

Canada's approach to remedies in international mergers

Omar Wakil, partner at *Torys LLP's Toronto office*, discusses the innovative way in which Canada's Competition Bureau handles competition concerns in multi-jurisdictional merger investigations

Canada's Competition Bureau has recently formalised the approach it will take to remedies in international mergers. In its Information Bulletin on Merger Remedies in Canada, the bureau affirmed its desire to explore coordinated solutions with agencies in other jurisdictions. More notably, it also affirmed its willingness – in appropriate cases – to accept remedies agreed to elsewhere as sufficient to resolve potential competition concerns in Canada. This evolution in the bureau's thinking represents both a sound policy approach and effective use of scarce resources.

The bureau has a longstanding policy of working closely with foreign agencies in merger investigations, particularly the US Federal Trade Commission, the Department of Justice and the European Commission. Wherever possible, the bureau will coordinate with foreign competition authorities on remedies when a multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar, or related to, those likely to result in other jurisdictions.

According to the bulletin, "The greater the extent to which competition issues identified in Canada are similar to those in other jurisdictions, the greater the likelihood that coordinated remedies will be effective. [...] Consistent and coordinated remedies help avoid potential frictions stemming from situations whereby a remedy in one jurisdiction may not be acceptable in another. Consistent and coordinated remedies can also lead to a more effective resolution than would be attained through independent enforcement action."

Coordinated cross-border remedies may mean the coordinated approval of a divestment package as well as the approval of a particular buyer or monitor trustee for a North American or worldwide divestment.

A notable case in which enforcers in Canada and elsewhere worked hand in glove to craft workable worldwide solutions occurred in connection with Bayer AG's acquisition of the global crop protection

business of Aventis. The multi-jurisdictional review of the transaction resulted in the harmonisation of remedies in Canada, the US, Europe and elsewhere. The agreed remedies included cross-border divestments and IP licences, a six-month divestment term and crown jewel provisions.

A similar example of cooperation occurred in the merger of Lafarge and Blue Circle Industries. In that case, the Competition Bureau and the FTC identified a concern in a sub-national but cross-border cement market that included the province of Ontario in Canada and, in the US, all of Michigan and the coastal markets around Lake Superior, Lake Michigan, Lake Erie and Lake Ontario. The cement production facilities were located in Ontario and the agencies cooperated closely on a divestment package that would remedy the competition problems on both sides of the border.

What is particularly remarkable about the bulletin is that it also acknowledges that the bureau will sometimes not take separate action to formalise negotiated remedies in Canada, even when a merger is expected to result in a substantial lessening or prevention of competition. According to the bulletin, the bureau may rely on foreign remedies when the locus of the remedy is outside Canada. There is an important qualifier: the bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada.

COMPETITION BUREAU INVESTIGATIONS

The policy approach articulated in the bulletin does not mean that the bureau will defer its investigation to a foreign authority. Indeed, the time pressure of a merger transaction requires the bureau to at least keep pace with the timing of the international review. Substantive antitrust issues may not become clear until the bureau has conducted a full investigation. Moreover, it may only be at the late stage of identifying effective remedies that the bureau is able to determine

that an international solution could satisfy a Canadian concern.

That said, the bureau can and does size up mergers early in the review process. A typical review begins with an evaluation of the filings and competitive impact submissions from the merger parties and a marketplace inquiry that usually focuses on the parties' customers but can include competitors and suppliers. It can quickly become evident that the locus of a transaction is offshore, that substantive antitrust issues do not differ from those in the US, Europe or elsewhere and, importantly, that a remedy would likely take place outside Canada. This may happen, for example, when the merger parties have sales offices in Canada but all production occurs offshore. In such cases, the bureau may not pursue an investigative approach that would require the parties to supply Canadian versions of submissions made elsewhere or embark on costly document productions unlikely to produce evidence that differs from that supplied elsewhere. Instead, it may actively monitor foreign regulatory developments by requesting status updates and waivers to exchange information with foreign counterparts.

Such an approach is not adopted in all international cases. Significant productive assets may be located in Canada, or the bureau may identify Canada-specific issues that warrant an investigation just as detailed as those occurring elsewhere. When Diageo purchased part of the Seagram Spirits and Wine Business from Vivendi Universal, the bureau quickly zeroed in on a Canada-only overlap in the narrow Canadian whisky market. After an in-depth investigation, it required the divestment of the overlap brand. Interestingly, the bureau also scrutinised rum markets in the same transaction but ultimately took no action, possibly because it knew the US Federal Trade Commission would likely require a worldwide divestment in that market, which it did some months later. More recently, the Competition Bureau required the divestment of Zincofax diaper rash ointment and related assets to address competition concerns arising from Johnson & Johnson's acquisition of the consumer health-care business of Pfizer. The FTC also required a diaper rash ointment divestment,

but of a different brand (that was not sold in Canada).

ACCEPTANCE OF INTERNATIONAL REMEDIES

Just as it will not truly defer to the investigation of another authority, the bureau has made it clear that it would never defer to another jurisdiction when it comes to fashioning remedies. Rather, it is open to accepting remedies in foreign jurisdictions as adequate solutions for anticipated anti-competitive impacts in Canada. The distinction may be a fine one, but the point is that the bureau will not uncritically accept a foreign remedy. Just as it will carry out its own independent investigation, it will carry on its own assessment of what it believes is necessary to resolve an anti-competitive merger. This practical, low(er) cost approach appears to have worked well in several cases.

Dow/Union Carbide

An early (pre-bulletin) example of the bureau's acceptance of an international remedy occurred in connection with the combination of the Dow Chemical Company and Union Carbide Corporation. The bureau determined that separate Canadian remedial action was not required in light of the remedies being ordered by other enforcement authorities. The bureau had identified significant competition issues in a number of product markets, as did the FTC and the European Commission. To satisfy concerns in the US and Europe, the parties agreed to divest certain technology assets, IP rights and businesses. According to a recent statement by Sheridan Scott, Canada's competition commissioner, the remedy for the substantive issues identified by the bureau "consisted primarily of worldwide intellectual property rights that were covered by the US Consent Decree." Given that the IP was covered by the US decree, the bureau concluded that it did not need to take additional action. There is not enough information on the public record to know exactly what IP was covered by the US decree, but information disclosed by the FTC suggests that it might have required the licensing of Canadian IP. The case is interesting in highlighting the bureau's (probable) approach to an offshore remedy where the only Canadian component is the licensing of Canadian IP (but, like other older cases, *Dow* ought to be treated somewhat cautiously as a precedent, as the bureau evolves and refines its approach to remedies in international mergers). Where the IP is simply the Canadian counterpart to IP issued elsewhere and is only needed to sell a product into Canada, the bureau will likely

not require a separate and formal Canadian remedial approach.

GE/Instrumentarium

The bureau concluded that the merger between General Electric Company and Instrumentarium Oyj would likely result in significant competition concerns in the supply of patient monitors in hospitals and health-care facilities. To resolve concerns in Europe and the US, GE agreed to divest the worldwide Spacelabs business of Instrumentarium. GE also provided a formal commitment to the European Commission that it would maintain interfaces on patient monitors and other devices to ensure that third-party suppliers could interconnect with their equipment. At the request of the bureau,

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GE confirmed that the European interface commitment would apply on a global basis. Accepting the worldwide divestment commitment at face value and armed with the side-letter assurance that Canada would be covered by the interface commitment, the bureau issued a 'no-action letter' and closed its file. It did not require any further action or more formal recording of the remedy. Notably, it emphasised that if the Spacelabs business was not divested or the interface commitment was breached, the bureau had the right under the Competition Act to make an application to the Competition Tribunal within three years after the transaction had closed.

Alcan/Pechiney

The bureau concluded that Alcan's acquisition of Pechiney would likely not result in a substantial lessening or prevention of competition when assessed in light of the remedial commitments made by Alcan

in the US and Europe. The geographic markets examined by the bureau were primarily North American or global, and Pechiney did not control any physical assets in Canada that overlapped with those of Alcan. Alcan had agreed to divestment of facilities in the US and Europe and made commitments to the European Commission regarding certain technologies and designs. The bureau determined that these measures preserved competitive options for Canadian customers as well, and did not take any further action. The case highlights the bureau's fundamental approach: essentially it is conditionally closing its file on the basis that there will be no substantial lessening of competition in Canada if the foreign remedy is implemented.

Procter & Gamble/Gillette

The bureau determined that divestments required by US and European competition agencies adequately resolved concerns in Canada. The Procter & Gamble Company had agreed with the FTC and the European Commission that it would divest products in oral care markets in the US, Europe and Canada. (In fact, the bureau's press release states that the parties agreed to the divestments in the US and Europe partially in response to concerns expressed by the bureau.) Interestingly, the bureau's assessment does not appear to have been identical to that of the FTC. The bureau "identified some concern in the oral care markets for battery powered toothbrushes and teeth-whitening products." The FTC identified additional problematic overlaps and also required remedies in connection with rechargeable toothbrushes and anti-perspirant and deodorant products. There is no indication that the agencies adopted differing analytical approaches and the divergence may have been due to different product line-ups or the presence of additional competitors in Canada.

Boston Scientific/Guidant

The bureau decided to not challenge Boston Scientific Corporation's acquisition of Guidant Corporation after concluding that the consent order that Boston Scientific had signed with the FTC and the commitments made to the European Commission adequately resolved competition concerns in Canada. Reminiscent of its narrow approach in *Procter & Gamble/Gillette*, the bureau's public statements suggest that it was concerned with a subset of issues being dealt with in the US. The bureau flagged two aspects of the US consent order

as particularly important to it. The first was the upfront divestment of Guidant's vascular intervention and endovascular businesses, including IP, to Abbott Laboratories. The second was the agreement that Abbott would relinquish the small equity position it acquired in Boston Scientific as part of the transaction financing arrangements.

Notably, in all of these cases, the bureau emphasised that its conclusions were reached after "extensive" or "thorough" reviews. In *Alcan*, *Boston Scientific* and *Procter & Gamble*, it added that it had consulted with customers and competitors as well as with the FTC and the European Commission. These cases serve to emphasise that an in-depth review ought to be anticipated in Canada, even when the outcome is the acceptance of an international remedy.

In all of these cases the bureau is effectively relying on the willingness of other enforcers to adopt an extraterritorial approach to merger remedies, such as a worldwide divestment, to resolve a competition concern. Clearly a workable remedy will not always have to be global in scope. *GE/Instrumentarium* is a case in point: it was presumably the unclear geographical extent of the interoperability remedy that required the bureau to seek a separate assurance from the merger parties that it would in fact apply to Canada. (Although pragmatic, the advisability of seeking such assurance in the form of an informal commitment from merger parties may also raise questions about enforceability.) *GE/Instrumentarium* probably also provides a good example of the furthest the bureau will go in accepting an international remedy without requiring a formal consent agreement in Canada.

When the Bureau is deciding whether to accept an international remedy, the main question is whether the remedy involves conduct or assets that are "primarily" outside Canada. According to the bulletin, "the bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the assets that are subject to divestiture, and/or conduct that must be carried out as part of a behavioural remedy, are primarily located outside of Canada." Conversely, "the bureau is more likely to formalise negotiated remedies within Canada when the matter raises Canada-specific issues, when the Canadian impact is particularly significant, when the asset to be divested resides in Canada, or when it is critical to the enforcement of the terms of the settlement." It is therefore relevant to consider these factors in assessing

the likelihood that the bureau would accept a particular remedy.

Where there is a significant Canadian component or action that must be taken in Canada, a separate and formal Canadian remedy ought to be expected. Although the "primarily" test is clearly somewhat subjective, it seems to be a reasonable way of articulating when the bureau will exercise enforcement discretion in cross-border cases. In *GE/Instrumentarium*, it was clear that conduct in Canada was required to resolve a Canadian concern. Moreover, it was unclear whether the foreign remedy was meant to cover Canada. Should a similar fact situation arise today, a formal Canadian resolution should be expected. The bureau's acceptance of foreign remedies that are global, or that at least cover Canada, will therefore clearly have limits.

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ENFORCEMENT

The bureau's policy approach to international remedies relies partially on its jurisdiction to challenge a merger up to three years after completion. This allows the agency to reopen its investigation and bring an application before the Competition Tribunal for a remedial order in the event that a foreign remedy is not fully carried out. As suggested in the *GE* and *Alcan* case summaries referred to above, the bureau would not challenge the breach of the foreign remedial commitment but rather the merger itself, on the basis that the circumstances under which the agency closed its file had changed. Indeed, the bureau could probably take the same approach if it had initially 'cleared' the merger on the basis of an advance ruling certificate, as well as a no-action letter (which advises the merger parties that the bureau has concluded that

it does not presently have sufficient grounds to bring an application to challenge the merger, and also reminds them of the three-year limitation period and that the bureau may therefore reopen its investigation). An advance ruling certificate formally binds the commissioner and prevents her from challenging a merger. But it restricts her only from bringing an application on the basis of "information that is the same or substantially the same as the information on the basis of which the certificate was issued." If the certificate were issued on the basis that a foreign remedy would be carried out, and that remedy is not carried out, the issuance of the certificate would likely not bar a challenge. As a practical matter, of course, it is unlikely that the bureau would ever have to take enforcement action. The foreign authority that required the remedy will presumably have a stronger interest in policing its implementation.

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To resolve competition concerns within Canada, the Competition Bureau may either take specific action or determine that action beyond what will be taken in foreign jurisdictions is not required. While enforcement decisions are made on a case-by-case basis, the bureau is likely to be sympathetic to the acceptance of an international remedy where the assets or conduct in question is primarily outside Canada, where there are no uniquely Canadian substantive issues and where separate Canadian enforcement action is not necessary for the successful implementation of the remedy. For merger parties in these sorts of cases, an early cooperative approach with the bureau is advisable. It can increase the likelihood that the bureau will accept an international remedy and potentially lead to lower investigation and remedial costs. In practical terms, it will be important to explain the proposed transaction and its nexus to Canada upfront. This should be supplemented with offers of cooperation in the form of waivers to allow the bureau to confirm with foreign agencies what it is being told by the parties. Coordination on remedies will be difficult or impossible if the bureau is constrained in the scope of the information it can secure from the agency planning to require the remedy. Clearly, only a subset of cross-border cases will qualify for this sort of enforcement approach. Nevertheless, the bureau's innovative and open-minded policy in these cases ought to be welcomed by international businesses and their advisers.