Goodmans LLP Update

New Bureau Merger Challenge Evidences Effective M&A Strategies and Alleges Monopsony

Canada's Competition Bureau recently sued a Canadian agricultural company, seeking to unwind part of a closed transaction involving the company's purchase of grain elevators. This case matters to business because:

- it demonstrates that companies may have a valuable opportunity to close large transactions (and vendors can get paid) even though part of the transaction may potentially be anti-competitive.
- it is the first public example of the Bureau taking action in respect of alleged "monopsony" (i.e., market power for the purchase of a product, rather than its sale).

Background

Parrish & Heimbecker (P&H) is a Canadian operator of grain elevators, grain processing assets and export terminals. In September 2019, P&H announced it would acquire 10 additional grain elevators in Manitoba, Saskatchewan, Alberta and British Columbia from Louis Dreyfus Company, and closed the transaction on December 10, 2019. The value of the transaction was not publicly disclosed.

A grain elevator operator purchases grain (such as wheat and canola) from farmers in the area surrounding the elevator. The operator then processes the grain in different ways (e.g., sorting and storing the grain) before loading the grain onto rail cars for transportation to downstream customers. P&H operated grain elevators in the area of some of the 10 grain elevators it purchased from Louis Dreyfus Company.

The Bureau's complaint explains that, as a result of the transaction, P&H owns the only grain elevators along a 180 km stretch of the TransCanada Highway, the main highway through the Canadian prairies (where a significant percentage of Canadian grain is grown). The Bureau seeks a divestiture of one of P&H's two grain elevators in this stretch.

Key Takeaways

Parties' Aggressive Closing Schedule and Bureau's Litigation Strategy

The Bureau's complaint explains that it investigated the transaction, including by issuing Supplementary Information Requests (akin to US Second Requests). The parties closed their transaction 32 days after they complied with the Supplementary Information Requests and a mere two days after the mandatory waiting period under the *Competition Act* expired.

While the Bureau would have known from the outset that P&H would own the only grain elevators along a 180 km stretch of the TransCanada Highway post-transaction, it did not take interim action to prevent the closing. Instead, the Bureau permitted the transaction to close and only brought litigation in respect of part of the transaction.

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The parties' aggressive closing schedule and the Bureau's litigation strategy deployed in response is similar to an earlier merger in 2019 involving Thoma Bravo, which acquired a software company shortly after it complied with a Supplementary Information Request. In that case, the Bureau brought litigation against Thoma Bravo after closing, alleging that the acquisition of a single software product was anti-competitive. Later, Thoma Bravo entered into a "hold separate" agreement with the Bureau in respect of that product, and subsequently into a consent agreement for the divestiture of that product. These aggressive closing schedules reflect the fact that it is challenging for the Bureau to obtain an interim injunction against closing a broader transaction as a matter of law.

Bureau Seeks Divestiture and Excludes Vendor

Notably, the Bureau's complaint lists only P&H as a defendant and seeks divestiture of one of the two grain elevators P&H owns along the stretch of the TransCanada Highway. The Bureau does not name the vendor as a defendant or seek rescission of the merger (i.e., the Bureau does not seek to have the vendor re-acquire an asset it previously sold).

Bureau Extends Merger Provisions to Alleged Monopsony

The Bureau's complaint alleges that by purchasing grains and improving its quality before on-sale to downstream customers, grain elevator operators are in the business of *supplying* "grain handling services" to the farmers from whom they purchase grain. This is despite the fact that in real life grain elevator *operators* only purchase grain from farmers (and do not sell them anything), and farmers are indifferent to how grain elevator operators handle their purchased grain.

While Canadian merger law does not define "competition" to relate only to monopoly, the Bureau's complaint in this case represents the first public example of the Bureau attempting to extend Canadian competition law to competition for the purchase of a product (i.e., monopsony). The Bureau's complaint suggests some sensitivity about this extension of the law, arguing that grain elevators actually supply a service to farmers and charge an "implicit price" to farmers for grain handling services when purchasing their grain. Whether the Competition Tribunal accepts the extension of the merger provisions to monopsony, or finds the distinction between monopoly and monopsony relevant under Canadian competition law, is something that keen observers will watch going forward (assuming the case is not settled first).

For further information concerning this development, please contact any member of our Competition, Antitrust and Foreign Investment Group.