INFORMATION NOTE

On October 31, 2022, the Competition Tribunal issued its decision in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited* (CT-2019-005).

The Tribunal dismissed the Commissioner's application. The Tribunal concluded that the Commissioner did not prove that the acquisition of a grain elevator near Virden, Manitoba would lessen competition substantially in the markets for the purchase of wheat and canola in the area around the elevator.

Technical Summary

The Tribunal dismissed the application brought by the Commissioner of Competition ("**Commissioner**") against Parrish & Heimbecker, Limited ("**P&H**"), under section 92 of the *Competition Act*, RSC 1985, c C-34 ("**Act**").

The Commissioner's application followed the acquisition by P&H of 10 primary grain elevators ("**Elevators**") located in Western Canada ("**Transaction**"). Prior to the Transaction, these 10 Elevators were owned and operated by Louis Dreyfus Company Canada ULC ("**LDC**"), one of P&H's competitors in the grain business. In his application, the Commissioner challenged the acquisition by P&H of one of these Elevators, namely, the LDC Elevator located on the Trans-Canada Highway in Virden, Manitoba ("**Virden Elevator**"), near the Manitoba-Saskatchewan border.

In brief, the Commissioner claimed that by acquiring the Virden Elevator ("**Acquisition**"), P&H caused or was likely to cause a substantial reduction of competition in the supply of grain handling services ("**GHS**") for wheat and canola for those farms that benefited from competition between the Virden Elevator and the nearby elevator owned by P&H and located in Moosomin, Saskatchewan ("**Moosomin Elevator**"). The Commissioner argued that, following the Acquisition, farms which had previously benefited from the competition between P&H and LDC were likely to pay materially more to obtain GHS from the Moosomin and Virden Elevators, and would thus receive less money for their wheat and canola. In his application, the Commissioner sought an order requiring P&H to divest either the Virden Elevator or the Moosomin Elevator, as well as an order prohibiting P&H from acquiring any Elevator in the relevant markets for a certain period of time.

The Tribunal first concluded that in the circumstances of this case, the relevant product was not the sale of GHS to farms, as alleged by the Commissioner, but the purchase of wheat and canola by P&H. The definition of the relevant product market was a fundamental point of disagreement between the parties, and significantly influenced many elements in the Tribunal's overall analysis. The Tribunal found that the Commissioner's proposed product market (i.e., the sale of GHS) was not grounded in commercial reality and in the evidence. Moreover, in this case, the "value-added" approach to product market definition advanced by the Commissioner failed on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective.

Turning to the geographic market, the Tribunal determined that the relevant geographic market for the purchase of wheat was more likely than not to comprise at least seven Elevators, including the Virden and Moosomin Elevators. As to the relevant geographic market for the purchase of canola, it included at least 10 Elevators as well as four crushing plants.

The Tribunal then found that the Commissioner had not established that the Acquisition lessened competition substantially in any relevant market, or was likely to do so in the future. The Tribunal reached that conclusion after considering extensive economic and factual evidence as contemplated by sections 92 and 93 of the Act.

The Tribunal concluded that the Virden Acquisition did not materially reduce, and was not likely to reduce materially, the degree of price or non-price competition in the purchase of wheat and canola in the relevant geographic markets, relative to the degree that would likely have existed in the absence of the merger. In particular, the evidence showed that the price effects of the Acquisition were immaterial, that several effective remaining competitors remained after the Acquisition, and that post-merger market shares were below the 35% safe harbour threshold. The Tribunal determined that the Acquisition caused some lessening of competition for the purchase of wheat, but the evidence did not allow it to conclude that such lessening reached the substantiality level required by section 92.

In light of those conclusions, the Tribunal did not need to determine the issue of efficiencies claimed by P&H pursuant to section 96 of the Act. However, considering the extensive submissions made by the parties on efficiencies and the nature of the issues raised, the Tribunal addressed the matter. The Tribunal concluded that P&H had not proven, with clear and convincing evidence, that the Virden Acquisition is likely to bring about cognizable gains in efficiency. As a result, P&H would not have met its burden of demonstrating, on a balance of probabilities, that its claimed gains in efficiency would be greater than, and would offset, the anti-competitive effects of any lessening of competition resulting from the Acquisition.

The Commissioner's application was therefore dismissed with costs.

Confidentiality and Panel Members

The Tribunal's reasons are confidential at this time in order to protect evidence covered by a Confidentiality Order. The Tribunal will release a public version of the decision after hearing from the parties concerning what information in the reasons must remain confidential.

The Tribunal panel was composed of the Honourable Justice Denis Gascon (judicial member and former Chairperson of the Tribunal), the Honourable Justice Andrew D. Little (judicial member and current Chairperson of the Tribunal), and Ms. Ramaz Samrout (lay member of the Tribunal).