

September, 2019

Merger Review:

Increased Competition Bureau Monitoring

In a series of speeches, announcements and through enforcement, the Competition Bureau has put businesses and their advisors on notice that the expanded “Merger Intelligence and Notification Unit” (“MINU”) has broadened its intelligence-gathering activities to identify mergers that are likely to raise substantive competition concerns. The increased monitoring will include a focus on “non-notifiable” mergers, those of smaller businesses in which certain financial thresholds are not triggered and for which the parties are not required to provide pre-merger notification to the Competition Bureau. This increased monitoring activity is accompanied by increased enforcement activity by the Bureau.

Pre-Merger Notification Thresholds

The *Competition Act* (the “Act”) provides that parties to a merger are required to provide pre-merger notification to the Competition Bureau where two financial thresholds are met: where the combined assets or revenues of the parties and their respective affiliates, in, from or into Canada, exceed \$400 million; and where the acquired business’ assets in Canada or revenues from sales in or from Canada generated from those assets exceed \$96 million. The “size of the target” threshold is revised annually.¹ Since

¹ The pre-merger notification requirements are set out in Part IX of the Act, available at: <https://laws.justice.gc.ca/eng/acts/C-34/page-28.html#h-90061>. The 2019 “size of the target” threshold was announced in the Competition Bureau’s press release, January 31, 2019, at <https://www.canada.ca/en/competition-bureau/news/2019/01/2019-pre-merger-notification-transaction-size-threshold.html>

the thresholds are so high, only mergers of large businesses are subject to the pre-notification requirement. However, the Act's merger prohibition applies to mergers that prevent or lessen competition substantially in a relevant market, or are likely to do so, regardless of the size of the parties to the transaction or of the business being acquired.² For this reason, it is important that all businesses consider the competitive effects of their transactions, as well as the financial thresholds for pre-merger notification.

Competition Bureau Enforcement, Speeches and Announcements

While many Competition Bureau enforcement activities take place without publicity, reported cases help to illustrate its priorities. During 2011- 2015, the Bureau challenged a non-notifiable merger involving two British Columbia landfill operations,³ which attracted attention for three reasons: the merger was non-notifiable; the basis for the challenge was that the merger was likely to prevent competition in the relevant market; and the s. 96 efficiency exception was argued as a defense. With respect to the notification requirement, the transaction was valued at only \$6 million, significantly below the pre-notification threshold. The fact that the Bureau committed investigative and enforcement resources to this case helped to send the message that parties to smaller transactions do need to consider substantive competition issues.

Since that time, the Bureau has used the opportunity of speeches and presentations to remind businesses and their advisors that any substantial prevention or lessening of competition in a relevant market will be of concern, regardless of the size of the parties and the transaction.

This year, in his speech to the Canadian Bar Association's Competition Law Section spring meeting, the Commissioner of Competition announced the Bureau's increased focus on identifying non-notifiable mergers that have the potential to raise competition

² Specifically, s. 92 provides that, following an application by the Competition Bureau, the Competition Tribunal may issue prohibition, divestiture or other types of orders relating to proposed mergers or completed mergers, where the Tribunal determines that the required effect on competition has occurred or is likely to occur: <https://laws.justice.gc.ca/eng/acts/C-34/page-25.html#h-89782>

³ Commissioner of Competition v. CCS Corporation [subsequently, Tervita Corporation] *et al.*, Notice of Application filed January 24, 2011. Documents posted on the Competition Tribunal site at: <https://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=336>. The Supreme Court of Canada decision was issued in January 2015: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do>

law concerns. Matthew Boswell stated that the mandate of a recently expanded MINU, would include a broader focus on intelligence gathering, since the “notification provisions allow detection of most, but not all, potentially anti-competitive transactions”. He noted that the unit had already captured “two potentially problematic transactions.”⁴

On June 14, 2019, the Bureau filed an application with the Competition Tribunal to challenge a transaction that was non-notifiable and had closed on May 13, 2019, the acquisition of Aucerna by Thoma Bravo LLC. The purchaser was a U.S.- based private equity firm that already owned Quorum. Together Aucerna and Quorum were the two largest suppliers of specialized software used by businesses that manage oil and gas reserves. The Bureau has applied to the Competition Tribunal for an order requiring the divestiture of assets related to one of those businesses, to ensure that competition in that relevant market would not be lessened substantially. The application was filed on June 14, 2019. In July, the Bureau and Bravo entered into a consent agreement, under which Bravo would “hold separate” the assets of the two businesses. Following further negotiations with the Bureau, on August 20, 2019, Bravo agreed to divest its MOSAIC reserves software, to address the Competition Bureau’s concerns that the merger was likely to substantially lessen competition in the relevant market. The divestiture will take place under the direction of a monitor appointed by the Commissioner, either by Thoma Bravo directly during an initial sale period, or after that date by a divestiture trustee.⁵ In an August 30, 2019 statement about its review of the transaction, the Bureau described its conclusions with respect to the relevant market, its competitive analysis of the merger and its likely effects, and barriers to entry.⁶ The statement and the Bureau’s enforcement action provide an example that can be used by businesses as they consider the possible competitive effects of their own transactions.

⁴ Commissioner of Competition Speech, “No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age” May 7, 2019 to the CBA Competition Law Spring conference, posted at: <https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html>

⁵ The Bureau’s Notice of Application and public versions of the two consent agreements are posted on the Competition Tribunal site at: <https://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=440>

⁶ Competition Bureau statement regarding Thoma Bravo’s acquisition of Aucerna, August 30, 2019, posted at: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04493.html>

Most recently, on September 17, 2019, the Competition Bureau issued a news release, “Competition Bureau enhances information-gathering efforts on non-notifiable mergers”,⁷ announcing the name change of the former Merger Notification Unit, and emphasizing the fact that the *Competition Act* authorizes the Bureau to review mergers “of all sizes and in all sectors of the economy,” and that s. 97 of the Act enables it to challenge a merger that is likely to substantially lessen or prevent competition, before the Competition Tribunal, for up to one year following the completion of the merger. In this notice, the Bureau repeated its advice that parties should raise any potential concerns on a voluntary basis and provide information about proposed transactions to the Bureau voluntarily, and at an early stage, to avoid a post-closing review or enforcement action.

Businesses and their advisors should take notice of these examples and announcements relating to the Competition Bureau’s increased monitoring and enforcement activity, and be sure to take the time necessary to consider the potential anti-competitive effects of mergers, regardless of the size of the parties and the business to be acquired.

If you have questions about mergers, or any other competition law matters, contact Carol Anne O’Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O’Brien’s law practice is focused on regulatory matters including competition law, communications law (broadcasting and telecommunications), advertising and marketing, Internet domain names and privacy.

⁷ Competition Bureau, Sept. 17, 2019 at: <https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-enhances-information-gathering-efforts-on-non-notifiable-mergers.html>.