MERGER CONTROL IN TIMES OF CRISIS
North and Central American Webinar
Wednesday, November 18, 2020

A. INTRODUCTION

Overview

On Wednesday, November 18, 2020, as part of the ICN Merger Working Group regional webinar series, an hour-long panel discussion was held for North American antitrust agencies on the topic of Merger Control in Times of Crisis. The Canadian Competition Bureau ("*CCB*") hosted with three panelists attending, one each from the "*CCB*", US Federal Trade Commission ("*US FTC*") and US Department of Justice, Antitrust Division ("*US DOJ*"). This report provides a summary of the webinar, which followed a Q&A style.

Participants

Moderator:
Ms. Tiara Kerr, Competition Law Officer, Canadian Competition Bureau ("CCB")

Panelists and Topics of Focus:
Mr. Bashiri Wilson, Trial Attorney, US DOJ: Practical Aspects of Merger Review
Mr. Sangwon Lee, Major Case Director, CCB: Failing Firm Defense
Ms. Maribeth Petrizzi, Assistant Director for Compliance, US FTC: Remedies

Any views or opinions of the panelists are their own and not the views of the competition authorities that are being discussed on today's panel.

B. TOPIC-SPECIFIC QUESTIONS AND ANSWERS:

<u>TOPIC 1: Practical Aspects of Merger Review (Mr. Bashiri Wilson, US DOJ)</u>

Q: Can you give an overview of the efforts that the US DOJ undertook in response to the COVID- 19 pandemic regarding daily work of your staff and third parties you deal with?

- Mr. Wilson explained how, in response to the COVID-19 pandemic, the US DOJ, Antitrust Division moved to telework to the maximum extent possible in their Washington, DC, New York, San Francisco and Chicago offices.
- Regarding third parties, all meetings moved quickly to being via teleconference or video absent extenuating circumstances. Depositions also began taking place via video.

Q: Have there been any changes to policies or procedures specific to merger review at the US DOJ in response to COVID-19?

- The US DOJ and the US FTC are only accepting electronic filings at this time.

- For mergers pending or proposed, the US DOJ is requesting from merging parties an additional 30 days to timing agreements to complete review of transactions.
- As a result of the pandemic, the US DOJ began prioritizing holding accountable individuals and companies that use the pandemic to engage in criminal antitrust violations, including bid rigging, price fixing, market allocation and related fraud schemes.
- The Attorney General of the US DOJ directed its components, including the Antitrust Division, to prioritize the investigation and prosecution of COVID-19 fraud cases.

Q: What were the different factors that the US DOJ took into consideration when developing the policy changes? (i.e. What did the US DOJ try to change and what did the US DOJ try to preserve?)

Competitor Collaborations

- On March 24, 2020, both American competition agencies issued a joint statement detailing an expedited antitrust procedure and providing guidance for collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic.
- Under the expedited procedure, the American competition agencies will respond to and resolve all COVID-19-related requests, within seven calendar days of receiving all information necessary to vet these proposals. The expedited procedure notes that health care facilities may need to work together in providing resources and services to assist patients, consumers, and communities affected by the pandemic and its aftermath. Other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies.
- Approved collaborations are largely under the explicit direction, and in the presence of, the U.S. Government and its agents.

Collaborating companies have committed to following several safe guards:

- Collaboration is specifically intended to further U.S. government policy and efforts. Collaboration cannot be used to increase prices, reduce output, reduce quality or otherwise engage in COVID-19 profiteering.
- The collaborations are limited to the "time period necessary to assist the Federal Emergency Management Agency ("FEMA") and other government agencies in responding to COVID-19 shortages."
- If FEMA, the United States Department of Health and Human Services, other government entities, or their consultants and designees request any competitively sensitive information from any of the companies, each will make all reasonable efforts to share this information only with the requesting government agency, and not with any other competitor.

- Collaborations are limited in time and must formally dissolve upon resolution of COVID-19 related disruptions. Upon resolution of the COVID-19-related disruptions and the disbanding of the related U.S. Government response initiatives, the companies will formally dissolve this competitor collaboration and immediately notify the Department, in writing. The companies will commit to work with the US DOJ to determine appropriate sequestration of competitively sensitive material that was produced during the collaboration period.

Q: How has COVID-19 impacted international cooperation with other antitrust agencies?

- Mr. Wilson explained that the US DOJ recognizes the importance of communicating with its international colleagues about its COVID-19 response. They are coordinatingregularly with sister competition agencies regarding changes to competition law enforcement that have been put in place around the world.

TOPIC 2: Failing Firm Defense (Mr. Sangwon Lee, CCB)

Q: Can you give a brief description of the Bureau's failing firm regime?

- Mr. Lee provided an outline of the failing firm regime in Canada.
- Firstly, in Canada, consideration of "failing firm" claim is mentioned in section 93 (b) of the Competition Act.
    - Section 93 of the Act sets out a number of factors that the Competition Tribunal may take into consideration when it determines whether a merger is likely to result in a substantial lessening or prevention of competition, which includes well-known factors such as barriers to entry, effective remaining competition, and removal of a vigorous competitor, among others like failing firm claims.
    - Thus, in Canada, failing firm claims are to be assessed as part of the competitive effects analysis.
        - Mr. Lee avoided using the word "defense" with "failing firm" since in Canada, failing firm claims are assessed as part of competitive effects analysis, and are not treated as a defense to an otherwise anti-competitive merger. This may be different from other jurisdictions where failing firm claims may be used as a defense by the parties.
        - Failing firm analysis should consider if the failing firm's assets would have exited the market but for the transaction. If they would have, any loss of competition influence will not be attributed to the merger.

- Secondly, additional guidance can be found in Part 13 of the Merger Enforcement Guidelines, where it list steps to be taken for failing firm analysis.
    - First, the agency would determine if one of the parties to the transaction is considered to be failing or have failed,

- The second step in the analysis requires an assessment of competitive alternatives to the transaction, and if any of the alternatives would result in a materially greater level of competition than that of the proposed transaction. The alternative would involve three different counterfactual scenarios:
  - (1) the restructuring or retrenchment of the failing firm,
  - (2) the sale of the failing firm to a competitively preferable purchaser, or what some may refer as the "shop" process, and
  - (3) liquidation of the failing firm's assets.

Q: With respect to failing firm analysis, has the Bureau changed its approach due to the current crisis?

- From the start of the current pandemic, there have been calls for competition agencies to relax their standards with respect to assessing failing firm claims, since some were/are expecting to see an increase in failing firms, and a nimble reaction by competition agencies would be necessary and crucial for economic recovery or to prevent economic downturn.
- The best way for a competition agency to support both short and long term economic recovery is <u>not</u> to relax its standards and make it easier for anti-competitive transactions to proceed, which may have everlasting permanent structural impacts on consumers and the economy.
- That said, the CCB understands that some aspects of the facts may look different during the pandemic, for example, the agency would still expect a good faith "shop" for a competitively preferable purchaser be conducted, but it will take into account the current financial situation or availability of financing, as well as the fact that due-diligence may be conducted differently than before because of lock-downs.
- However, the CCB would still look if a "shop" was conducted.

Q: Is this the case even in the face of requests for urgent cases to be fast-tracked?

- Even prior to the pandemic, the CCB does its best to triage its cases with resources available. That does not change with the pandemic.
- With respect to concerns regarding timing, Mr. Lee does not believe that a "timely" merger and "rigorous" merger review is an "either/or" situation. From prior failing firm cases prior to the pandemic, the CCB has demonstrated that a thorough failing firm analysis can be conducted on a timely manner with cooperation from the parties.
- Parties can influence the timeliness by coming in early and readily providing the CCB with evidence and data and any expert analysis necessary to assess a failing firm claim.

Q: Have you seen or do you expect to see an increase in failing firm cases due to the COVID-19 situation?

- Mr. Lee was uncertain how to respond, given that most of his colleagues are uncertain of how long the pandemic and its economic effects will last, or where Canada is currently in that cycle.
- However, failing firm claims are extremely rare. The majority of transactions that the CCB receives do not raise competition concerns. Of those few transactions that do raise competition concerns and require an in-depth review, very few involve failing firm review, and of those failing firm claims, more often than not they turn into flailing firm claims rather than failing firm claims.
- During the 2008 financial crisis, there was similar speculation that competition authorities would see an increase in failing firm reviews. Luckily, that did not materialize then.

TOPIC 3: Remedies (Ms. Maribeth Petrizzi, US FTC)

Q*: *Has the US FTC changed its approach to what is a suitable remedy in light of COVID-19? If so, in what ways. If not, why not?

- Ms. Petrizzi explained how the current situation is very similar to the questions raised during the 2008/2009 economic downturn and similar to that time, COVID-19 hasn't affected how the US FTC conducts its analysis nor how it considers remedies.
- The US FTC will not suspend its usual approach to seeking appropriate relief, even in the face of today's economic uncertainty.
    - The agency can't think of the short-term only, but needs to think of the likely long-term negative consequences that such a suspension of its normal policy would create - namely fewer competitors, reduced innovation, and higher prices.
- The agency will continue to follow the facts, adjust to changing market conditions, and master the many details that comprise a thorough antitrust review. There isn't a one-size-fits all change – never is; each review is fact and case specific.
- The agency will not change its long-held standards for effective relief and it will continue to have a strong preference for structural relief to remedy competitive effects in horizontal mergers.
- Ms. Petrizzi made reference to a Respondent's Guide published to explain what FTC Respondents can expect during a divestiture process.
    - Proposals to divest select assets, rather than an ongoing business, will undergo more detailed scrutiny to reduce the risk that the buyer won't get what it needs to be an effective competitor; need to show that it is likely to maintain or restore competition; and acceptability of package could vary depending on the proposed buyer.
    - Selected asset divestitures have succeeded where the divestiture buyers had similar existing operations, were knowledgeable about relevant markets, and were familiar with relevant customers.
    - Communication is critical at all stages of the settlement process, which will occur by engaging with US FTC staff early and often.

Q: Has the US FTC changed how it evaluates divestiture buyers?

- Any prospective buyer of divested assets must be able to maintain or restore competition in the markets of concern, so the agency can ensure that the merger will not cause harm.
- The US FTC's staff will continue to vet potential buyers, taking full account of current financial and economic realities. Now, more than ever, it is important to conduct thorough due diligence to ensure the success and viability of proposed divestitures and the proposed divestiture buyer.
- The agency evaluates whether the buyer has the current financial capability to acquire and operate the divestiture assets, as well as the buyer's ability to compete in the relevant markets with those assets.
- The agency will look at whether the buyer can successfully integrate the assets into its business, and evaluate that execution risk.
- The agency understands that both current and future financial stability may become issues for buyers as they are considering purchases during these uncertain economic times. However, the agency can't sacrifice effective relief by rushing to approve a less-than-financially-stable buyer.
- The buyer should provide information regarding its experience in the relevant industry and identify (and make available for interviews) the executives with experience in the relevant industries.
- It is important that both the proposed buyer and the US FTC have sufficient time to conduct due diligence.

Q: Has the FTC changed its due diligence regarding the buyers' financials in light of COVID 19?

- Ms. Petrizzi referred to the Potential Buyer's Guide published to explain what potential buyers can expect during a divestiture process.
- Buyers should be prepared to provide detailed information about how the proposed acquisition will be financed.
- In addition, a buyer should:
    - Explain the structure of the funding for the investment, including any limitations of the funds;
    - Provide all sources of financing for the acquisition of the divested assets;
    - Explain how the buyer and the financial entities reviewed and evaluated the proposed divestiture purchase and formed the basis for authorizing the purchase;
    - Make representatives from the financing entities available for discussions with FTC staff;
    - Provide detailed financial and business plans, with supporting documentation;
    - Explain the underlying assumptions of the financial and business plans, including contingency plans if sales and other financials do not meet projections;
    - Also make sure the buyer understands the pre-COVID financials and competitiveness of the divested assets, the current status, and the Respondent's normal course of business projections for post-COVID operations or the prolonged COVID status of the products/business. This applies to sales, but also to dealing

with the employees and possible furloughs or layoffs and how to deal with that going forward; and
    - Make management, sales and marketing representatives, and accounting and other personnel available for discussions with US FTC's staff.

Q: What about the US FTC's preference for upfront buyers, has that changed?

- There is continued evolution in the agency's thinking about upfront buyers.
    - While no approach is foolproof, divesting assets to an upfront buyer has been one of the most consistently effective means for achieving successful merger remedies.
    - This approach minimizes the risks that acquired assets will lose value (due to the loss of employees, customers, and business opportunities) or that competition will be diminished while ownership of the assets remains uncertain.
    - An upfront buyer is critically important when the divestiture is less than an ongoing business.
    - Previewed the greater emphasis on the preference for upfront buyers in March 21, 2019 blog – The uphill case for a post-Order divestiture.

C. GROUP DISCUSSION QUESTIONS AND ANSWERS:

Q: Since the start of COVID-19, most competition authorities have experienced the shift from early days, when we thought the lockdown would last a very short time, to it becoming clear that the pandemic would impact us for months, if not years. Was there a shift in your authority's willingness to change its approach to merger reviews when it became clear that the pandemic was not going to be a short term challenge? If so, when did that occur and what changed occurred in your organization to adapt to the pandemic?

MP's response

- Ms. Petrizzi acknowledged the efforts of the US FTC's IT department who were able to move the agency's staff from a small percentage of telework to almost the entire agency moving to telework.
- Furthermore, the Compliance staff processed over 10 negotiated settlements since March 2020, which is a lot of work at any time, but particularly outstanding under the current work environment.
- Substantively things did not change regarding how the agency reviewed cases, but there were significant process changes. Both within and outside the agency – the process by which interviews, and meetings were conducted changed, and Zoom and Webex meetings have become the new normal.
- Ms. Petrizzi noted that while the Compliance Division doesn't conduct a lot of investigational hearings and depositions, her team held off on conducting them

initially in anticipation that staff would return to the office. However, there came a point in time when it was clear that the agency was going to continue to telework for the foreseeable future. Conducting remote investigational hearings required new processes, including how documents are introduced and where the court reporter is located – these factors are all different depending on the witness.

SL's response

- At the CCB, there have been adjustments that the staff had to make regarding how and where we work. Mr. Lee believes that the best was made out of this difficult situation with respect to adjusting to working remotely, although the agency had hiccups here and there, big and small, he maintains that it went more smoothly than what most expected.
- Regarding the question of whether the CCB changed its approach or standards, as prior to the pandemic, the agency has always been open to listen to legitimate concerns or limitations of the parties. In those situations, as before the pandemic, the agency has been open to discuss them on a case-by-case basis, in order to find a solution that would conserve the integrity of the review, and address the concerns at the same time.

Q: Most antitrust agencies rely heavily on information freely given by market participants. Especially in the early days of the pandemic, everyone, including market contacts, had to adjust to life in lockdown. Did your organizations find there was increased difficulty in connecting with the market in order to gather information? Were there particular types of businesses that saw a greater shift in responsiveness? If so, how did you adjust?

BW's response

- Mr. Wilson explained that the US DOJ saw an increased challenge to make connections with people in certain markets.
- This challenge continued as layoffs increased and industries continued adjusting to the new economic situation.

SL's response

- Mr. Lee indicated that having email addresses has been helpful, rather than just receiving the phone numbers. Currently, it is not a requirement to receive email addresses in the notification filings, but for filings where the agency received email addresses, it was easier to reach the market contacts.
- At the beginning of the pandemic, the CCB did see a lag in the response time from the market since the economy was adjusting to the pandemic as well. But, now, he cannot say that it is significantly difficult to reach market participants compared to before.
- The CCB is noticing that technology-heavy industries, such as IT companies are responding to the agency slowly compared to "less-technologically reliant traditional

industries". He is unaware of the reason behind it, but maybe industries are also adjusting to the situation as well as the agency.

D. CONCLUSION

In summary, various agencies responsible for reviewing mergers in North America have quickly adapted to the challenges caused by the COVID-19 crisis despite lack of information in early days, unpredictability of constantly shifting priorities, and challenges of an unknown future. These agencies have found ways to maintain their commitment to fostering competition while adjusting to practical difficulties faced by their employees and market participants. Overall, there is much that has been and will continue to be learned during the COVID-19 crisis.

E. ACKNOWLEDGEMENTS

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