided is that the Bureau intends to make the important decisions on how to proceed in a case within the statutory timeframes provided for in the *Competition Act* (the “Act”). Section 2.1 of the Draft Guidelines provides as follows:

In discharging its merger review obligations, the Bureau's priority is to identify in a timely manner those few proposed mergers that pose a significant threat to competitive markets in Canada, and to allow the balance to proceed as expeditiously as possible. The Act provides an initial 30-day review period during which the vast majority of mergers will be cleared. For those few transactions where further review is required, the Act authorizes the Bureau to issue a "supplementary information request" for additional relevant information and extends the review period for an additional 30 calendar days from the date upon which the requested information is supplied. During this time, a proposed transaction may not be completed.

This language suggests that a determination of whether a transaction may be one in respect of which the Bureau may need a remedy to resolve competition law concerns or seek a challenge will be made within the initial 30 day period. Where such a determination is made, a SIR will be issued and the waiting period automatically extended.

In our view, this impression appropriately reflects the rationale (including as expressed by the Competition Policy Review Panel (the "Panel")) for adopting the new merger review process, as well as the reasonable expectation of parties to a merger. We understand, however, based on subsequent communications from the Bureau, including at the roundtable meetings in Toronto on May 4, 2009, that the Bureau is considering an approach which we believe is inconsistent with the above of continuing existing practices of the Mergers Branch which would have the effect of preserving informal timeframes for merger review that would not be aligned with the statutory waiting periods. We understand that the Bureau has not made any firm decisions on its internal processes going forward and we welcome the Bureau's collaborative approach and openness to the views of the competition law bar on such matters as the continued use of the service standard periods and the desirability of continuing the practice of issuing "no-action" letters signalling the completion of the Bureau's review. Our comments on these specific points are set out below. More fundamentally, however, we would like to take this opportunity to address what we understand to be the Bureau's intention to reserve the use of the statutory SIR process for the most obvious, difficult cases, while continuing as a matter of stated practice (i.e. in more than the exceptional case) for potentially "complex" transactions deferral of a decision on whether a transaction may be likely to raise concerns beyond the expiry of the initial 30 day waiting period.

We appreciate that under the prior statutory framework for merger review, there may have been legitimate reasons for the Bureau to make significant decisions outside of the statutory timeframes. However, as discussed below, we strongly encourage the Bureau to carefully consider the implications of continuing under the new process a merger review model that contemplates review periods that do not correspond with the statutory timelines. In our view, in addition to depriving merging parties of the greater certainty and transparency and harmonization with the U.S. process that was intended by the Panel,

a parallel review process based on informal, non-statutory timelines for transactions that may raise competition law concerns is unlikely to be sustainable, as effective enforcement will likely require that the Bureau preserve its statutory rights in the case of any transaction that could realistically be the subject of a challenge.

As a practical matter, the issue of informal review timelines is unlikely to be of concern in the category of cases that have in the past been classified as “non-complex”, as these are likely to be reviewed well within the initial 30 day period. However, issues regarding review timelines are very real with respect to other cases, particularly those that have been described in the past as falling into the middle “complex” category. The key issue in these cases will be whether parties can expect that their transaction will be unlikely to be challenged where the Commissioner has declined to issue a SIR. In our view, this is a reasonable expectation, which should not be undermined as a matter of stated Bureau policy by a parallel non-statutory review process with different timelines for making critical decisions than those contemplated by the statutory framework. While we acknowledge that there will be exceptional cases where parties may wish to negotiate a timing arrangement that meets their particular needs, we strongly urge the Bureau to structure its internal review process in such a way that parties may conclude, with a high degree of certainty, that their transaction has effectively been cleared by the Bureau if the initial 30 day waiting period has been allowed to expire.

The discussion below first addresses a number of conceptual points and then turns to a discussion of practical recommendations.

A. Conceptual Issues

1. Purpose of the Amendments to the Merger Review Process

In connection with a review of its internal policy and procedure for reviewing mergers, we hope and expect that the Bureau will carefully consider Parliament’s rationale for adopting the new statutory merger review process in Canada. While there was little public discussion on this point by the Government, we note that, as was the case for many of the amendments adopted, the Government acted on the advice of the Panel, which carefully considered these issues.¹ Accordingly, it is instructive to make reference to the portions of the Panel’s June 2008 Report, “Compete to Win” (the “Report”), that discuss the recommendation that Canada adopt a two stage merger review process modelled on the U.S. regime.

¹ See the Government’s press release entitled “Protecting Consumers”, dated September 25, 2008, available at <http://www.conservative.ca/EN/1091/106349>.

(a) Transparency, Predictability and Efficiency

In its Report, the Panel noted that “merger analysis needs to be conducted on a timely basis in the fast-paced world of modern business” and that during its consultations “concerns 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 merging parties and other market participants”. The Panel also observed that very few merger cases actually require remedies, and indeed that “from 2002 to December 2007, data indicate that there were 7937 mergers in Canada. Of these, 1431 transactions were reviewed by the Competition Bureau and only 15 resulted in merger remedies, such as divestitures of assets or businesses”.

The Panel therefore, made recommendations designed to provide the Bureau with more time and effective tools to review those few cases that could legitimately require remedies, while at the same time providing greater certainty to parties to all other transactions by virtue of a system that would “effectively clear” their cases within the initial 30 day period. In its Report, the Panel described the new two stage process as follows:

This change 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. So-called "second stage" cases would be subjected to an additional review period that would terminate 30 days following full compliance with a "second request" for information.

Accordingly, in recommending the new merger review process, the Panel contemplated a review process in which parties could rely on the expiry of the initial waiting period as a form of “clearance” of their transaction, such that there would be effectively no risk of their transaction being subject to post-closing challenge.

(b) International Harmonization

In addition to transparency and efficiency, the Panel highlighted the desirability of achieving greater harmonization with the U.S. merger review process and specifically stated that “it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the U.S”. In this regard, while we acknowledge that a practice of “pulling and refiling” is used in the U.S. in some cases (see discussion below), it remains that the clear view in the U.S. is that once the initial statutory waiting period has expired (i.e. and no second request has been issued), there is very little risk of a post-closing challenge if the parties proceed to close their transaction.

2. Reasonable Expectations of the Parties

The pre-amended merger review process provided the Bureau with limited statutory rights to continue its review of a merger on a pre-closing basis once the waiting period had expired. The Commissioner also had the right to challenge a merger for up to three years after it had been substantially implemented. Moreover, parties could not necessarily draw any conclusions from the fact that the Commissioner had not applied for an injunction to delay closing of a transaction, given that failure to have done so may have been the result of an assessment that an injunction would be unlikely to be granted because of an inability to meet the requirements set forth in paragraph 100(1)(a) of the *Act*, rather than an absence of potential competition law concerns. In light of this fact, parties to mergers which potentially raised concerns often waited for affirmative comfort from the Bureau in the form of a “no action” letter prior to closing, and a practice developed of relying on the Bureau’s internal service standards as a basis for projecting when such affirmative comfort would be issued. In other words, because the *Act* did not provide the Commissioner with adequate time or tools to complete the review process within the statutory timeframes and there was a three year post-closing challenge period, merging parties typically concluded that there was a material risk that a transaction could be challenged post-closing and so often waited for affirmative comfort prior to consummating their transactions.

By providing the Bureau with the unilateral and discretionary statutory right to substantially extend the pre-closing review period and to obtain substantial additional information from the parties, the new merger review provisions arguably eliminate any basis for the Bureau to suggest that parties not implement their transaction upon expiry of the 30 day waiting period where the Bureau has not issued a SIR. Given that the right to extend the review process and obtain information from the parties is now wholly within the discretion of the Commissioner, it would be entirely reasonable for merging parties to expect that the risk of a post-closing challenge would be greatly reduced where the Commissioner has opted to let the initial waiting period expire, relative to the situation that existed under the prior merger review process.

3. Practical Implications

The implication that must be drawn from the Bureau’s proposal that it continue its substantive review beyond the expiry of the initial review period is that the Bureau would potentially be prepared to challenge transactions in respect of which it has allowed the initial waiting period to expire without the issuance of a SIR. This raises a number of issues, as discussed below.

First, if the Bureau is suggesting that it would be prepared to challenge a transaction in respect of which no SIR was issued, this substantially undermines the certainty that Parliament intended the parties should draw from the expiry of the waiting period.

Second, this approach raises fundamental questions about how the Bureau would proceed to prepare its case in the event it determined a challenge was warranted. Without the right to compel the production of information through issuance of a SIR, the Bureau would have little choice but to attempt to resort to the use of a Section 11 order. In our view, it would be highly undesirable to maintain a review process in which parties need to be concerned about the potential issuance of a Section 11 order some period of time after the Bureau has declined to use its SIR power. This would be entirely inconsistent with the spirit of the Panel's recommendations.

Moreover, as a practical matter, we expect that the Bureau would face resistance in convincing a court to issue a Section 11 order where the Bureau had foregone the right to issue a SIR (unless parties had explicitly consented to the potential issuance of a Section 11 order, although many parties would likely find such a commitment undesirable). It can also be expected that the Bureau would face significant difficulties in successfully seeking an injunction to delay closing in a case where it did not exercise its statutory right to extend the waiting period. We expect that this would still be the case even where the parties had agreed on a voluntary basis to delay closing for some period following expiry of the initial waiting period. In addition, we expect that it would be significantly more difficult for the Bureau to convince the Tribunal that remedies were warranted in a case where the Bureau did not exercise its full statutory rights of review. While it is always possible that in a particular case, the Commissioner could demonstrate that the market situation had changed materially or that the severity of the issues were not foreseen, we question why the Bureau would wish to adopt an approach to merger review that contemplates abandoning its statutory rights in cases that it realistically considers may be worthy of a challenge.

B. Recommendations

1. Objectives of Review

Adopting the new merger review process requires, as the Panel recommended, a more efficient, streamlined review process in which the Bureau's objective within the initial 30 day review period is solely to determine whether, in respect of a notified transaction, the transaction raises sufficiently serious potential issues that further review by the Bureau is warranted because remedies may be required. Based on statistics indicating that less than 1% of cases have actually required remedies, we submit that many cases that previously would have been classified as "complex" because of some degree of competitive overlap between the parties will not require the issuance of a SIR and should be effectively "cleared" within the initial 30 day statutory waiting period. While we acknowledge that this discretionary triage of cases would require a shift in the Bureau's approach to merger review and internal case management, we submit that the objectives of the new merger review process cannot be accomplished unless such changes are made.

This is not to say, however, that the Bureau should not undertake the necessary steps to understand the relevant issues in all cases and the onus will fall to a large degree on the parties and their counsel to assist the Bureau in doing so. We clearly recognize the importance of early (pre-filing) dialogue with the Bureau, as described in the Draft Guidelines, to assist the Bureau in understanding the issues that may arise in a particular case. To reinforce this point, we suggest that the Draft Guidelines also make clear that the Bureau wishes to continue to receive (as has been the practice) competitive effects submissions along with merger notifications.

2. Use of SIR Power vs. Voluntary Information Requests

Where there is a genuine concern at the end of the initial 30 day review period that the competition issues raised in a particular case may be serious enough to warrant a challenge, we submit that the appropriate course of action in most cases would be for the Bureau to issue a SIR to obtain further information and continue its review. We recognize that allowing the waiting period to expire and issuing a voluntary information request has the appeal (from the point of view the parties) of avoiding a SIR and legally permitting the parties to close, either immediately or after some agreed upon period, and (from the point of view of the Bureau) of assisting the Bureau in achieving its stated commitment to limit the use of the SIR power. We submit, however, that it would be inappropriate for the Bureau to establish a stated practice that would involve issuing voluntary information requests following expiry of the initial 30 day period instead of SIRs in cases where there remains a realistic prospect of a challenge. While this approach could make sense in exceptional cases, we would oppose the routine use of a parallel voluntary process, including (as discussed above) because of the resulting reduction in transparency in the Bureau's review process and the reduced incentive for the Bureau to operate more efficiently, the prospect of the continued use of section 11 orders, and the difficulty the Bureau would likely face in actually undertaking enforcement action where this is warranted.

As a general matter, we do not believe it would be appropriate for the Bureau to develop informal practices as an alternative to using its statutory powers out of concern that it would otherwise be seen to be overusing its formal powers. The Bureau has the right to issue SIRs wherever there is a genuine concern that a transaction raises serious enough competition law concerns to potentially warrant a challenge. We also note (including in response to concerns that may be raised about a lack of resources to deal with an increased number of SIRs) that we do not accept as a general premise the argument that a SIR must necessarily be broader than any voluntary information request that would be issued instead. We can see no legitimate reason why a SIR should not cover the same information as would be sought on a voluntary basis. Furthermore, to the extent the Bureau lacks sufficient resources to effectively fulfil its functions, it should seek additional resources.

3. Pulling and Refiling vs. Agreements to Delay Closing

There will inevitably be cases where the issuance of a SIR is viewed as unnecessary in terms of the delay that would be caused to the parties, for example, where a narrow issue remains to be resolved as the expiry of the initial 30 day period approaches and there is a realistic prospect that the issue could be resolved relatively quickly. In such cases, we understand that the Bureau's preference would be to allow the initial waiting period to expire and deal with the parties on a voluntary basis (with or without an agreement to delay closing) rather than to allow the parties to "pull and refile" in order to effectively extend the initial review period. In our view, neither of these options is a desirable way of addressing the issue, as both options equally demonstrate a "failure" of the system. In our view, it would be unacceptable if either of these practices became part of the routine way of dealing with cases that are not clearly problematic but may raise some issues. It is inevitable, however, that cases will arise where the parties (and/or the Bureau) will want to make use of these options. While some parties (and the Bureau, at least initially) may prefer the voluntary request option, we anticipate that the Bureau will become increasingly reluctant to abandon its statutory rights in cases that it realistically considers may be worthy of a challenge, as is the case in the U.S. We expect, therefore, that pulling and refiling will become an aspect of the process in Canada, and we suggest that the Bureau make provision for this in its Draft Guidelines, including permitting the parties to pull and refile once without the requirement to pay a second filing fee, as is the case in the U.S.

4. Use of Internal Service Standards

It is the policy of the Federal Government that those who pay fees for government services are entitled to fundamental information on the services being provided and any associated service standards. As stated in the Treasury Board of Canada's Policy on Service Standards for External Fees "service standards represent the government's commitment to those who use its services, in a framework of transparency and accountability. This is particularly true when users are charged a fee." The Policy requires the Bureau in respect of matters for which a fee is paid (including notifiable transactions under Part IX of the *Act*) to adopt service standards that are: "measurable; and relevant at the level of the paying stakeholder."

We respectfully submit that the Bureau must now conform its internal service standards relating to merger review with the new statutory waiting periods as these were deliberately designed by Parliament to reflect actual review timeframes. To do otherwise would be wholly inconsistent with the Government's commitment to providing transparency and accountability to Canadian businesses and would undermine the utility of the Treasury Board's Policy as it applies to merger review under the Act.

5. Issuance of no-action Letters

We submit that the Bureau should discontinue the practice of issuing no-action letters in cases where parties have filed a pre-merger notification, as we do not see a need for the parties to receive “affirmative comfort” under the new system. Rather, for the reasons discussed above, parties should generally be entitled to rely on the expiry of the initial statutory waiting period as a clear signal that the Commissioner has determined that a transaction will not be challenged. If the Bureau were to continue issuing no-action letters after the expiry of the initial review period, this would suggest that the expiry of the waiting period is not meaningful in terms of its being a reflection of the Commissioner’s conclusion that a transaction is not worthy of a challenge.

The one circumstance in which it would still be appropriate to issue a no-action letter would be in circumstances where parties have proceeded solely by requesting an ARC and the Commissioner does not feel it is appropriate to issue an ARC but is prepared to issue a no-action letter, together with a waiver of the obligation to notify.

6. Clear Statement of Process

We are hopeful that the Bureau will carefully consider the points made in this letter in developing its internal processes. However, regardless of the positions adopted, in the interest of transparency we urge the Bureau to clearly describe these aspects of its review process in the Draft Guidelines.

C. Conclusion

We would be pleased to discuss any of the issues raised in this letter with you in further detail at your convenience. Again we appreciate being provided with the opportunity to comment on the Draft Guidelines.

Yours very truly,

Osler, Hoskin & Harcourt LLP