Competition Bureau Canada
Bureau de la concurrence Canada

Pre-Merger Notification Interpretation Guideline Number 6

Pre-Merger Notification Interpretation Guideline Number 6: Amalgamation (Subsections 110(4) and 110(4.1) of the Act)

Canada

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Enforcement guidelines

June 20, 2011

Notice

This publication replaces the following Competition Bureau publication:

Enforcement Guidelines — Notifiable Transactions under Part IX of the *Competition Act* — Interpretation Guidelines, April 25, 2000

This Interpretation Guideline is issued by the Commissioner of Competition ("Commissioner"), who is responsible for the administration and enforcement of the *Competition Act* ("Act"). The purpose of this Guideline is to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions. This Guideline sets out the general approach taken by the Competition Bureau ("Bureau") and supersedes all previous statements made by the Commissioner or other Bureau officials. This Guideline is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such, nor is it intended to substitute for the advice of legal counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Merger Notification Unit[Footnote 1].

Background

Subsection 110(4) of the Act provides that, subject to subsection 110(4.1), notification is required for a proposed amalgamation of two or more corporations where:

1. the aggregate value of the assets in Canada of the continuing corporation, other than assets that are shares of that corporation, exceed $70 million or such other amount as prescribed pursuant to subsection 110(8)[Footnote 2]; or

2. the gross revenues from sales in or from Canada generated from the assets in (a) exceed $70 million or such other amount as prescribed pursuant to subsection 110(8).

Subsection 110(4.1) provides that no notification is required for a proposed amalgamation of two or more corporations, unless each of at least two of the amalgamating corporations, "together with its affiliates"[Footnote 3], has:

1. assets in Canada that exceed $70 million or such other amount as prescribed pursuant to subsection 110(8); or

2. gross revenues from sales in, from or into Canada that exceed $70 million or such other amount as prescribed pursuant to subsection 110(8).

This additional requirement provides that each of at least two of the amalgamating corporations must be large enough to meet a required financial threshold on its own. In other words, a corporation (including its affiliates) with less than $70 million in assets and revenues will not trigger a notification requirement merely by merging

with a larger corporation. The fact that the assets in Canada and revenues in, from or into Canada of each amalgamating party's affiliates are included in the subsection 110(4.1) calculation ensures that an acquirer cannot avoid a notification requirement by incorporating a shell subsidiary and amalgamating the subsidiary with a large target corporation, instead of acquiring the shares of the target.

Policy

While the Act does not provide a definition of amalgamation, the process of amalgamation refers to the union of two or more corporations, whereby they become one corporation. For most federally incorporated businesses, sections 181 to 186 of the *Canada Business Corporations Act* set out the procedure for amalgamation. For provincially incorporated businesses, the applicable corporations legislation should be consulted.

An amalgamation pursuant to valid legislation is considered an amalgamation for purposes of subsection 110(4) of the Act, whether the amalgamation occurs under federal or provincial legislation or under the laws of a foreign jurisdiction. Care should be exercised not to confuse amalgamations with share acquisitions, which are considered under subsection 110(3) of the Act.

A triangular merger, also known as a Delaware merger, where the target corporation is absorbed into the acquiring corporation's subsidiary, with the target's shareholders receiving shares of the parent corporation, is considered an amalgamation for purposes of subsection 110(4) of the Act. A reverse triangular merger, or reverse Delaware merger, where the acquiring corporation's subsidiary is absorbed into the target corporation, is also considered an amalgamation for purposes of subsection 110(4) of the Act.

Examples

The examples below are hypothetical and are intended only to illustrate the Bureau's interpretation, as outlined above. It is assumed for the purposes of these examples that the threshold under subsections 110(4) and 110(4.1) of the Act is $70 million.

Example 1

Parties A, B and C, three Canadian corporations, propose to amalgamate. Party A has assets in Canada of $500 million and gross revenues from sales in, from or into Canada of $900 million. Parties B and C each have assets in Canada of $40 million and gross revenues from sales in, from or into Canada of $60 million. A, B and C have no affiliates.

In this scenario, the section 109 and subsection 110(4) thresholds are exceeded. However, the subsection 110(4.1) threshold is not exceeded, as only one of the amalgamating parties, i.e. Party A, has assets in Canada or gross revenues from sales in, from or into Canada that exceed $70 million. Consequently, the proposed transaction is not notifiable.

If B or C had assets in Canada or gross revenues from sales in, from or into Canada in excess of $70 million, then the proposed transaction would be notifiable.

Example 2

Two corporations, Acorp and Bcorp, enter into an agreement whereby Bcorp will amalgamate with Asub, a wholly-owned subsidiary of Acorp, which was incorporated for the sole purpose of effecting the proposed transaction. Asub has no assets or revenues. Acorp has assets in Canada of $350 million. Bcorp has assets in Canada of $75 million.

For the purposes of determining whether the party-size threshold has been met, Acorp and Bcorp, together, have a total of $425 million in assets in Canada. Accordingly, the section 109 threshold is met since the combined assets for both parties are greater than $400 million.

For the purposes of determining the transaction-size threshold under subsection 110(4), the continuing corporation that will result from the amalgamation will have assets of $75 million, therefore the $70 million threshold under subsection 110(4) is exceeded.

Finally, the subsection 110(4.1) threshold is also exceeded, as each of the two parties to the amalgamation, together with their respective affiliates, have assets in Canada that exceed $70 million. Bcorp has $75 million of assets in Canada and Asub, together with its parent Acorp, has $350 million of assets in Canada.

Example 3

Acorp is a publicly traded corporation that has $350 million of assets in Canada. Acorp has a shell subsidiary Asub that has no assets or revenues. Holdcorp's only assets are the shares of Bcorp, which has assets in Canada of $65 million and gross revenues from sales in or from Canada of $60 million. Asub and Bcorp amalgamate and, in consideration, Holdcorp receives 25% of the shares of Acorp.

In this case, the $70 million threshold under subsection 110(4) is not exceeded; therefore, the transaction is not notifiable under subsection 110(4). However, the acquisition of 25% of the shares of Acorp by Holdcorp is notifiable under subsection 110(3).

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Footnotes

Footnote 1

For further information, please refer to the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates* under the *Competition Act* at p14.

Footnote 2

The 2009 amendments to the *Competition Act* increased the transaction-size threshold to $70 million and introduced an indexing mechanism for subsequent years based on the change in the level of Nominal Gross Domestic Product at market prices. The indexing mechanism is defined at subsection 110(8) of the Act. Pursuant to subsection 110(9) of the Act, the amount determined for a particular year shall be published in the Canada Gazette and that amount will also be posted on the Bureau web site. Alternatively, a threshold amount may be prescribed by regulation. If no amount is prescribed or published in a particular year, the previous year's threshold remains in effect.

Footnote 3

For a definition of affiliate, see subsection 2(2) of the Act.