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Mediation in Canadian Competition Tribunal Proceeding Leads to Settlement in Merger Challenge

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On March 29, 2016, the Canadian Commissioner of Competition and Parkland Fuel Corp. entered into a consent agreement to resolve the Commissioner's challenge to Parkland's acquisition of Pioneer Energy. This marks the first time in a Canadian Competition Tribunal proceeding that a consent agreement has been negotiated through mediation.

The consent agreement includes not only divestitures and termination of fuel supply agreements in certain local markets but also a cap on margins in supply provisions applicable to some other local markets. While such supply provisions are typically not a merger remedy favoured by competition law enforcers, the Parkland resolution demonstrates that the Commissioner may be willing to consider non-standard behavioural remedies or processes in particular cases.

Background

In April 2015, the Commissioner challenged Parkland's proposed acquisition of Pioneer Energy, alleging that the transaction would likely result in a substantial lessening of competition in the retail supply of gasoline in 14 local markets (representing about 10% of the acquired business). At the same time, the Commissioner applied for an injunction to prevent the merging parties from implementing the transaction in the identified local markets pending the outcome of the Commissioner's challenge, but otherwise allowing the acquisition to proceed. In May 2015, the Tribunal granted an interim injunction, ordering Parkland and Pioneer Energy to preserve and hold separate retail gas stations and related supply arrangements in 6 of the 14 markets pending a full hearing on the contested merger, which was scheduled for May 2016. (See our discussion of the case following the Tribunal's injunction decision.)

The Consent Agreement

The consent agreement requires Parkland to divest six retail gas stations – five in Ontario and one in Manitoba. In at least one case, Parkland has the option to terminate a fuel supply arrangement, rather than divest service station assets in the local market. The consent agreement also requires Parkland to adhere to certain price restrictions in the wholesale supply of gas to dealers in two additional local markets in Manitoba.

While some details of the consent agreement are included in confidential schedules, the public version includes a few provisions of note:

• Divestiture to One or More Purchasers. The consent agreement permits Parkland to divest the relevant assets to one or more purchasers. Competition authorities often require assets to be divested to a single purchaser to ensure sufficient competition in the relevant market(s). This is typically the case where sale of a subset of the divestiture assets to more than one purchaser may negatively impact the divested business. In this case, the option to sell to more than one purchaser suggests that the Commissioner views the divestiture assets as sufficiently distinct that a single purchaser of all the divestiture assets in the six markets is not necessary to ensure effective and sufficient competition in those markets.

• Parkland's Choice of Divestiture Assets. The consent agreement includes the usual pre-approval requirements that must be satisfied before the Commissioner signs off on a proposed purchaser, including that Parkland will have no direct or indirect interest in the divestiture assets following the divestiture. Interestingly, the consent agreement also provides Parkland with some choice relating to the assets it divests. In particular, Parkland must (i) in Kapuskasing, Ontario, divest "the business of Parkland at a corporate station of its choice"; and (ii) in the remaining five markets in Ontario and Manitoba, divest one Parkland corporate station or, in at least one case, terminate a fuel supply contract with a dealer.

• Margin Caps. In the two markets subject to restrictions on wholesale supply arrangements, rather than divestitures, the consent agreement prohibits Parkland from increasing its rack forward margin for six years. In addition, for six years, Parkland is prohibited from increasing its delivery fees to dealers in these two markets, except if the increase is cost justified and/or there is a province-wide increase in delivery fees. (Presumably, the province-wide exception is included on the basis that competition across the province is sufficient to prevent an anti-competitive price increase.) Notably, based on the Tribunal record, it appears that neither Parkland nor Pioneer Energy has a corporate station in either of these two markets.

While the Commissioner's application challenging the proposed merger sought divestiture of retail gas stations and related supply agreements in 14 local markets, the negotiated consent agreement involves remedies in only 8 of the 14 markets and requires divestiture in only 6 of these. Again interestingly, some of the required divestitures are in markets that were not subject to the Tribunal's interim preservation and hold separate order.

The Parkland consent agreement signals the Commissioner's flexibility and willingness, at least in some circumstances, to negotiate terms in the course of a mediation process to foster timely and efficient resolutions. It remains to be seen how widely, and how early in a proceeding, the Commissioner will be prepared to participate in a mediation process to resolve future merger challenges.

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This post originally appeared on KluwerCompetitionLawBlog.com.

This entry was posted on Tuesday, April 5th, 2016 at 9:40 pm and is filed under International Competition Law
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