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mcmillan competition bulletin

the erosion of confidentiality safeguards in Canada's merger control regime

On March 9, 2012, the Commissioner of Competition made public the first of what will be monthly entries on a Competition Bureau "merger register" of concluded Canadian merger reviews.[1] The register is, according to the Bureau, intended to provide information on all merger reviews completed in the prior month in which the parties either submitted mandatory pre-merger notification filings or applied for an Advance Ruling Certificate. Specifically, the register identifies the parties to the proposed merger, the relevant industry within which the transaction occurred and the outcome of the Bureau's review. This information has typically not previously been made public by the Bureau, and parties to the Canadian merger review process now need to be aware that this information will be disclosed at the conclusion of the Bureau's review. Such disclosure amounts to a significant and in our view inappropriate erosion of the statutory protections afforded by the *Competition Act* (the "*Act*").

[1] Available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02435.html.

the issue

Bureau officials have defended the merger registry as an anodyne initiative to improve transparency. However, the initiative is problematic for a number of reasons, notably:

- The registry entries are extremely low-yield in terms of the substantive information they offer. By simply identifying the parties and the outcomes, the merger registry sheds no light on the Bureau's decision-making process – the very thing of value to business people and their legal advisors. Moreover, far more detailed statistics are already set out in the Bureau's annual report to the Minister of Industry, albeit in an appropriately anonymized and aggregated fashion; and
- The disclosure of merging parties' identities can create significant strategic issues, particularly in circumstances involving multiple jurisdictions with live timing concerns or in cases involving hostile or multiple bidder transactions.

The initiative appears grounded in the Commissioner's broad, we argue excessively broad, interpretation of the scope of permitted disclosure under the *Act*. It may also serve as a foundation for additional erosions of the *Act's* confidentiality protections. Moreover, in an era of otherwise converging merger control practices among major antitrust agencies, the Bureau has adopted a less robust approach to the protection of confidential transaction information than that of the leading authorities in Europe and the United States.[2]

[2] See e.g. section 7A(h) of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*. The Antitrust Division of the U.S. Department of Justice takes the position that this confidentiality constraint "appl[ies] not only to HSR information contained in HSR filings, second request responses and information provided voluntarily by the merger parties during an HSR investigation, but also to the fact that an HSR filing has been made, the fact that a second request has been issued, and the date the waiting period expires." Similarly, the U.S. Federal Trade Commission announced that it would only publicly acknowledge the existence of a merger investigation "where a party to the transaction ha[d] disclosed its existence in a press release or other public filing."

the scope of permitted disclosure

The protection of confidential transaction information is a central tenet of the merger control process in most major jurisdictions. It has, until now, been a hallmark of the Canadian Competition Bureau's approach as well. Governed specifically by section 29 and framed by section 10(3) of the *Act*, the Canadian legislative framework explicitly prohibits direct or indirect communication by those involved in the administration or enforcement of the *Act* of:

- the identity of any person from whom information was obtained pursuant to the Act;
- any information obtained through the pre-merger notification process;
- any information obtained through the Advance Ruling Certificate process; and
- any information provided voluntarily pursuant to the Act — as merging parties routinely do in their introductory discussions with the Bureau.

These prohibitions are subject to two limited statutory exceptions. Such information may be disclosed: (i) to a Canadian law enforcement agency; and (ii) for the purposes of the administration or enforcement of the *Act*.

At first glance, section 29 appears to provide a straightforward and appropriate carve out to the otherwise broadly worded statutory protection for confidential information. In fact, the Commissioner has made considerable efforts to express the Bureau's respect for the protection of confidential transaction information in both the case law and its enforcement bulletins.[3]

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[3] See *e.g.* the testimony from Ann Salvatore, Assistant Deputy Commissioner of Competition, in *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2011 ONSC 3387, in which she asserted that the maintenance of confidentiality is important because the Bureau's ability to access the information that it requires to enforce the Act depends on its ability to provide an assurance of confidentiality to the party producing the subject information. See also the assurances in the Bureau's *Information Bulletin on The Communication of Confidential Information under the Competition Act* (Gatineau, QC.: Competition Bureau, 2007), such as, "maintaining confidentiality is fundamental to the Bureau's ability to pursue its responsibilities under the law," (at para. 1.3) and

However, it is very difficult to understand how merger registry information, released after the Bureau has completed its review of a transaction, can be understood to be for the purposes of the administration or enforcement of the *Act* since, in respect of completed merger reviews, the *Act* has been "administered" and "enforced". This new initiative suggests that, in the Commissioner's view, virtually any Bureau action could fall under the "administration or enforcement of the *Act* " rubric, thereby bypassing the protection of confidential information afforded to merging parties under the *Act*.

The impact of this interpretation of this section 29 exception has to-date largely been limited to the practice of disclosing confidential deal information to foreign antitrust authorities without asking the merging parties for a waiver to do so (itself an accepted and common practice in other major jurisdictions). While occasionally problematic from a business perspective, and arguably improper from a statutory interpretation standpoint – particularly given the comprehensive scheme governing cooperation with foreign jurisdictions set out in Part III of the *Act* – this practice is less egregious than the public release of information concerning concluded merger reviews. It is also more defensible as, at the very least, the Bureau's merger review is still ongoing at the time such disclosure is made, so it may be relevant to the Bureau's ongoing review of a transaction and therefore logically connected to the "administration or enforcement of the *Act*". Information about a merger issued after the review of the transaction is complete cannot be relevant to the Bureau's work in respect of the transaction.

"the general policy of the Bureau is one of minimizing the extent to which confidential information is communicated to other parties" (at para. 1.4).

concluding observations

While the monthly disclosure of information about concluded merger reviews is not expected to present serious problems for a majority of transactions, the erosion of the legislative protection of confidential deal information is a problematic development in Bureau policy. While efforts to improve transparency in the merger review process are welcomed, it is unclear how this initiative will advance that goal in any meaningful way. In any event, parties to prospective mergers (in particular, parties to an international transaction with a Canadian connection) must now be aware that pertinent transaction information will be made available to the general public at the conclusion of the Bureau's review in Canada and, through the wonder of the internet, worldwide.

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a cautionary note