THE CANADIAN BAR ASSOCIATION
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Via email: paul.collins@bc-cb.gc.ca

Paul Collins
Senior Deputy Commissioner of Competition
Competition Bureau - Mergers Branch
Industry Canada
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Paul:

Re: Proposed Merger Register

I am writing on behalf of the Competition Law Section of the Canadian Bar Association (the CBA Section), to comment on the Competition Bureau's proposed merger register.

On October 6, 2011, the Bureau announced its intent to "establish a merger register – namely, a list of all completed merger reviews, updated on a monthly basis". During a conference call with the Mergers Committee of the CBA Section on November 7, 2011, Bureau representatives indicated that the merger register would be a list on the Bureau website of all merger transactions reviewed by the Bureau where the parties had requested an advance ruling certificate (ARC) or no-action letter, or had submitted a pre-merger notification filing. We understand the merger register would identify (i) the parties to the transaction, (ii) the industry to which the transaction relates (likely, by high-level NAICS code), and (iii) the outcome of the Bureau's review (e.g., no-action letter issued).

COMMENTS

Section 29 of the *Competition Act* provides:

> 29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act
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> (a) the identity of any person from whom information was obtained pursuant to this Act;
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> (b) any information obtained pursuant to section 11, 15, 16 or 114;

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> (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;
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> (d) any information obtained from a person requesting a certificate under section 102; or
>
> (e) any information provided voluntarily pursuant to this Act.
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> Exception
> (2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

In most cases, disclosure in the proposed merger register of the matters would not be problematic because the information (in particular, the identities of the parties, the fact of the proposed transaction and that it was reviewed by the Bureau) would have been made public, by the parties themselves or otherwise (e.g., press coverage).

However, in the realtively small number of cases where a proposed merger or the fact that it was reviewed by the Bureau has not been made public, it is our view that, absent express authorization of the parties, the Bureau cannot disclose the identity of the parties to the merger, or details about the merger (following completion of the Bureau's review or otherwise), in reliance on either:

- the "administration or enforcement" reference in the opening of subsection 29(1); or
- an implied authorization arising from the fact that the parties have either submitted supplier and contact information as part of their premerger notification filing or consented to the Bureau making market contacts as part of its review.

Administration and Enforcement of the Act

With respect to "the administration or enforcement of the Act" as a basis for disclosure, the *Investment Canada Act* (ICA) contains a statutory confidentiality regime similar to that in the *Competition Act.* Like the *Competition Act*, the ICA includes authorization to disclose information in certain circumstances for the purposes of legislative administration or enforcement. However, unlike the *Competition Act*, the ICA includes explicit language on the publication of information relating to completed ICA reviews.

Section 36 of the ICA provides:

> 36. (1) Subject to subsections (3) to (4), all information obtained with respect to a Canadian, a non-Canadian, a business or an entity referred to in paragraph 25.1(c) by the Minister or an officer or employee of Her Majesty in the course of the administration or enforcement of this Act is privileged and no one shall knowingly communicate or allow to be communicated any such information or allow anyone to inspect or to have access to any such information.
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> * * *
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> (3) Information that is privileged under subsection (1) may, on such terms and conditions and under such circumstances as the Minister deems appropriate,
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> (a) on request in writing to the Director by or on behalf of the Canadian or non-Canadian to which the information relates, be communicated or disclosed to any person or authority named in the request; or

(b) for any purpose relating to the administration or enforcement of this Act, be communicated or disclosed to a minister of the Crown in right of Canada or a province or to an officer or employee of Her Majesty in right of Canada or a province.

* * *

(4) Nothing in this section prohibits the communication or disclosure of

(a) information for the purposes of legal proceedings relating to the administration or enforcement of this Act;

(b) information contained in any written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

(c) information to which the public has access;

(d) information the communication or disclosure of which has been authorized in writing by the Canadian or the non-Canadian to which the information relates;

(e) information contained in

(i) any receipt sent pursuant to subsection 13(1) relating to an investment that is not reviewable pursuant to subsection 13(3),

(ii) any notice sent under subsection 21(1) or (2), 22(2) or (3) or 23(3), or

(iii) any demand sent by the Minister under section 39, other than a demand sent for the purposes of the administration or enforcement of Part IV.1;

(f) information to which a person is otherwise legally entitled; or

(g) information contained in reasons given by the Minister for any decision taken under subsection 21(1), 22(2) or 23(3).

* * *

Subparagraph 36(4)(e)(i) permits disclosure of information in "any receipt sent pursuant to subsection 13(1) relating to an investment that is not reviewable pursuant to subsection 13(3)" of the ICA (that is, the fact and date of receipt of a notification and the other details in the Industry Canada registry for notifications), while subparagraph 36(4)(e)(ii) permits disclosure of information in "any notice sent under subsection 21(1) or (2), 22(2) or (3) or 23(3)" of the ICA (that is, information related to reviewable transactions at various stages of review). No specific statutory authorization for disclosure is set out in section 29 of the *Competition Act*.

While the Bureau may be of the view – as outlined its bulletin on the *Communication of Confidential Information under the Competition Act* – that communicating the results of its examinations and inquiries to the public is part of the administration and enforcement of the Act, the CBA Section has long disagreed with this position. In our view, the "enforcement and administration of the Act" is intended to be a narrow exception to an express statutory prohibition on information disclosure. If disclosure is to be made in the face of a statutory scheme designed to protect confidentiality in merger review, specific statutory authorization – as in the ICA – is required.

While U.S. merger law permits limited disclosure of the details of merger transactions and their review by regulatory authorities, the disclosure takes place only where expressly authorized.

For example, Section 7A(h) of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* parallels section 29(1) of the *Competition Act* by exempting documents or information submitted as part of an HSR filing from disclosure "except as may be relevant to any administrative or judicial action or

proceeding." The Antitrust Division of the 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."

In 1997, the U.S. Federal Trade Commission announced that it would publicly acknowledge the existence of a merger investigation, but only in circumstances "where a party to the transaction ha[d] disclosed its existence in a press release or other public filing." There was no change to the policy on the disclosure of non-public investigations or of other details of merger transactions.

The only circumstance under which previously confidential information about a merger notification and the parties thereto can be made public in the U.S. is where the parties have sought and have been granted early termination of the HSR waiting period. However, as one would expect, such public disclosure is mandated by law.

Implied Consent

With respect to "authorization by the parties" as a basis for disclosure, we strongly disagree with the view that parties to a proposed merger who have consented to market contacts by the Bureau as part of its review implicitly authorize broader public disclosure of the transaction by the Bureau, through the proposed merger register or otherwise.

Section 29 establishes a statutory confidentiality scheme designed to protect, among other things, the confidentiality of information given to the Bureau for merger review purposes. It is significant that this is an exception to the broader legislative scheme of the *Access to Information Act*, which is designed to provide the Canadian public with access to information in records under the control of Canadian government institutions. This exception to the general rule reinforces the view that the confidentiality provisions in the *Competition Act* are designed to protect the confidentiality of merger-related information, and that exceptions to the confidentiality scheme should be construed narrowly in favour of those whose information the provision was designed to protect. This view is consistent with Canadian privacy legislation, and the general legal principles governing disclosure of confidential information, which typically require that explicit consent be given and that it be limited to particular purposes. If consent to disclose confidential information is provided for purpose A, a separate consent is required to disclose that information for purpose B.

That the parties to an otherwise unpublicized merger transaction, by consenting to discreet market contacts by the Bureau, could be deemed to have consented to a much broader, general disclosure of the transaction runs counter to all principles governing the protection of confidential information. It is also inconsistent with subsection 10(3) of the Act, which requires that all inquiries conducted by the Commissioner under section 10 of the Act "shall be conducted in private".

RECOMMENDATION

In the CBA Section's view, without the express authorization of the parties, the Bureau is prohibited by section 29 of the Act from disclosing – in the proposed merger register or otherwise – the identity of parties to a merger transaction for which the parties have requested an ARC or no-action letter or submitted a pre-merger notification filing, other than where the information has previously been made public.

If the Bureau decides to proceed with the merger register, the CBA Section recommends that:

- Unless the information has previously been made public, the express authorization of merging parties to the disclosure of the names of the parties, the industry to which the merger relates, and the outcome of the Bureau's review, should be obtained prior to including the information in the merger register.
- The Bureau should advise merging parties about the merger register in the acknowledgement letters issued on receipt of an ARC request or pre-merger notification and seek authorization as described above. Where authorization is given by the parties, the Bureau could confirm same in the ARC cover letter or no-action letter.
- Even where disclosure authorization has been obtained from the parties, on the request of merging parties, the Bureau should delay including a transaction in the merger register if there would otherwise be material prejudice to the parties. An example would include a hostile take-over bid where the bid has not yet been announced but the transaction has been cleared by the Bureau without the need for market contacts.
- A description of the merger register process, including the rationale for the register and the information to be disclosed by the Bureau (perhaps in the form of an FAQ), should be published on the Bureau website.
- The Bureau should delay implementation of the merger register until all disclosure issues have been resolved.

The CBA Section, and particularly the Mergers Committee, would be pleased to discuss these concerns with you at greater length.

Yours truly,

(Original signed by Tamra L. Thomson for Donald B. Houston)

Donald B. Houston
Chair, National Competition Law Section

cc. Ann Wallwork, Assistant Deputy Commissioner of Competition, Mergers Branch Division A (via email wallwork.ann@cb-bc.gc.ca)