Author - Industry Canada - Competition Bureau

Publication Date - 1987-01-01

Notifiable Transactions under the *Competition Act:* Prenotification Guide

- Introduction
- Notifiable Transactions and Prenotification
- Examination of Proposed Transactions
- Application to the Tribunal
- Who Must Notify
- Which Form to Use
- Information Requirements of Prenotification Provisions
- Explanation of Terms
- Short and long forms - Explanation of Terms

Introduction

One of the significant reforms bought about by the passage of the *Competition Act* in 1986 is the change to the law dealing with mergers. The previous law, section 33, of the *Combines Investigation Act*, required that mergers be found detrimental to the public interest under the criminal law which requires proof of the offence beyond a reasonable doubt. This law was felt to be inadequate to deal with the competition issues raised by mergers.

The *Competition Act* contains a non-criminal provision, section 92, which allows for the review of mergers under a test of whether or not competition is, or is likely to be, prevented or lessened substantially in a market. The Director of Investigation and Research under the *Competition Act* is empowered to investigate mergers and apply for remedial orders to the Competition Tribunal, a quasi-judicial body established under the *Competition Tribunal Act* to adjudicate the non-criminal provisions of the *Competition Act*. There are also provisions in sections 100 and 104 of the *Act* allowing the Director to apply to the Tribunal for interim orders to prevent the completion or implementation of a transaction. Such orders may be made by the Tribunal in cases where (a) the completion of a transaction that is reasonably likely to lessen competition substantially would substantially impair the ability of the Tribunal to order an effective remedy, (b) the parties have failed to comply with the prenotification provisions, or (c) the Director has made application for an order under section 92. The use of non-criminal law offers the advantage of flexible remedies that are more appropriate to deal with the effects of mergers in the marketplace.

The comments contained herein are intended to provide to interested persons an outline of the general position of the Director with respect to the Notifiable Transaction provisions. However, it should be understood that only the legislation and regulations govern any question which may arise in relation to prenotification.

Notifiable Transactions and Prenotification

Part IX (sections 108 to 124) of the *Competition Act* which deals with Notifiable Transactions came into force on July 15, 1987. The rationale for these provisions is that in the case of large, complex transactions it is important to have an opportunity to examine the competitive impact before the merger is completed. It is often difficult, if not impossible, to obtain effective remedies in those cases where the operations of formerly independent businesses have been combined. Section 114 of the *Act* requires that persons proposing a transaction which exceeds the thresholds set out in sections

109 and 110 must notify the Director in advanced of the completion of the transaction.

There are two threshold levels relating to the Notifiable Transactions provisions. First, theparties to the transaction, together with the affiliates, must have assets or annual gross revenues from sales in, from or into Canada that exceed $400 million. The second threshold varies depending on the nature of the transaction. The Director must be notified in cases where:

a) in respect of a proposed acquisition of assets of an operating business, the value of the assets or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million;

b) in respect of a proposed acquisition of voting shares of a corporation carrying on an operating business, the value of the assets of the acquired corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million, and the persons acquiring the shares would acquire an interest in the corporation exceeding either 20–percent in the case of a public corporation, or 35 percent in the case of a private corporation. If the parties already surpass either the 20-percent or 35-percent threshold, and make a subsequent share purchase which results in their owning more than a 50-percent interest, then the subsequent transaction also requires notification. Exact conditions for the thresholds for share ownership in the case of public and private corporations are set out at subparagraphs 110 (3) (b) (i) and (ii);

c) in the case of a proposed corporate amalgamation where one or more of the corporations carries on a operating business, the value of the assets of the continuing corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed $70 million; and

d) in the case of a proposed combination, the value of the assets of the continuing business or the annual gross revenues from sales in or from Canada generated from those assets would exceed $35 million.

Section 113 sets out general exemptions from the requirement to prenotify in the case of transactions between affiliates, those for which the Director has issued an advance ruling certificate pursuant to section 102, and those pursuant to an agreement entered into before the coming into force of the Notifiable Transactions provisions and which were substantially completed within one year after section 113 came into force.

Once notification is given, the parties to the merger are required by section 123 to wait from 7 to 21 days, depending on whether the filing is made under section 121 or 122 and whether the transaction is effected through a stock exchange, before completing the merger. This period can be shortened if the Director informs the parties he does not intend to make an application by the Director pursuant to either section 100 or 104 the Tribunal has issued an interim order preventing the completion of the transaction.

Examination of Proposed Transactions

All mergers, whether or not they exceed the prenotification thresholds, are subject to examination by the Director to determine if they have, or are likely to have, the effect of preventing or lessening substantially competition in a definable market. The assessment of the competitive effect of a merger is made with reference to the factors identified under section 93 of the *Act*. Subsection 92 (2) of the *Act* specifically provides that a finding of the requisite prevention or lessening of competition cannot be made solely on the basis of evidence of market share or concentration. Although such evidence is significant, other qualitative and quantitative measures of competition must be taken into account.

Section 96 of the *Act* provides that the Tribunal shall not make an order if it finds that the merger will result in gains in efficiency that would more than offset the effects of any prevention or lessening of competition, and such efficiency gains would not likely be attained if the order of the Tribunal sought by the Director were made.

Application to the Tribunal

The Director may apply to the Competition Tribunal for a remedial order disallowing all or part of the merger pursuant to section 92 of the *Act*. The section also allows other forms of remedial orders with the consent of the Director and the parties against whom the order is directed. Consent orders are also available pursuant to section 105, which provides that the Tribunal may make an order, the terms of which are agreed to by the Director and the person in respect of whow the order is sought, without hearing such evidence as would ordinarily be placed before the Tribunal.

Section 97 of the *Act* provides that no application to the Tribunal may be made by the Director in respect of a merger more than three years after the merger has been substantially completed.

Who Must Notify

Subsection 114 (1) requires the person or persons who are proposing a notifiable transaction to notify the Director and supply the relevant information before completing the transaction. However, subsection 114 (2) allows one person to supply information on behalf of or in lieu of the others.

It is important to note that the obligation to notify arises before the transaction is completed. Therefore, in cases where notification is applicable, it is required to be completed prior to the transfer of the ownership of assets or voting shares, the effective date of articles of amalgamation, or the contribution of assets to a combination.

Which Form to Use

The Notifier has the option to file a "short form" under section 121 or a "long form" under section 122. Firms filing a short form shall not complete the transaction before the expiration of a seven-day waiting period after receipt of the information by the Director. For firms filing the long form this waiting period is 21 days. However, if a short form filing has been submitted, the Director may, within the seven-day waiting period, require that the long form filing be submitted. In the case of proposed transactions which are acquisitions of voting shares to be effected through the facilities of a stock exchange, and if the long form filing is used, the waiting period is 10 trading days or such longer period not exceeding 21 days as allowed by the rules of the exchange before the shares can be taken up.

Information Requirements of Prenotification Provisions

If parties to a transaction are unsure whether certain information is within the scope of a term used in the *Act* or the Regulations and, therefore, whether the information is required to be included as part of the prenotification filing, they should bear in mind that it is in the best interests to supply all information that may be considered relevant in order to permit the Director to complete the review in the shortest time possible. When the Director believes that the information provided is insufficient for the purpose of the review, further steps may be required to obtain more specific information, including application to the Competition Tribunal on the basis that there has been a failure to comply with the prenotification requirements. This will delay the review process.

Explanation of Terms

(a) **Agreement and substantially completed** (paragraph 113 (c))

Paragraph 113 (c) of the *Act* exempts from the prenotification provisions a transaction pursuant to an agreement entered into before July 15, 1987, and substantially completed no later than July 14, 1988.

In the view of the Director the agreement between or among the parties must be binding and set out all the necessary terms and conditions for the completion of the transaction, such as would be found in a formal contract document. In some circumstances a detailed letter of intent signed by all parties, setting out the conditions of the transaction including a description of the assets, the price to be paid or a formula for determining the price, required actions of parties, penalty clauses, etc., could be considered an agreement.

Also in the Director's view, a transaction is considered to be substantially completed when there has been a closing where the title the assets is transferred for consideration. After closing there may remain some ancillary details of a minor or routine nature to be completed, such as filings or registrations. Once they have been attended to , the transaction will be finally completed. In normal circumstances the closing of the transaction means that the acquisition of control, to which the merger provisions of the *Act* apply, has been achieved.

(b) **Publicly traded** (paragraph 110 (3) (b))

Publicly traded in respect of voting shares of a corporation would include shares that have been listed and posted for trading on any stock exchange in Canada that is recognized as such by the appropriate provincial securities authority or traded in any other market if the prices at which they have been traded are regularly published in a *bona fide* news, business or financial publication of general and regular circulation.

Short and long forms - Explanation of terms

(a) **Description of the transaction and business objectives**

The description of the proposed transaction ought to identify the parties to the transaction, the type and value of transaction being proposed (e.g. acquisition of assets or shares, amalgamation, combination), the value of the transaction, the method of financing, the assets or shares being acquired, the businesses being amalgamated or combined, and the closing date. The description of the business objectives intended to be achieved ought to include an outline of the immediate plans for the acquired or continuing business. It should include any proposed changes in management, product lines, employment and assets.

(b) **Affiliates**

The term "affiliate" is defined in subsection 2 (2) of the *Act*. For the purpose of the Notifiable Transactions provisions, the definition of affiliates in the case of Crown corporations is limited by subsection 108 (2). Essentially, corporations are affiliated if one is a subsidiary of the other or both are subsidiaries of the same corporation or controlled by the same person. A corporation is a subsidiary of another corporation if it is controlled by that corporation A corporation is controlled by a person if more than 50 percent of the voting shares in a corporation are held, directly or indirectly, by that person and the votes attached to those shares are sufficient to elect a majority of directors of the corporation, i.e. *de jure* control. It is suggested that the chart required under subparagraph 121(c)(iii) describing the relationship between affiliated corporations be in the form of an organizational chart showing the percentage of voting shares controlled by each corporation.

(c) **Significant**

Only affiliates that have significant assets in Canada or sales in, from or into Canada have to be included in the filing. This should help to ease the reporting burden when a large number of corporations are affiliated with one or more of the parties required to prenotify.

It is recommended that parties use their own judgment of what constitutes "significant" assets in Canada or "significant" sales in, from or into Canada, bearing in mind that irrelevant information does not have to be supplied (subsection 116 (2) and (3)) but failing to prenotify may give rise to sanctions under subsection 65 (2) or the issuance of an interim order under subsection 100 (1). Any plant or office in Canada would be considered a significant asset. Other assets, however, such as portfolio investments, inventories or marketable securities may or may not be considered to be "significant", depending on the relevant circumstances. Sales in Canada may also present some problems. Again, parties should use their best judgment.

(d) **Principal businesses, customers and suppliers**

The summary description of the principal businesses of the parties to the transaction and their affiliates does not have to be excessively detailed. It should identify product, markets, distribution methods, employment, major competitors, technology and any other relevant facts.

For the purpose of prenotification, current principal suppliers and customers, in the Director's view, ought to include customers or suppliers with which the parties have done business over the past fiscal year and which are important to the successful continuation of the business of the parties in question. This encompasses not only customers and suppliers that are important simply by virtue of the amount of goods and services exchanged, but should also include customers or suppliers that are vital to production even though the absolute dollar value of the services or purchases may be quite small. For example, crucial banking services or suppliers of inputs which, though insignificant as a cost [illegible], may be critical to the ongoing viability of the business will be relevant in this context. Also, [illegible]nes that represent sales or purchases between affiliates should be reported assuming, of course, that they can be characterized as being transactions with a principle customer or supplier.

(e) **Additional information**

Section IV of the form allows the Notifier, or other party, to provide additional information that may be relevant to the Director's analysis of the transaction under the Merger provisions of the *Act*. Such analysis is made with reference to the factors listed in section 93 and other specific provisions referring to concentration, market share, efficiencies, etc. Parties filing under the Notifiable Transactions provisions are encouraged to provide such information even though it is optional. The waiting periods under the *Act* for completion of the transaction are very limited. The provision of additional information relevant to the factors will greatly assist the Director to arrive at a conclusion as to whether or not the transaction should be the subject of further proceedings under the *Act*.