Kluwer Competition Law Blog

RECENT DEVELOPMENTS IN CANADIAN MERGER REVIEW: NEW COMMISSIONER MEANS NEW ENFORCEMENT AGENDA

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, July 26th, 2019

RECENT DEVELOPMENTS IN CANADIAN MERGER REVIEW: NEW COMMISSIONER MEANS NEW ENFORCEMENT AGENDA

Anita Banicevic, Charles Tingley, Mark Katz

In March 2019, Matthew Boswell was appointed to head the Canadian Competition Bureau ("Bureau") as the country's newest Commissioner of Competition ("Commissioner"). In that capacity, Mr. Boswell is responsible for the enforcement and administration of Canada's *Competition Act* (Act"), including its merger review process.

Mr. Boswell launched his 5-year term as Commissioner by promising to take a more aggressive enforcement stance, including by making greater use of already-existing powers and tools under the Act. Although Mr. Boswell has only been in office for some four months, we are already seeing signs of his pledge being transformed into reality in the merger enforcement area. Two recent developments stand out in particular:

(1) the Bureau's more aggressive pursuit of "below the threshold" transactions (i.e., transactions that do not exceed the Act's pre-merger notification thresholds); and

(2) the announcement of proposals to make it much more difficult for merging parties to have the Bureau evaluate claims that their transactions ought to be saved under the Act's "efficiencies defence".

Each of these developments is discussed below.

1. "Below the Threshold Transactions": Not Flying Below the Radar Screen

As in the United States, the Commissioner is entitled to review and challenge allegedly anti-competitive transactions even if they do not exceed the applicable notification thresholds and do not require pre-merger filings and approval. The one limitation is that the Commissioner only has up until one year following closing to investigate and challenge a "below the threshold" transaction.

The Commissioner has not hesitated to use this authority in the past. Indeed, of the very few contested merger cases that have reached Canada's Supreme Court for ultimate adjudication, two

involved transactions that did not have to be notified to the Competition Bureau initially.

That said, Commissioner Boswell has now upped the ante by making it a central plank of his new enforcement agenda to pursue anti-competitive transactions that are not notifiable. He announced the formation of a new "Merger Intelligence Unit" to search out unreported mergers that may raise competition issues in Canada, and recently followed through by filing an application with the Canadian Competition Tribunal challenging the acquisition of a Canadian software company that services the oil and gas industry. The Commissioner's application was brought post-closing, the acquisition having been completed in May 2019. It is also now a matter of public record that the Bureau is investigating another non-notifiable transaction, this one in the event planning industry.

IMPLICATIONS

The Commissioner's focus on "below the threshold" transactions highlights the need for merging parties in Canada to evaluate if their proposed transactions may have anticompetitive effects, regardless of whether the transaction is subject to mandatory pre-merger notification, and even if it only implicates small or niche markets (transactions involving the acquisition of high-tech companies may be particularly vulnerable). If potential competition issues are identified, parties must then make the difficult choice of either pro-actively engaging with the Competition Bureau before implementation, or adopting the alternative strategy of "keeping their heads down" and hoping for the best. Either way, it is imperative that parties do the necessary work up front, including having a frank discussion of the likelihood of market complaints, and at the very least be prepared to address any issues that may be raised by the authorities, before or after closing.

2. The Bureau Targets the "Efficiencies Defence" – Again

One of the more unique aspects of the Canadian merger review regime is that it expressly allows parties to claim that no remedy may be imposed in respect of an otherwise anticompetitive merger if the "efficiencies" arising from the merger outweigh the alleged anticompetitive harm.

In recent years, the Bureau has repeatedly voiced its displeasure with this "efficiencies defence". That is likely because it has landed up on the losing side the very few times that the defence has been invoked in contested merger proceedings. One of the Bureau's complaints is that recent jurisprudence of the Supreme Court of Canada imposes a significant practical and evidentiary burden on it to quantify the anticompetitive effects that it argues outweigh any claimed efficiencies by the merging parties.

Legitimate questions can be asked about why the Bureau is so focussed on neutering the efficiencies defence when it comes up (as a serious matter) in so few transactions. Be that as it may, it is clear that Commissioner Boswell has no intention of abandoning the Bureau's negative campaign. Just this month, the Bureau released a draft model for "timing agreements" that it parties will be required to sign if they wish to raise efficiencies claims. Although the draft remains subject to comment and possible amendment, it sends a clear message that the Bureau's preferred position is to make it difficult for parties to rely on the efficiencies defence. Among other things, the Bureau's draft contemplates that parties will have to:

(i) effectively decide whether to pursue the efficiencies defence at an early stage of the Bureau's review process (and before the parties even know whether the Bureau will be asserting that the merger will result in anticompetitive effects);

(ii) respond to extensive information requests and subject their transaction to a much longer review;

(iii) identify employees who will be subject to oral interviews under oath in respect of the claimed efficiencies (it traditionally has been very unusual for the Bureau to depose witnesses as part of its merger reviews); and

(iv) agree not to close without providing at least 30 days' notice to the Bureau.

IMPLICATIONS

As currently proposed, the Bureau's draft timing agreement would impose significant procedural hurdles and delays for parties wishing to raise efficiencies claims. Although the Bureau may argue that it is doing no more than ensuring its ability to thoroughly test the parties' claims, the practical impact (and possibly intended effect) is to discourage parties from making efficiencies claims in the first place. However, the Bureau may find itself instead falling victim to the law of unintended consequences. Rather than subject themselves to the Bureau's one-sided process, merging parties may simply elect to close their transactions after the statutory waiting period expires, thereby challenging the Bureau to bring them before the Competition Tribunal (and appellate courts) to test any efficiencies claims. With an expedited hearing process now available for Competition Tribunal hearings, the prospect of a contested hearing may, in fact, be more palatable to merging parties than an extended Bureau review that only serves to delay the inevitable.

This entry was posted on Friday, July 26th, 2019 at 1:43 am and is filed under Canada, Merger control
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.