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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Canada --

25 February 2014

This note is submitted by Canada to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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− Canada −

1. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee Working Party No. 3 roundtable on the "Investigation of Consummated and Non-notifiable Mergers". The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act") [1] and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian consumers and businesses prosper in a competitive and innovative marketplace.

2. The Act is a federal law governing most business conduct in Canada. It includes both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace, including civil provisions relating to the review of mergers. These merger provisions permit the Bureau to review virtually all mergers to determine whether they will likely result in a substantial lessening or prevention of competition and require parties to large transactions to notify the Bureau prior to completion. The Mergers Branch is responsible for conducting merger review in Canada.

3. If the Bureau concludes that a completed or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Commissioner can apply to the Competition Tribunal (the "Tribunal") for a remedy. The Tribunal is a specialized tribunal composed of judges and lay members that has jurisdiction to hear and dispose of all applications made by the Commissioner under the civil provisions of the Act.

1. Overview of pre-merger notification

4. Subject to certain exceptions, if a proposed transaction exceeds certain prescribed thresholds and includes an operating business,[2] it is subject to mandatory pre-merger notification under the Act and cannot be completed until the expiry of a statutory waiting period. In particular, notifiable transactions are subject to an initial 30-day waiting period during which the proposed transaction cannot be completed. If, during this initial waiting period, the Commissioner issues a supplementary information request ("SIR"), the proposed transaction cannot be completed until the expiry of a second 30-day waiting period that commences when the Commissioner has received a complete SIR response from each recipient of a SIR. The Commissioner may terminate or waive the waiting period at any time.

5. Notification of a proposed transaction is required where *both* "size-of-parties" and "size-of-transaction" thresholds are exceeded. The size-of-parties threshold is exceeded where the parties to the transaction, together with their affiliates, have combined assets in Canada or annual gross revenues from sales in, from or into Canada in excess of C$400 million. The size-of-transaction threshold is exceeded where the target's Canadian assets (or the assets in Canada being acquired) or the annual gross revenues from sales in or from Canada generated by those assets exceed C$82 million.[3]

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1 R.S.C. 1985, c. C-34.

2 The term "operating business" is defined in subsection 108(1) of the Act to mean "a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work". See also *Pre-Merger Notification Interpretation Guideline Number 1: Definition of "operating business" (Section 108 of the Act)*, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03358.html.

3 The pre-merger notification provisions apply to five types of transactions, namely: an acquisition of assets; an acquisition of voting shares; an amalgamation; a combination; and an acquisition of an interest in a

6. In the case of an acquisition of shares, the proposed transaction must also result in the acquirer holding a minimum percentage of voting shares of the target. In the case of public corporations, this threshold is more than 20% (or more than 50% if more than 20% of the voting shares are already owned) and, in the case of private corporations, this threshold is more than 35% (or more than 50% if more than 35% of the voting shares are already owned).

7. There are no special notification thresholds or exemptions from pre-merger notification requirements for any specific industry sector. However, there are several general exemptions from the pre-merger notification requirements of the Act, including the following: (i) a transaction where all of the parties are affiliates of each other; (ii) a transaction that the Minister of Finance has certified under the Act to be in the public interest; (iii) a transaction that has received an advance ruling certificate ("ARC") under section 102 of the Act;[4] and (iv) a transaction in respect of which the Commissioner has waived the obligation to notify under paragraph 113(c) of the Act.[5]

2. Review of mergers falling below notification thresholds

8. The Act grants the Commissioner jurisdiction to review and challenge mergers of all sizes and in all sectors of the economy, even if they fall below notification thresholds. This authority has been clearly and strongly signalled twice over the last few years. In January 2011, the Commissioner filed an application with the Tribunal in respect of a non-notifiable and already consummated merger involving secure landfills (the "Landfills Merger"). Five months later, the Commissioner filed another application with the Tribunal, this time in respect of a non-notifiable proposed joint venture between two airline companies on Canada-US transborder routes (the "Airlines JV"). For more information on these two cases, please see Appendix A.

9. While the Commissioner has the ability to review virtually any merger, amendments to the Act passed in March 2009 reduced the amount of time the Commissioner has to challenge a transaction after it has been substantially completed from three years to one year.[6] Given this relatively short limitation period, parties to a non-notifiable transaction may be more likely to engage in strategic behaviour to avoid detection than was historically the case.

2.1 Detection of non-notifiable transactions

10. Non-notifiable transactions that the Bureau may wish to review are detected mainly through complaints from market stakeholders (e.g. customers, suppliers and competitors) or market monitoring using media sources and mergers and acquisitions databases. Additionally, it is not uncommon for parties

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combination. For further information on these types of transactions, see Canada's OECD submission for the roundtable of June 18, 2013 regarding the "Definition of Transaction for the Purpose of Merger Control Review".

4 The Act provides that in lieu of a pre-merger notification filing, the parties may submit a request for an ARC. Where an ARC is issued, the parties are exempt from any further notification requirements as long as the transaction is completed within one year of the issuance of the ARC. Where an ARC is not issued, a notification filing is required unless the Commissioner waives this requirement on the basis that the ARC request supplied substantially similar information to that required in a notification filing.

5 In addition, certain specific exemptions in respect of acquisitions of voting shares, assets or interests are included in the Act. For more information on these exemptions, see the *Notifiable Transaction Regulations,* SOR/87 348, as well as the Pre-Merger Notification Interpretation Guidelines (http://laws-lois.justice.gc.ca/eng/regulations/SOR-87-348/ and www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03357.html, respectively).

6 *Supra* note 1 at s. 97.

themselves to seek written confirmation that the Commissioner will take no action with respect to an upcoming transaction by submitting an ARC request, even if the proposed transaction is not notifiable.

2.2 Preventing closing of non-notifiable transactions

11. Since these mergers are not subject to the pre-merger notification provisions of the Act, they are exempt from the initial 30-day waiting period discussed above. As such, these mergers may legally close at any time. If the parties in question have voluntarily provided the Bureau with an ARC request, they are more likely to co-operate with the Bureau to allow a sufficient period of time for the Bureau to undertake an analysis of the impact of the proposed transaction. If that is not the case, the Bureau may need to pursue other avenues to preserve a potential remedy.

12. If the parties to a non-notifiable merger wish to close their transaction before the Bureau substantially completes its analysis, the Bureau may enter into a timing agreement with the parties or, more rarely, a preservation agreement or hold separate agreement. Timing agreements can include a variety of commitments, such as providing the Bureau with the information necessary to continue its review and/or advance written notice of closing the proposed transaction.[7] Preservation agreements generally include commitments by the acquirer to preserve certain assets, allowing the transaction to close while maintaining the integrity and viability of assets for potential divestitures or other remedies. Hold separate agreements ensure that the acquirer keeps assets that could be the subject of a Tribunal order at arms' length, reducing the likelihood of asset deterioration and avoiding, at least to some extent, the problem of "unscrambling the eggs" if the merger has to be restructured at a later date.[8]

13. The Bureau may also seek an interim order from the Tribunal forbidding parties from implementing or completing a proposed merger where a formal application by the Commissioner (regarding a substantial lessening or prevention of competition) has yet to be made. In this case, the Tribunal must find that, in the absence of such an order, a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed transaction on competition because the implementation or completion would be difficult to reverse.[9]

2.3 Gathering information

14. Information to complete the review of a non-notifiable merger may be obtained through voluntary information requests and/or an application by the Commissioner to a superior or county court judge for an order requiring a person to attend an oral examination, produce records or provide written returns.[10] Unlike in the case of notifiable mergers, the means of compelling the production of relevant information from the merging parties through the issuance of SIRs is not available for the review of non-notifiable merger transactions.

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7 *Merger Review Process Guidelines*, Section 4, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html.

8 The primary purpose of hold-separate provisions is to preserve the Bureau's ability to achieve an effective remedy pending its implementation. However, the Bureau will not normally agree to hold separate agreements prior to the completion of the merger investigation. For more information about the circumstances in which the Bureau may use hold separate or preservation provisions, see the *Information Bulletin on Merger Remedies in Canada*, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/02170.html.

9 *Supra* note 1 at s. 100.

10 *Id.* at s. 11.

2.4 Remedies available

15. If the Commissioner determines that a non-notifiable merger prevents or lessens, or is likely to prevent or lessen, competition substantially in one or more relevant markets, the Commissioner may avail himself of the full range of available remedies to find the most appropriate one.[11] For example, in the Landfills Merger referred to above, the Commissioner applied to the Tribunal for an order dissolving the transaction or, alternatively, requiring the divestiture of landfill assets. The Tribunal granted the Commissioner's application and ordered the acquiring party to divest certain landfill assets. This decision was upheld by the Federal Court of Appeal and subsequently appealed to the Supreme Court of Canada, which will hear the appeal in March 2014.

16. Similarly, in the Airlines JV referred to above, the Commissioner filed an application under the merger provisions of the Act for an order prohibiting the implementation of a proposed joint venture between two airlines on 19 Canada-US transborder routes, and an application under another civil provision of the Act to unwind three coordination agreements between the same two airlines. Sixteen months later, the Commissioner and the airlines agreed to file a Consent Agreement with the Tribunal, which prohibited the implementation of the joint venture and the three coordination agreements on 14 transborder routes.

3. Review of mergers that should have been notified but were not

17. The Act includes criminal and civil sanctions for completing a notifiable transaction without submitting a notification, or for completing a notifiable transaction prior to the expiry of the applicable 30-day waiting period.

18. It is an offence to complete a notifiable transaction without submitting a notification (or receiving a waiver from the Bureau of the obligation to notify) pursuant to the Act. Those found guilty may face fines up to $50,000.[12]

19. Where parties complete or are likely to complete a notifiable transaction before the expiry of the applicable waiting period (i.e. the initial or subsequent 30-day period),[13] the Commissioner may apply to a court for a remedy under the Act, including, among other things, an interim prohibition order, a dissolution or divestiture order, or administrative monetary penalties.[14]

20. These possible sanctions appear to be effective in ensuring compliance, as, in the Bureau's experience, the failure to notify is rare and in most instances inadvertent. As such, parties in this position tend to co-operate with the Bureau to complete the review as efficiently as possible.[15]

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11 See the *Information Bulletin on Merger Remedies in Canada* for more information about available merger remedies, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/02170.html.

12 *Supra* note 1 at s. 65(2).

13 In cases where a transaction is already completed, the Bureau does not formally assign a 30-day waiting period.

14 *Supra* note 1 at s. 123.1.

15 The Commissioner cannot issue an ARC for a transaction that has been completed. A No-Action Letter may be issued, indicating that the Commissioner does not, at that time, intend to make an application to the Tribunal with respect to the proposed transaction. See the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the* Competition Act, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html.

21. As with non-notifiable mergers, the Commissioner may seek information to complete the review through voluntary measures or formal requests sought through a court,[16] and has access to the full range of available remedies. However, if a transaction is already completed, the effectiveness of certain remedies may be compromised if assets have deteriorated, operations have been combined or confidential information has been shared.

4. Conclusion

22. The Bureau has the ability to investigate and challenge proposed and completed mergers which are non-notifiable and mergers that should have been notified but were not. Given that the Bureau now only has one year to challenge mergers after they have been substantially completed, the main challenges with respect to non-notifiable mergers are timely detection and the ability to obtain an effective remedy where the transaction has already closed. As a result, the Bureau maintains communication with market stakeholders to detect any transactions it may wish to review. Where issues are identified, the Bureau will take appropriate action in a timely and responsive manner.

16 Supra note 1 at ss. 11 and 123.1(a).

Appendix A

Landfills Merger – *The Commissioner of Competition v. CCS Corporation*[17]

In January 2011, CCS Corporation ("CCS", now known as Tervita Corporation) acquired Complete Environmental Inc. ("Complete"), and the permit Complete had obtained to operate a secure landfill facility in North-Eastern British Columbia (the "Babkirk Site"). CCS already owned the only other two operational secure landfills in the province. A competitor of CCS brought this transaction to the Bureau's attention since it fell below the size-of-transaction threshold and, as such, was non-notifiable.

Prior to the closing of the transaction, the parties were made aware of the Commissioner's conclusions with respect to the anti-competitive nature of the merger. The Commissioner also obtained a written undertaking from CCS stating that it would preserve Complete's assets, including the permits related to the Babkirk Site and other documentation necessary for the eventual operation of the landfill. Since the permits constituted an important portion of the acquired assets[18] and the associated landfill was not yet constructed or operational, a preservation agreement maintained the integrity of both the asset and any future structural remedy.

On January 24, 2011, the Commissioner applied to the Tribunal for an order dissolving the transaction or, alternatively, requiring the divestiture of landfill assets. The Tribunal subsequently found that the acquisition led to a substantial prevention of competition and, on May 29, 2012, ordered the divestiture of the land and permits associated with the proposed landfill. The Federal Court of Appeal upheld this decision; however, it has been appealed to the Supreme Court of Canada, which will hear the appeal in March 2014.

Airlines JV – *The Commissioner of Competition) v. Air Canada*[19]

In October 2010, Air Canada and United Continental Holdings announced their intention to enter into a joint venture that would have resulted in a merger of their operations on transborder routes between Canada and the United States. Specifically, the parties' proposed joint venture would have involved cooperation on pricing, capacity setting (route planning), frequent-flyer programs and sales, as well as revenue and cost-sharing. Although the transaction was not notifiable, the Bureau commenced a review in November 2010.

In addition to reviewing the joint venture, the Bureau also analyzed three existing "coordination agreements" between Air Canada and United Continental. These agreements allowed the parties to coordinate on important aspects of competition, including, but not limited to, joint pricing and scheduling, as well as revenue sharing.

As a result of its review, the Bureau concluded that the joint venture would lead to a monopoly on ten transborder routes, and substantially reduce competition on nine others, leading to increased prices and reduced consumer choice. On this basis, the Bureau filed an application with the Tribunal in June 2011.

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[17] *Commissioner of Competition) v. CCS Corporation* CT-2011-002, Reasons for Order and Order (May 29, 2012), available online at www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf, aff'd *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28 (CanLII).

[18] CCS also acquired Complete's operating businesses, including the ownership of a roll-off bin rental business and the operation of a transfer station. Neither of these businesses pertained to the hazardous waste deposited in secure landfills.

[19] *The Commissioner of Competition v. Air Canada,* CT-2012-01, Consent Agreement (October 24, 2012), available online at www.ct-tc.gc.ca/CMFiles/CT-2012-001_Consent%20Agreement_2_45_10-24-2012_7871.pdf.

In addition to challenging the proposed joint venture under the merger provisions of the Act, the Bureau also sought to unwind the three coordination agreements. This is particularly notable, as it was the Bureau's first challenge under section 90.1 of the Act, which allows the Commissioner to challenge anti-competitive agreements – whether existing or proposed – between competitors that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market.

In October 2012, a Consent Agreement was reached, pursuant to which the parties are prohibited from implementing their joint venture agreement or coordinating via existing coordination agreements on 14 high-demand transborder routes. The Consent Agreement will remain in force for as long as the existing agreements or the joint venture remain intact. In the event there is a substantial change to competition on any of the 14 routes, the Consent Agreement provides that specific prohibitions can be suspended or reinstated.