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Via email: ann.wallwork@canada.ca

Ann Wallwork
Deputy Commissioner of Competition
Mergers Branch
Competition Bureau
Innovation, Science and Economic Development Canada
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Ms. Wallwork:

Re: Proposed Increase to Filing Fees for Merger Reviews

The Competition Law Section of the Canadian Bar Association (CBA Section) is pleased to comment on the Competition Bureau's proposal to increase the filing fee to $72,000 for merger reviews conducted under Part IX of the *Competition Act*.

We recognize that these fees were last raised in 2003 (from $25,000 to $50,000) and the Bureau continues to face fiscal constraints that affect its ability to conduct merger reviews efficiently and effectively. We support a properly resourced Mergers Directorate and acknowledge that additional funding – including by an increase of filing fees – is appropriate at this time. We do, however, want to share a few comments and suggestions that should be considered as the Bureau proceeds with its proposal. These issues will be discussed in more detail below:

- **Sources of funding**: The Bureau's proposal assumes that the entire Mergers Directorate's funding comes from filing fees. This represents a fundamental change from past fee analyses conducted by the Bureau, which recognized that administering the Act's merger provisions has public benefits that should be at least partially funded by taxpayers rather than fully funded by parties to notifiable transactions. The rationale for this fundamental change remains unclear.
- **Flat fee and fairness**: The flat fee approach remains compelling even with the proposed increase to $72,000. However, as the fee increases, including any future indexing, the flat fee approach will require closer examination and a consideration of alternative fee structures. A major concern with the flat-fee system is that parties who pay for the review of clearly non-problematic mergers end up subsidizing the review of more complex transactions.

- **Non-fee based measures:** We urge the Bureau to adopt non-fee based measures to improve resource allocation in the Mergers Directorate. These measures may include increasing certain thresholds and exempting pre-notification for mergers that rarely, if ever, raise serious competition issues.
- **Transparency and communication**: Continued commitment to transparency and timely communication of Bureau case theories and potential concerns to merging parties would contribute significantly to improving the merger review process, including compliance with the Bureau's service standards.

A. Fees Should Reflect Service Rendered and Public Benefit of Merger Review

The Bureau's cost assumptions do not indicate any source of Mergers Directorate funding other than filing fees paid by notifying parties. This is a significant change from prior analyses where the Bureau assessed optimal filing fees based on:

(i) a mixed funding model comprised of filing fees and allocations from the Bureau's general budget; and

(ii) the principle that parties to notifiable mergers should not subsidize the costs of other Bureau services, including the review of non-notifiable mergers.[1]

Prior CBA Section submissions[2] on the structure of merger filing fees note that a split-funding model properly recognizes the significant public benefits arising from the Bureau's administration of the merger provisions. These public benefits, which increase directly with the complexity of the mergers, are appropriately funded (at least in significant part) by taxpayers as a whole rather than by individual notifying parties.

The Bureau's consultation document does not specifically identify or define the "service" being received in return for the filing fee,[3] which we believe is an important step to develop an appropriate funding approach. What distinguishes the merger provisions from other provisions in the Act is the mandatory pre-merger notification regime in Part IX.[4] It is reasonable to expect users of the notification regime to pay fees in return for an orderly and timely review. However, the inclusion of items like litigation, review of non-notifiable mergers and preparation of general guidance documents in the relevant "service" raises concerns. Activities such as litigation and

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1 These principles were highlighted in the *Competition Bureau User Fee Discussion Paper* (May 1997), which preceded the adoption of filing fees for notifiable mergers, and the *Competition Bureau Discussion Paper on the Proposal to Increase Fees and Revise its Fee and Service Standards Policy* (August 2002), which preceded the fee increase from $25,000 to $50,000. The consultation document on the current proposal also appears to recognize the clear and substantial public benefits derived from merger enforcement in that, among other things, it "contribut[es] to the Government's efforts to keep the Canadian economy competitive, innovative and accessible to businesses".

2 See letter (http://ow.ly/WvJ730gzU6k) dated October 18, 2002 (Response to Competition Bureau discussion paper on the proposal to increase fees and revise its Fee and Service Standards Policy) and letter (http://ow.ly/QsKb30gzT44) dated November 30, 2007 (Re: Merger Notification Filing Fee Structure).

3 Rather, it is implicit in the consultation document that the relevant service constitutes all aspects of the administration and enforcement of the merger provisions, and that notifying parties are the sole or overwhelming beneficiaries of that service.

4 In two of the comparator jurisdictions for which the Bureau gives fee information in the consultation document (United Kingdom and Australia), pre-merger notification is voluntary rather than mandatory. There, merger reviews occur at the specific request of the merging parties, so the private benefits accruing to them are more evident than in mandatory notification jurisdictions like Canada.

guidance in the mergers context are indistinguishable from other Bureau enforcement activities (e.g., all other investigations and enforcement actions under Parts VI, VIII.1 and VIII of the Act) that are publicly funded from tax revenue, presumably because these enforcement activities carry significant public benefits.

The CBA Section acknowledges the Bureau's assessment of its budgetary requirements and supports a fully resourced Mergers Directorate. However, careful consideration should be given to maintaining or adopting, at least to some degree, a mixed funding model that recognizes the significant public benefits of the Bureau's merger programme.

B. Future Consideration of Alternative Methods for Calculating Filing Fees

We recognize the advantages of a flat-fee for merger filings, including simplicity and ease of administration. However, as noted in prior CBA Section submissions[5], an inherent unfairness in a flat-fee system arises from a systematic subsidization of complex merger reviews by parties to non-complex mergers.[6] To date, and at prevailing fee levels, this inequity has been internalized by filing parties as a cost of doing business. However, there is inevitably a tipping point where the absolute fee for non-complex merger reviews is too high to justify in terms of either the time and effort expended by the Bureau to complete its review or the value of receiving clearance under the Act when there is clearly no prospect of a merger challenge.

For these reasons, we believe that in the future, closer consideration should be given to alternative fee structures if the Bureau's proposed fee increase (with indexation) is adopted. The need to evaluate alternative fee structures more closely will become even more important if the scope of exemptions from pre-merger notification is not expanded as suggested below.

C. Notification Thresholds and Exemptions Require Adjustment

As noted in prior CBA Section submissions[7], given the proposed fee increase, we reiterate our suggestion to consider additional exemptions from pre-merger notification. Additional exemptions would focus on sectors or types of transactions where there is a low likelihood of substantive issues or concerns arising and little or no risk that closing would deprive the Tribunal of effective remedies in a post-closing challenge. Adding exemptions would enable the Mergers Directorate to focus its resources more squarely on the mergers that matter.

For instance, transactions in the real estate and upstream oil and gas sectors are frequently cited as strong candidates for exemption from pre-merger notification (and for which certain exemptions from notification already exist in the United States). Transactions in these sectors consistently make up a significant proportion of all mergers notified to the Bureau (38% in the most recent fiscal year),

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5 See note 2

6 While the Bureau does not publish detailed cost information according to different types of merger review, its performance statistics for fiscal year 2016-17 indicate that over three quarters of merger reviews were designated non-complex and completed in virtually all cases within the Bureau's 14-day service standard for non-complex mergers. Of the 53 concluded merger reviews designated by the Bureau to be complex (23% of total concluded merger reviews), a smaller number (21) involved the issuance of supplementary information requests which more closely indicate labour intensive reviews that may proceed to a consent agreement or contested litigation. Only nine concluded merger reviews resulted in issues, with eight being resolved through consent agreements and one being abandoned. It is this small subset of merger reviews that likely accounts for the majority of the Bureau's costs. More generally, in its 2002 Discussion Paper, the Bureau noted that 90% of the costs of reviewing mergers at that time were related to complex and very complex mergers. We do not expect this proportion to have changed significantly over time.

7 See note 2, letter dated November 30, 2007.

yet the vast majority of them are non-complex and require minimal resources to review. To our knowledge, no such mergers have given rise to enforcement action under the Act.

Even if analysis beyond a cursory review is necessary for certain mergers in these sectors, the standard for adopting an exemption should not be absolute certainty that no substantive issues will arise. As in other sectors, the Bureau would retain the ability to investigate and challenge any non-notifiable mergers that raise substantive concerns.

We therefore renew our suggestion to add exemptions from pre-merger notification for additional classes of transactions. The Act provides a process for doing so expeditiously: subsection 113(d) specifically contemplates that "other classes of transactions" may be exempted from pre-merger notification by regulation rather than legislative amendment, and this has occurred in the past. We believe that subsection 113(d) would permit exempting by regulation a class of transactions comprised of mergers and acquisitions in defined industry sectors.

In addition to exemptions, thresholds for determining whether a transaction is subject to pre-merger notification could be increased. In 2009, the "size of transaction" threshold was increased from $50 million to $70 million and indexed to Canada's GDP. However, the $400 million "size of parties" threshold has not changed since pre-merger notification was introduced in 1987. It is appropriate to revisit whether the "size of parties" threshold should be adjusted in light of experience accumulated over the last 30 years. Section 109 of the Act contemplates amendment of the threshold through regulation, and some adjustment, at least to reflect inflation, would appear to be warranted and could correspond to improved resource allocation to the extent that fewer reviews may be conducted.

D. Improving Service Levels for Complex Merger Reviews

The CBA Section supports the Bureau's intention to use increased fee revenue to improve the Mergers Directorate's operations and service levels.[8] We also share the Bureau's expectation that investment of fee revenue into additional resources and improved processes is likely to reduce review times for some complex mergers. We agree that complex merger reviews, where delays are most often encountered and the private and public costs of delays are the greatest, can be improved.

It is important, however, to highlight two points on improving service levels in complex merger reviews:

(i) Other Means of Improving Service Levels

As noted above, there are alternative methods to improve service levels in complex merger reviews beyond raising fees, including the diversion of existing resources from the review of mergers least likely to raise competition issues. Continued commitment by the Bureau to transparency, and the timely communication of Bureau case theories and potential concerns to merging parties, contributes to the efficiency of complex merger reviews, including by reducing overall review timeframes. These improvements can be made while respecting the Bureau's confidentiality obligations to third parties and complainants and can be adopted independently of budgetary considerations.

(ii) Reconsidering Complexity and Service Standards

While the Bureau's fee increase proposal does not amend the service standards in its *Fees and Service Standards Handbook for Mergers and Merger-Related Matters*, we understand that the Bureau will continue to evaluate the need to do so in the future. A re-evaluation may also be

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[8] For greater certainty, the CBA Section's comments are predicated on the Bureau's ability to retain 100% of merger filing fee revenue for use in administering the merger provisions of the Act, which the CBA Section strongly supports. Indeed, we do not believe that it is appropriate for any portion of merger filing fee revenue to revert to the Treasury.

required in the relatively near-term given changes introduced by the *User Fees Act*, including the need to develop a mechanism for the remission of fees if service standards are not met.

There is merit to revisiting the Bureau's complexity and service standard policies based not only on the level of filing fees but also the experience accumulated since the 2009 amendments to the merger review process. Any proposed amendments to these policies would benefit from separate and more in-depth consultation. The CBA Section would appreciate the opportunity to participate in further discussions.

E. Conclusions

The Bureau's proposal differs from past proposals in that it seeks to fund the Mergers Directorate entirely from filing fees, despite the clear public benefits of the Bureau's merger review functions, particularly in the most complex and costly cases. A mixed funding model may be more appropriate.

After reviewing the alternative approaches, we believe the flat fee approach remains compelling for now, even if the fee is raised to $72,000. However, going forward, the Bureau should evaluate whether alternative fee structures, including a tiered fee structure based on transaction or party size, would be more appropriate.

Given the significant costs of mandatory pre-merger reviews and the Commissioner's jurisdiction to review even non-notifiable mergers on substantive grounds, the CBA Section supports adding exemptions from pre-merger notification and considering increasing party size thresholds for pre-merger notification.

We support the Bureau's retention of all filing fee revenues. The additional revenue should improve service levels in the review of mergers for which a notification and/or request for an advance ruling certificate is filed. However, some service improvements, including a consistent approach to transparency with merging parties, do not depend on additional funding and should be considered by the Bureau as part of an overall strategy to increase the efficiency of merger review.

While it is beyond the scope of the current proposal, reconsideration of the Bureau's fees and service standards policy for mergers may be required given the new *User Fees Act* and nearly a decade's worth of experience under the regime introduced in 2009. The CBA Section would be pleased to participate in future consultations on these proposals.

Thank you for the opportunity to comment on the Bureau's proposal to increase the filing fee for merger reviews.

Yours very truly,

(original letter signed by Marc-André O'Rourke for Anita Banicevic)

Anita Banicevic
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