Competition Bureau Canada
Bureau de la concurrence Canada

Pre-Merger Notification Interpretation Guideline Number 16

Definition of “Goods” (Paragraph 111(a) of the Act)

Canada

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Enforcement guidelines

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Preface

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 relating to the content described herein. 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]

This Guideline addresses the treatment of certain intangible assets, such as loans, mortgages and receivables, for the purpose of the exemption for acquisitions in the ordinary course of business (Paragraph 111(a) of the Act). This Guideline supplements *Pre-Merger Notification Interpretation Guideline Number 3: Exemptions for Acquisitions in the Ordinary Course of Business (Paragraph 111(a) of the Act).*

Background

Paragraph 111(a) of the Act provides that the following class of transaction is exempt from the application of Part IX of the Act:

111. (a) an acquisition of real property or goods in the ordinary course of business if the person or persons who propose to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business.

While the word "goods" is not defined in the Act, it is defined in different ways in a number of other statutes. In some cases, its definition is limited to tangible property, but in others it has a broader scope and includes some kinds of intangible property. This indicates that the definition of goods depends on the context. The Bureau considers that for the purpose of the paragraph 111(a) exemption, the word "goods" includes intangible goods, as described below.

Policy

For the purpose of paragraph 111(a) of the Act, certain intangible assets such as loans, mortgages and receivables, are considered to be goods. Therefore, the acquisition of loans, mortgages and receivables may be exempt from the notification requirements of Part IX of the Act if the requirements of paragraph 111(a) of the Act are met.[Footnote 2]

Example

The example below is hypothetical and is intended only to illustrate the Bureau's interpretation of this Guideline, as outlined above.

Facts

A is a motor vehicle manufacturer that sells its products in Canada through a dealers' network. B is a financial institution that currently provides financing services to A's dealers to allow these dealers to acquire inventory of motor vehicles, parts and accessories. A and B are currently parties to a Dealer Finance Program Agreement pursuant to which B provides commercial inventory finance services to A's dealers in Canada (the "Program"). A has given notice to B that it will not be renewing the Program past the expiry of its term and that it intends to exercise its option to purchase the portfolio of accounts receivables arising from the Program that will be outstanding at the end of its term (the "Accounts"). A and B have reached an agreement concerning the acquisition of the Accounts (the "Transaction"). After the Transaction is completed, A will offer financing services directly to its dealers and B will continue to offer financing services to other motor vehicle dealers.

Analysis

1) Will the acquiror, as a result of the Transaction, hold all or substantially all of the assets of a business or of an operating segment of a business?

While it could be argued that providing asset-based financing, such as financing to motor vehicle dealers, constitutes an operating segment of B's business, B is only selling the Accounts and will continue to offer asset-based financing, including motor vehicle financing services to other dealers, after the Transaction is completed. Further, B is not transferring to A other key assets that would be required to operate a standalone asset-based financing business, such as key personnel and proprietary software normally required to service the Accounts. Therefore, the Transaction does not constitute the acquisition of all or substantially all of the assets of an operating segment of a business.

2) Is this an acquisition of real property or goods in the ordinary course of business?

The Transaction is in the ordinary course of business as OEMs, such as A, switch commercial finance providers for dealer programs from time to time and commercial finance providers often buy and sell accounts receivable and loan portfolios more generally. The Transaction results from A's decision not to renew the Program and to provide its own commercial inventory finance services to its dealer network.

Conclusion

The Transaction meets the two parts of the test provided in paragraph 111(a) and is therefore exempt from the notification requirements of Part IX of the Act.

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Footnotes

Footnote 1

For further information, please refer to page 14 of the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act*.

Footnote 2

The reader should refer to *Pre-Merger Notification Interpretation Guideline Number 3: Exemptions for Acquisitions in the Ordinary Course of Business (Paragraph 111(a) of the Act)* for a detailed description of the two-step analysis required to determine whether the paragraph 111(a) exemption applies to a particular proposed acquisition.