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Ottawa

Ms Patrizia Martino  
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Dear Ms Martino:

**Draft Enforcement Guidelines on the Revised Merger Review Process**

I am writing to provide comments on the *Enforcement Guidelines on the Merger Review Process* (the “Draft Guidelines”) which have been released for public consultation. I am doing so in my personal capacity and not on behalf of my firm, Osler, Hoskin & Harcourt LLP, which is separately providing its own comments on the Draft Guidelines.

Because I am no longer actively engaged in legal practice on a day-to-day basis, I will not be providing detailed comments on the Draft Guidelines as such. The issues I wish to address relate more to matters of general principle and, as a consequence, these remarks will be relatively abbreviated.

However, before dealing with these issues, I would like to mention that the Competition Bureau (the “Bureau”) has done a very commendable and responsible job in so promptly preparing and releasing for public discussion guidelines to assist parties in dealing with the very significant changes to the *Competition Act* (the “Act”) brought about (or to be brought about) by Bill C-10 (the “Bill”), the *Budget Implementation Act, 2009*. Not only is the release of this guidance very timely, but it appears that a genuine effort has been made by the Bureau in drafting it, to provide practical and useful direction in what is, at this stage at least, pretty unfamiliar territory. This is particularly valuable as the Bill not only effects “sea changes” in many areas of Canadian competition law; in many cases such changes have come into effect with relatively little advance notice.

I have been prompted to write in response to the Bureau’s invitation to comment on the Draft Guidelines not so much on the basis of their specific content but, rather, because of what I heard said about them and about the new merger review process brought about by the Bill (the “New Merger Review Process”) at a Roundtable discussion on those subjects which I attended on May 4, 2009 in Toronto both by representatives of the Bureau and by a number of competition law practitioners in attendance.

Based on this discussion, it would appear that the Bureau may be giving serious consideration to continuing a number of the practices which evolved under the former merger review system but which would not seem of particular relevance or necessity under the New Merger Review Process. While I recognize that, in some respects, the continuation of such practices may have been intended to be of assistance to merging parties unfamiliar with the new process and/or offered in response to suggestions by members of the bar to do so, it is my view that, in most instances, the continued recourse to such practices and procedures (such as “no action letters”, advance ruling certificates, agreements extending “waiting” or “no closing” periods and obtaining additional information through the issuance of section 11 orders to the parties and supplemental voluntary information requests) are simply not appropriate or needed in the context of the New Merger Review Process.

The comments are, however, predicated on my perception of what the new provisions were intended to accomplish. In this regard, if one goes back to what the Competition Policy Review Panel (the “Panel”) recommended and the reasons given for making such recommendations, I think that what the Panel hoped to achieve in this regard is pretty clear:

- (a) The Panel clearly wished to provide more time (beyond the maximum 42 day waiting period provided under the Act) for the Bureau to complete its review of mergers which appear to be potentially problematic;
- (b) The Panel wished to encourage and facilitate the clearance, within 30 days of initial filing, of all the other merger cases not in that category and thereby reduce the time and cost to the parties of such reviews in such cases which, although not potential candidates for enforcement action or required restructuring, were often taking considerably longer than 30 days to complete;
- (c) The Panel sought to achieve greater alignment and congruity of the Canadian merger review process with the counterpart procedures in the United States in recognition of the fact that the business economies of the two countries are extensively integrated with the result that many of the mergers which the Bureau reviews, including those which do give rise to significant competition issues warranting the Bureau’s full consideration, are often contemporaneously being reviewed by one or other of the antitrust enforcement agencies in the U.S. (Accordingly, the adoption of a comparable process in Canada would likely more often mean that the merger reviews in the two countries of the same transaction would be better synchronized from a timing point of view. As well, because the substantive aspects of the Canadian and U.S. laws in relation to mergers

are largely similar, the outcomes of the two processes should, more often than not, be relatively similar.)

- (d) Another feature of the U.S. process is that it avoids the necessity and formality associated with obtaining court orders to obtain such additional information concerning a merger, in contrast to the use of section 11 orders to secure such information. (At page 56 of the Panel's report "*Compete to Win*" Final Report – June 2008 (the "Panel Report"), the Panel states: "Seeking court orders to obtain more information or obtain an extension of the review period is unsatisfactory, for both the public and private sectors, because it diverts time and attention away from consideration of substantive issues arising in connection with proposed merger transactions.")
- (e) Finally, the Panel undoubtedly wished, through all of the above, to provide greater time and outcome certainty for parties in the vast majority of cases going through the process.

It is perhaps not surprising that the Panel might look to the U.S. process as providing a basis for achieving these objectives given that the recent U.S. experience indicates that over 97% of all filed merger cases are cleared for completion within the initial 30 day period. The U.S. system effectively compels the reviewing agency to make an earlier decision by indicating, within 30 days of filing, those mergers which it is going to look at more closely and those others in respect of which it is going to close its file. Merger cases in the U.S. which are flagged for further or second stage review through the issuance of a so-called "second request" (less than 3% of all filings) are typically those cases the review of which are the most time-consuming and which require the production of the most information. According to statistical data mentioned in the Panel Report (see page 55 of the Panel Report), the experience in Canada indicates only 1% of all cases reviewed in the five year period, 2002-2007, resulted in merger remedies being required.

I would also mention that the Panel's recommendation to adopt the U.S. system for merger review is the most clear-cut example of its preference for aligning Canadian competition law and policy with that in the U.S. At page 53 of the Panel's Report, there is a clear statement of the Panel's perspective in this regard:

"In assessing the effectiveness of Canadian competition law and policy, the Panel believes that it is desirable to conform Canadian legal requirements with those of the U.S. where practicably feasible, with a view to minimizing unnecessary procedural or substantive differences, given

the high level of integration of business operations in the two countries.”

Due to the nature of the process by which this legislation was passed there is less explicit, direct evidence of Parliament’s intentions in enacting these provisions. However, given that its actions in doing so followed so soon after the publication of the Panel’s recommendations in this regard and the fact that provisions actually enacted effectively provide for the adoption of the U.S. merger review system as recommended by the Panel, there can be little doubt that that was, in fact, the intention of Parliament in taking the action it did.

Given all of this and the fact that the Panel was unambiguous in promoting the adoption of the U.S. system for the achievement of these purposes, I feel quite strongly that, in implementing Parliament’s direction to change our existing merger review system to substantially replicate the U.S. process, it is necessary to avoid engrafting onto that system, or to continue to follow, practices and procedures which are effectively hold-overs from the system we previously had. I can understand that some practitioners and parties may prefer the *status quo*, but that, it is submitted, does not sufficiently respect either the substance and purpose of the Panel’s recommendation or the apparent intent of Parliament in passing into law these provisions of the Bill.

Quite apart from the inconsistency with the legislative purpose which the continuance of the old system practices would entail, I seriously believe that continuing to follow or apply such practices will very likely undermine our capacity to achieve the benefits which were sought to be attained by passing this legislation.

With one exception (the so-called “pull and refile” procedure), the U.S. system does not rely upon the use of any of the devices or practices which have been discussed above to extend the time for review or to defer a decision whether to initiate a second request. While the “pull and refile” procedure is resorted to on occasion, in the great majority of merger cases in the U.S. the agency responsible for handling the case either issues a second request or waives the parties through the 30-day clearance process by not issuing such a request. What makes this more impressive is the fact that in regard to merger cases in the U.S. much of the 30-day period is often consumed by the determination of the question as to which of the two agencies, the Department of Justice or the Federal Trade Commission, should be assigned responsibility for the case. In addition, merger parties

in the U.S. much less frequently provide to the agency competition briefs or analyses, such as we do here, to assist the agency in its assessment of the case.

I referred above to the Canadian merger statistics for the 2002-2007 period cited in the Panel Report. They indicate that, of some 1431 merger transactions filed with the Bureau during this period, only 15 (or an average of 3 a year) resulted in the imposition or negotiation of merger remedies. In other words, these cases comprised only about 1% of all filings effected during that 5 year period. The U.S. merger statistics for 2007 indicate that less than 3% of merger filings resulted in the issuance of second requests. Presumably a number of these cases were not further pursued on an enforcement basis or because the parties discontinued their transaction, so that it is likely that a greater number of mergers were the subject of a second request than resulted in remedial action being taken. Accordingly, based on this data, it is reasonable to assume that the percentage of cases in which supplementary information requests ("SIRs"), the Canadian name for second requests, might be issued, covering both cases in which enforcement or remedial action is eventually taken and other cases which, for whatever reason, do not proceed to that stage, might be in the neighbourhood of 3% or less of total merger filings on average in any year.

If that is the case, this suggests that the occasions on which a SIR might be issued are likely to be highly exceptional. Following this logic and bearing in mind that the focus of the reviewing agency during the initial 30-day process ought to be exclusively directed to the question of distinguishing between those cases in which the agency reasonably concludes the merger transaction should either not proceed (or proceed only subject to some restructuring to address an identified competition concern), it ought to be possible, it seems to me, consistent with U.S. agency practice, to do this without resorting to any of these procedural devices to defer closing and/or to provide for the production of further information. A transaction ought not to be delayed beyond the expiry of the 30-day period unless, prior to such expiry, the agency has concluded that, in the absence of further information, it would be inclined to take enforcement action and/or require a restructuring of the transaction.

It appears that the proponents of continuing existing merger review mechanisms which provide for an extension of the initial merger review period may be under the impression that if the Bureau desires additional information or more time, for whatever reason, and it is not forthcoming

the Bureau would simply issue an SIR to provide for it whether or not the Bureau has concluded that, in the absence of additional information, it would challenge the transaction. However, as indicated above, the statistics suggest that it would only be in the exceptional case where the Bureau would have reached such a conclusion. Also, where it has reached such a conclusion, it would seem to follow that the Bureau's logical course of action would be to issue the SIR and subject that particular merger to a second stage review.

In my view, if the New Merger Review System is adhered to, as undoubtedly contemplated by the Panel and, by inference Parliament, there would be no need for deferred closing or timing agreements, voluntary information requests extending the initial review periods, advance ruling requests, no-action letters or other such extended reviews. Rather than embroidering the New Merger Review System with hold-overs from what we had previously, a conscious effort should be made to endeavour to comply with the process which appears was intended. If having done so over a sufficient period of time to be confident that that system actually cannot be made to work in a Canadian setting, that would be the time to make a determination of what the problems with that system are and how to go about addressing them.

I appreciate this opportunity to present my views to you for your consideration and would be pleased to discuss these comments with you if that would be helpful.

Yours sincerely,

*Original signed by Tim Kennish*

Tim Kennish  
Counsel  
TK:sl