THE CANADIAN BAR ASSOCIATION
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November 30, 2007

Melanie Aitken
Senior Deputy Commissioner of Competition
Competition Bureau – Mergers Branch
Industry Canada
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Ms. Aitken:

Re: Merger Notification Filing Fee Structure

The Competition Bureau asked the National Competition Law Section of the Canadian Bar Association (the CBA Section) for its current views on merger notification filing fees. The CBA Section welcomes the invitation and agrees with the Bureau that this issue is worth revisiting.

It has been a number of years since the CBA Section has examined the issue of merger notification filing fees. In October 2002, the CBA Section responded to the Bureau's proposal to increase fees and revise its Fee and Service Standards Policy. In that submission, the CBA Section recommended retention of the flat fee system. We also suggested that further consideration be given to the appropriateness of increasing merger notification filing fees (from $25,000 to $50,000), as well as the means by which those fees are determined. Since then, jurisdictions such as New Zealand and the United Kingdom have reviewed the issue of merger notification filing fees and in April 2005 the International Competition Network released its report on *Merger Notification Filing Fees.*

A. Background

The current fee structure in Canada is a flat fee of $50,000 (plus applicable taxes), which is applied regardless of the complexity of the transaction. Underlying the current fee structure is the policy that only partial recovery is appropriate, as the public benefits from effective enforcement and administration of the *Competition Act*. Another general principle underlying the current fee structure is that fees should relate only to the services being performed. That is, parties to notifiable mergers should not subsidize the costs of other Bureau services, including the review of non-notifiable mergers. The CBA Section agrees with these underlying principles.

An overwhelming majority of mergers do not give rise to substantive competition issues and do not require a large investment of Bureau resources to review.[1] Consequently, the flat fee structure results in

[1] For example, in 2006-2007 approximately 268 pre-merger filings were made. Of these, 90% were classified as "non-complex". In addition, revenues and costs reported in the Industry Canada 2006-2007 Performance Report (the Departmental Report) indicate that approximately 212 ARC Requests were filed without a short or long form filing and incurred costs of approximately $8,800 per filing - *i.e.*, more than 75% of pre-merger notification filings cost substantially less than the $50,000 filing fee.

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non-problematic mergers subsidizing the costs of reviewing problematic mergers to some degree. We question whether this is an equitable or desirable outcome.

Nevertheless, when one compares the total revenues generated by the fees for all notifications with the full costs of merger review, the Bureau is not profiting.[2] For example, in 2006-2007 approximately 75% of the full costs associated with merger review were recovered through filing fees.[3] The current fee structure therefore appears to be consistent with the policy of partial recovery.

The CBA Section questions whether there is an alternative to the current fee structure that would provide for a fairer distribution of the costs of merger review, while maintaining consistency with the above-noted principles underlying the current system.

B. Alternative Bases for Determining Fees

As indicated in our 2002 submission, the CBA Section believes it worthwhile to give consideration to the merits of alternative fee charging policies. The CBA Section has identified several alternative approaches, which are discussed below. In reviewing each alternative, the CBA Section considered whether the approach is in line with the policies underlying the current flat fee system, whether it would result in a fairer distribution of the costs amongst the filing parties, and whether it would be administratively burdensome.

1. Tiered fees based on transaction size or size of parties

Tiered fees are often based on transaction size or size of parties. The US, the UK and Spain have adopted this type of approach to merger filing fees. The US bases its tiers on the asset value held as a result of the transactions, the UK on the UK revenues of the entity being acquired, and Spain on the parties' aggregate revenues in Spain.

Tiered fees are a relatively recent initiative in the US, having taken effect in 2001. The US Government's decision to adopt a tiered fee structure appears to be based on the conclusion that there is a positive correlation between dollar value of transactions and agency resources devoted to investigating them, reflecting the view that the greater the transaction value, the more likely it is to require an in-depth antitrust review.[4]

A tiered fee system based on value may have the perceived advantage of being fairer than a flat fee system to the extent that the size of the transaction or size of the parties is correlated to the amount of resources required to conduct the review. However, the size of a transaction or size of parties may actually bear little relationship to level of complexity and the extent of any competitive impact. Transactions between large companies or involving large private equity groups may have no competitive issues. Should those parties still be subject to the higher merger filing fees? Like flat fees, a tiered fee system based on value shares the disadvantage that the fees paid may not correlate with the service performed.

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2 In addition to direct and indirect costs paid out of the Bureau's budget, full costs would include costs incurred by other governmental departments in support of the fee activity (*i.e.*, merger notification).

3 The 2006-2007 Departmental Report indicates total revenues from fees of $13.98 million and full costs of $18.71 million.

4 See "Supplementary Information" section of Federal Trade Commission, Notice of Proposed Rulemaking, "16 CFR parts 801, 802, and 803: Reporting and Waiting Period Requirements For Certain Mergers and Acquisitions: Implementation of Recent Amendments to the Clayton Act Proposed Amendments to the Rules of Practice and Request for Comments." <http://ftc.gov/os/2001/01/hsrrulesfrn.htm>.

The other main advantage of a tiered fee based on value is that the fees are less likely to discourage transactions as they better reflect the parties' ability to pay. However, the current fee in Canada of $50,000 is also not likely to discourage transactions since the size of transaction threshold for notification is $50 million. (The minimum fee in the US is US$ 45,000, only slightly less than the Canadian fee, and the maximum is US$ 280,000.)

Although tiered fees may also be fairly easy to administer if based on easy to calculate criteria such as asset value, revenue or transaction value there may be a practical problem of valuing transactions close to tier boundaries (*e.g.*, whether to use fair market value or book value).[5]

The CBA Section's view is that there is no real advantage to using the tiered fee approach over the flat fee system currently in place.

2. Tiered fees based on transaction complexity

Yet another approach is to introduce tiered fees based on transaction complexity. While this approach appears to be fairer than the flat fee approach and tiered fee systems based on value, a number of disadvantages weigh heavily against it, many of which are similar to a fee system based on review time.

The main concern with tiered fees based on complexity is that determination of a transaction's complexity is highly subjective. This makes the approach administratively difficult to implement, as there could be disagreement about the classification.[6] There would have to some type of post-merger reconciliation to determine whether the transaction was as complex as it was thought to be at the time of notification. The subjective nature of the classification also creates considerable up-front uncertainty of the quantum of fees payable.

This structure could also create the perception of a "moral hazard" that the Bureau could have incentive to delay reviews. The CBA Section does not question the integrity of Bureau staff, but observes that this structure could make it vulnerable to criticism that it delayed reviews in order to generate revenue. In addition it could penalize parties involved in the first merger in a particular industry, where lack of background information and familiarity, rather than complexity, may necessitate a more protracted review.

For all of these reasons, the CBA Section does not recommend a tiered fee system based on complexity over the current flat fee approach.

Another variation of tiered fees based on complexity would be tiered fees based on review cost. With this particular approach, an initial fee is charged upon filing and then once review costs exceed a certain threshold, the parties are notified and required to pay additional fees if the review is to continue. As the fee is reflective of the actual costs involved it could be perceived as a fairer approach than the flat fee system. It is also somewhat more favourable to a tiered fee based on complexity as it provides parties with some certainty as to the amount of the fee.

The biggest disadvantage to this approach is that it would be much more complex to administer. The Bureau would have to keep track of costs per file in order to assess whether the review costs have exceeded the threshold. Consequently, it is the CBA Section's view that the administrative complexity outweighs any advantage of this approach.

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5 This was a problem in the United States and the Federal Trade Commission developed rules to provide parties with some guidance in this situation. <http://www.ftc.gov/bc/hsr/hsrvaluation.shtm>

6 Although the Bureau currently classifies transactions as "non-complex", "complex" and "very complex" for administrative purposes and to give merger parties an initial indication of likely review times and information requirements, these classifications are non-binding and have no direct financial consequences to the parties.

3. Fee for service based on review time

Another alternative is a fee for service based on actual time spent on the review. For example, the fee may be based on an hourly or daily rate. Switzerland has implemented a fee for service approach to its second phase of merger review, and Germany has adopted certain elements of both fee for service and fee based on complexity of the transaction and on parties' revenues.

The main benefit of this approach is that the fee is tied to the actual cost of the service and, therefore, the amount paid relates fairly to the service performed. On the other hand, the parties would be unable to assess the total cost until the application is determined.

With greater uncertainty and potentially higher costs to the parties than a flat fee system, a fee for service system may operate as a disincentive for any voluntary notifications or ARC requests. It may also be unfair to parties if it were the first merger within an industry. (Presumably, the first merger would take longer to review than subsequent filings as the Bureau would be unfamiliar with the industry.) Furthermore, such a fee structure may operate as a disincentive for transactions amongst smaller parties with limited resources where the transaction would be complex. It would also be disadvantageous to the Bureau as could not collect its fees until after the application was determined and the work performed. In addition, this structure could also create "moral hazard"-type concerns.

The CBA Section does not support the adoption of this approach in Canada, for these reasons, and because the approach is inconsistent with general principal that merger review is to some extent a public service and that the general public should therefore bear some of the cost.

C. Exemptions for industries where there are no substantive issues

To the extent that there are concerns about the quantum of fees in the context of industry sectors where there are rarely competition concerns, the CBA Section believes that it would be more appropriate to consider additional exemptions from pre-merger notification rather than wholesale alterations to the filing fee structure for all transactions. Indeed, further exemptions from pre-merger notification may also be appropriate in circumstances where there is little or no risk that closing would deprive the Tribunal of effective remedies in a post closing challenge. An acquisition of an office building is a good example.[7]

Several industries or types of transaction fall into one or both of these categories (*i.e.*, low likelihood of substantive issues or concerns that could be remedied post-closing.) Transactions in the real estate and upstream oil and gas sectors are frequently cited as examples and where broad exemptions from notification exist in the US. The CBA Section therefore suggests that serious consideration be given to adding exemptions from pre-merger notification for additional classes of transaction.

D. Conclusions

While the current flat fee system creates a disparity between the actual cost of conducting the review and fee charged in the case of non-problematic mergers, it also has a number of advantages including ease of administration, and certainty in respect of the amount that parties will have to pay.

After reviewing the alternative approaches, the CBA Section believes that the flat fee system should remain in place. While other approaches may in some instances lessen the disparity and give the

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[7] More generally, the Section would encourage the Bureau to monitor periodically types of transactions (like asset securitizations or formations of income trusts - *i.e.*, not just transactions in specific industries) that are highly unlikely to raise substantive issues and support regulations to exempt these transactions from time to time.

perception of being fairer, the alternatives are more difficult to administer from the Bureau's perspective, and may in some cases create uncertainty for the parties.

Although the majority of mergers do not give rise to any substantive issues and require few resources to review, the CBA Section believes the $50,000 fee is still fair. To require a notification, the parties themselves must exceed the significant size of parties and size of transaction thresholds. On that basis the fee does not seem out of step with the parties' ability to pay. Furthermore, the $50,000 fee results in only partial recovery of the costs of merger review, consistent with the general public policy spirit of merger review. Finally, the current fee seems reasonable in relation to filing fees in other sophisticated jurisdictions. That said, given that the costs associated with mandatory pre-merger review for both the parties involved and the Bureau are not insignificant and in light of the Commissioner's unfettered jurisdiction to review even non-notifiable mergers on substantive grounds, the CBA Section would strongly support further consideration of the merits of additional exemptions from pre-merger notification.

Yours very truly,

(original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Chair
National Competition Law Section