



PERSPECTIVE

New Competition Bureau Policy on Information Sharing in Reviews of Hostile Bids

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On June 2, 2010, the Canadian Competition Bureau released a statement on its disclosure policy in the context of hostile or unsolicited bids (the "Policy").

In the past, Bureau practice has been unsettled as to the extent to which it has been prepared to advise a company which is the target of a hostile bid about the status of the Bureau's review of the proposed transaction. In some cases, the Bureau has not been prepared to tell the target anything other than to advise of the existence of a pre-merger notification filed by the bidder, a notification which is required by the *Competition Act* in any event, and triggers an obligation of the target to make its own filing. In recent years, the Bureau has on occasion shown more inclination to provide more information to the target.

This Policy should give both bidders and targets more certainty with respect to the Bureau process and assist them in planning their strategies accordingly.

Considerations That Have Led to Different Approaches in the Past

In general, the Bureau seeks to conduct its merger reviews in as neutral a manner as possible so as to avoid favouring the bidder or the target or in a multiple bid situation favouring one bidder over another. However, that general principle has been advanced at different times both to justify equivalent access to information to all parties and to justify the withholding of information from the target because of concerns about its strategic use of that information to defend against a bid and favour another bidder supported by the target.

Particularly in hostile bids that raise significant competition issues, information about the Bureau's timing and approach to critical issues such as market definition, let alone its conclusions about whether it has a basis to challenge the proposed transaction, can have a major influence on strategies adopted by the bidder as well as on decisions of the target's board of directors whether to recommend approval of the bid or to pursue other possible transactions. On the other hand, bidders may be concerned about the use that the target might make of such information in opposing a bid. For example, highlighting potential competition concerns could influence shareholders to delay tendering their shares, thereby

providing more time for a subsequent competing bid to be negotiated or obtain regulatory approval.

Information That Will Be Disclosed

The Bureau's new Policy states that the Bureau will normally advise both the bidder and the target of:

1. The Bureau's complexity designation of the proposed transaction - i.e., non-complex, complex, or very complex. (As discussed below, each designation has a different service standard period within which the Bureau seeks to complete its investigation.)
2. The anticipated timing of the Bureau's review.
3. The date upon which the other party has certified compliance of a response to a Supplemental Information Request ("SIR"), if any. (An SIR is a request by the Bureau for additional documents and data. An SIR has the effect of extending the initial 30 day waiting period following notification of a notifiable transaction until 30 days after compliance with the SIR, much like a "second request" under the U.S. *Hart-Scott-Rodino Act*.)
4. The Bureau's preliminary and final views on market definition and relevant analytical factors, such as barriers to entry and the effectiveness of remaining competition.
5. The Bureau's preliminary and final views on whether the proposed transaction is likely to prevent or lessen competition substantially. (The Bureau can challenge a merger only if it finds that the transaction is likely to have such an anti-competitive effect.)

According to the Policy, the Bureau will strive to disclose such information "equitably" to both parties, subject to confidentiality restrictions. Typically, the Bureau will first advise the bidder and shortly thereafter convey appropriate information to the target.

Neither the bidder nor the target should expect the Bureau to disclose any confidential information the Bureau has received from another person. Accordingly, the Bureau may be somewhat limited in explaining the reasons for its conclusions on market definition and competitive effects of the merger, as is the case with consensual transactions. A target should also not expect the Bureau to advise it of any remedy proposals put forward by a bidder.

Finally, the Bureau comments that its application of the Policy may be less than straightforward in some circumstances, such as cases involving multiple competing bids.

Proposed New Service Standard Periods

As an administrative practice, after receiving a merger notification, the Bureau classifies a proposed transaction as non-complex, complex, or very complex, depending on the degree of competitive overlap between the parties, the potential market shares, and other factors. Bureau guidelines apply non-binding "service standard periods" depending on the classification – namely, time periods within which the Bureau strives to complete its review

of a proposed transaction. Service standard periods may be shorter or longer than the statutory waiting period following a notification (within which a notifiable proposed transaction may not be completed).

Currently, the Bureau seeks to complete its assessment of a proposed non-complex transaction within two weeks, a complex transaction within 10 weeks, and a very complex transaction within five months. On May 31, 2010, the Bureau released a revised draft Fee and Service Standards Handbook which proposes to reduce the service standard periods for complex mergers to 60 days and very complex mergers to 120 days. The draft also proposes, as a new category, transactions for which an SIR is issued. For those transactions, the service standard period would coincide with the expiry of the waiting period, namely 30 days after compliance with the SIR.

The Bureau is accepting comments on its new draft Handbook until August 2, 2010.

The Bureau's policy statement on disclosure of information in hostile transactions can be found at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03243.html>; the draft Fee and Services Handbook for Merger-Related Matters can be found at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03239.html>.

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