

Competition Bureau Challenges Completed Merger

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The Facts

In an unusual move, the Competition Bureau is challenging a completed transaction – it is unclear from the materials filed by the Bureau whether the merger was subject to pre-merger notification. In its application, the Bureau alleges that the deal will create a monopoly in the market for the development, service and supply of reserves software sold to Canadian oil and gas producers. The Bureau alleges the transaction results in anti-competitive price and non-price effects, as well as lessening of innovation. The Commissioner is seeking an order requiring the purchaser to sell one of its reserves software products.

The materials filed by the Bureau allege that, because of its acquisition of Aucerna, Thoma Bravo, LLC, a US private equity firm (who already owned Quorum) now controls the two largest oil and gas reserves software businesses in Canada. Thoma Bravo has not responded to the Bureau's notice of application.

The Bureau's Concerns

Based on the notice of application, Canadian reserves software customers expressed significant concerns regarding the potential anti-competitive impact of the deal on what they viewed as "business critical" software. Significantly, the materials suggest that customers indicated that they had used the threat of switching between Aucerna and Quorum to negotiate better terms and prices and that competition between the two companies had resulted in improved customer service. Customers also expressed concerns that the merged firm would not have the same incentive to ensure their reserves software products are updated to reflect regulatory changes, or to otherwise regularly improve the functionality of the software.

The Bureau's materials do not indicate whether the deal was subject to pre-merger notification – simply that the purchase agreement was entered in late January 2019 and completed in mid-May. Accordingly, we will likely have to wait until Thoma Bravo files its materials to learn whether the Bureau is challenging a deal that (i) was not notifiable, or (ii) was subject to notification and the parties elected to close at risk following the expiry of the relevant waiting periods. In either case, there are potential strategic implications for firms involved in mergers that may raise competitive issues.

Key Takeaways

If this deal was not subject to pre-merger notification, the case may signal an increased willingness by the Bureau to proactively review and potentially challenge non-notifiable transactions that may raise competitive concerns. This aligns with statements by the Commissioner and other Bureau staff regarding the expanded

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Merger Intelligence and Notification Unit, which is focussed on flagging non-notifiable transactions for possible review. If this is the case, parties involved in non-notifiable deals may have an increased incentive to engage with the Bureau prior to completing deals that may raise competitive concerns.

If the deal was subject to notification, this case may signal an increased willingness of parties to close at risk (where the statutory waiting period has expired, but the Commissioner has not issued a comfort letter) if they are unwilling to give the Bureau additional time to complete his review. While there is currently too little information to determine whether this is a trend, this strategy is increasingly being considered in deals where the Bureau has not completed its review within the statutory timing.

While challenges to completed deals will likely continue to be unusual in Canada, this case may indicate an increased willingness by both companies and the Bureau to litigate mergers that raise potential competitive issues. Regardless of the notification issue, this case is also a good reminder for companies to consider whether to implement a proactive strategy to address the potential concerns of customers and other stakeholders to avoid possible complaints to the Bureau.

[For a copy of the Bureau's press release click here.](#)

[For a copy of the Notice of Application see the website of the Competition Tribunal here.](#)

If you have questions about merger review, or other aspects of Canadian competition law please contact a member of our Competition, International Trade & Foreign Investment Group.

The authors of this article gratefully acknowledge the contributions of summer student Stacey Weltman.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.