Kluwer Competition Law Blog

Fear of Filing: Canada Enforces Compliance with Pre-Merger Notification Rules

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Introduction

The Competition Act, R.S.C. 1985, c. C-34 ("Competition Act") requires that mergers, acquisitions and other business combinations that meet certain prescribed thresholds be notified to the Commissioner of Competition ("Commissioner"), the head of the federal Competition Bureau ("Bureau"), before they can be completed. A notification must be filed by each party to a notifiable transaction and requires the parties to provide basic information and documents regarding the parties, their customers and suppliers, and the transaction. A $50,000 filing fee is also payable.

The notification obligations under the Competition Act are distinct from the substantive merger review provisions. As a result, even if a proposed transaction does not raise substantive issues, it will still be subject to pre-merger notification provided that the applicable thresholds are exceeded.

Parties are prohibited from closing a notifiable transaction until a statutory waiting period that is triggered by notification has expired or, alternatively, has been terminated or waived by the issuance of a clearance letter by the Commissioner. Penalties for closing before expiry, termination or waiver of the waiting period may include significant fines and potential unwinding of the transaction.

Although the penalties for non-compliance with the Competition Act's pre-merger notification regime are severe on paper, they have rarely been applied in practice. In May 2015, however, the Bureau announced that it had resolved allegations that Parrish and Heimbecker, Limited ("P&H") had filed to notify the Bureau of a proposed acquisition on two separate occasions (see http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03948.html). The Bureau joins other enforcement authorities that have also recently taken enforcement steps to ensure compliance with their pre-merger notification regimes.

Brief Summary of Canada's Pre-Merger Notification Regime

The notification obligations under the Competition Act are set out in Part IX of the legislation and apply to the following types of transactions:
• acquisitions of assets;
• acquisitions of shares;
• amalgamations of corporations;

• formations of combinations to carry on business otherwise than through a corporation (for example, partnerships, income trusts and unincorporated joint ventures); and
• acquisitions of interests in combinations.

As a general rule, these types of transactions are subject to notification if:
• the parties to the transaction, together with their affiliates, have either assets in Canada that exceed $400 million in aggregate value, or annual gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value; AND
• the target of the transaction is, or controls, an operating business in Canada with assets in Canada that exceed $86 million in aggregate value, or with annual gross revenues from sales in or from Canada generated by those assets that exceed $86 million in value.

Generally speaking, the relevant asset and gross revenue figures used in the threshold calculations are to be obtained from the most recent audited financial statements of the relevant party. The "size of transaction" threshold referred to above is adjusted annually based on a statutorily prescribed formula.

In certain cases, the notification provisions also require that a minimum ownership threshold be exceeded. In the case of share acquisitions, for example, the purchaser's voting interest in the vendor following the transaction (including interests owned by the purchaser's affiliates) must exceed:
• 20%, where the vendor's shares are publicly traded;
• 35%, where the vendor has no publicly traded shares; and
• 50%, if the relevant threshold is already exceeded before the transaction.

When a transaction is subject to notification under the Competition Act, each party to the transaction must separately submit a notification to the Commissioner (the contents of the notification are set out in the Competition Act's regulations) and are precluded from completing their transaction until the expiry of a statutory waiting period, as follows:
• An initial waiting period of 30 days following submission of the notification by each party unless, before the end of that period, the Commissioner issues a supplementary information request ("SIR") to the parties for production of documents or responses to questions.
• An additional waiting period if a SIR is issued that expires 30 days after compliance with the SIR by both parties.

Penalties for Non-Compliance

Failure to file a notification "without good and sufficient cause" is a criminal offense pursuant to section 65 of the Competition Act. The offence is punishable by a fine of up to $50,000. This penalty may be imposed on the party that failed to submit a notification as well as its officers, directors and agents (whether or not the party itself is charged or convicted). Although the fine is not substantial, the prospect of criminal conviction is obviously of serious consequence.

Interestingly, however, section 65 contains an important qualification in that the Competition Act is only breached if the failure to file is done without "good and sufficient cause". Although this phrase has not yet been considered by the courts, it arguably gives parties a fair bit of leeway to refrain from filing where this decision is based on a good faith assessment by parties and their counsel that a notification is not required. One factor that parties may have to consider in this regard is the willingness of the Bureau's Pre-Merger Notification Unit to provide informal views

on pre-merger notification issues on a very expeditious basis. Could a party claim that it had exercised "good and sufficient cause" not to file if, in adopting this position, it had not consulted with the Bureau on the issue in question? At any rate, this is all quite theoretical as there have not been any prosecutions to date under section 65 of the Act. Indeed, the lack of prosecutions likely reflects the Bureau's own view that convictions under section 65 would be very difficult to secure, except perhaps in the most egregious of cases.

Prior to 2009, section 65 of the Competition Act also made it a criminal offence to complete a transaction before the statutory waiting period had expired. The Competition Act was amended in 2009 to repeal this offence, which was replaced with a civil "reviewable practice" now contained in section 123.1 of the legislation. Pursuant to section 123.1, the Commissioner may apply to a court for relief if of the view that a party, without good and sufficient cause the proof of which lies on that party, has completed or is likely to complete a transaction before the end of the applicable waiting period. Among other things, the Commissioner can ask the court to grant an interim order prohibiting the party from completing the transaction or, if the transaction has already been completed, seek orders requiring:
• dissolution of the transaction or the divestiture of assets or shares;
• payment of an administrative monetary penalty of up to $10,000 a day for each day the party was in violation of the waiting period; and/or
• any other relief considered appropriate.

It is not clear if the failure to file a pre-merger notification in and of itself is a breach of section 123.1 of the Competition Act. one view is that the Bureau's recourse in such situations should be limited to section 65 of the Competition Act and that section 123.1 only applies to situations where a notification has been filed but the party then failed to abide by the applicable waiting period. The contrary view is that if a party fails to file and then completes its proposed transaction, it would be exposed to both criminal proceedings under section 65 (failure to file) and civil proceedings under section 123.1 (failure to abide by the waiting period that ought to have been triggered by the notification that was not made). Again, all of this is theoretical only as there have not been any proceedings yet under section 123.1 either.

The P&H Case

On May 29, 2015, the Bureau announced that it had entered into a settlement with P&H, an agri-business company, after learning that P&H had failed to notify the Competition Bureau of two proposed acquisitions as required by the Competition Act.

According to the Bureau's press release, P&H management immediately reported the situation to the Bureau once they found that P&H had failed to notify the Bureau of the proposed acquisitions. In light of P&H's voluntary reporting and the immediate measures it took, the Bureau was of the view that the matter would be adequately resolved by having P&H adopt a compliance program to ensure it complies with the Competition Act in the future.

Among other things, P&H agreed to:
• ensure that its employees are familiar with all of the relevant provisions of the Competition Act;
• appoint two senior executives as Compliance Officers who will be responsible for the development, implementation and maintenance of the compliance program;
• seek a legal opinion on all proposed transactions exceeding $5 million in value to determine if they are subject to pre-merger notification; and

• inform the Bureau of the progress being made on the implementation of the compliance program.

As can be seen, the Bureau's settlement with P&H is not limited to addressing the specific issue of compliance with the Competition Act's Part IX pre-merger notification requirements. Rather, P&H was required to develop and institute a broad compliance program covering more than the pre-merger notification requirements.

Also of note is the Bureau's requirement that P&H appoint not merely one, but two Compliance Officers with responsibility for the development, implementation and maintenance of the compliance program. The requirement to appoint Compliance Officers is consistent with the Bureau's recently revised Bulletin on Corporate Compliance Programs, which was released in June 2015 (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf). According to this Bulletin, it is desirable for companies to assign responsibility for competition compliance programs to a specifically designated executive who will have:
• high visibility in the organization through an appropriate title, such as "Compliance Officer";
• independence, professionalism, and the authority to implement and enforce a credible and effective program across the company;
• the necessary financial and human resources relative to the company's risk profile; and
• the opportunity to participate in senior management decision making and to develop a solid understanding of what is taking place within the business itself, the industry in which it operates and an ability to properly assess the potential non-compliance risks to the business.

In the Bureau's view, having a Compliance Officer (or apparently more than one such officer) is a necessary element for demonstrating strong management support for competition compliance, and to ensure that a company's compliance policy will be implemented in an effective and credible manner. The Bureau no doubt regarded the P&H case as an excellent opportunity to drive this message home**.**

Conclusion

Even though the Bureau did not opt for criminal prosecution, the P&H case demonstrates that parties must take their obligations under the Competition Act's pre-merger notification requirements seriously. In that regard, the Bureau is showing the same seriousness of purpose as have other competition enforcement agencies recently. For example, the U.S. Federal Trade Commission has recently settled cases with investment funds that allegedly were mistaken in relying on what they believed was an applicable exemption from the pre-merger notification obligations under the U.S. Hart-Scott-Rodino Act.

As a result, parties contemplating merger transactions in Canada must be diligent in ensuring that they have done the appropriate pre-merger notification analysis, including obtaining advice when the analysis involves a more complicated exercise than simply reading a few numbers on a balance sheet.

Originally published in 13 October 2015 • Competition Law Insight

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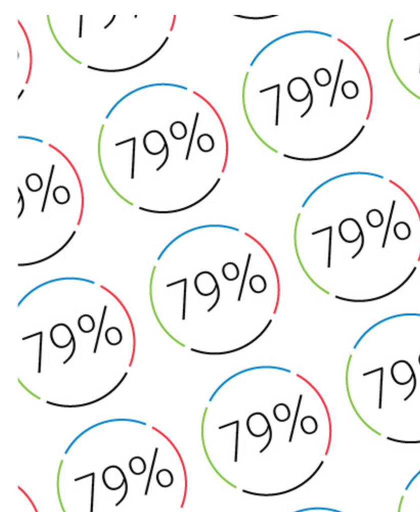

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This entry was posted on Wednesday, December 30th, 2015 at 7:39 pm and is filed under Canada, Source: OECD

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