Chemical Reaction: Canada and US Differ on Industrial Review

Mixed Reviews – Canada and U.S. Come to Different Conclusions on Review of Chemical Industry Transaction

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Over the years, Canada's Competition Bureau ("Bureau") has developed a close working relationship with its counterpart agencies in the United States, the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ"). Merger review is an area of particular cooperation, given the number of transactions affecting Canada that have a North American, cross-border element to them. Among other things, the agencies will coordinate with each other on the timing of reviews, collection of evidence, sharing of insights and assessments, and formulation of remedies. (For more details, see the agencies' Best Practices on Cooperation in Merger Investigations (March 2014).)

More often than not, agency coordination leads to consistency of results. Sometimes this works in favour of the merging parties, for example if both countries decide to clear a transaction or agree on the remedies that will form the basis for clearance. In other cases, the parties might have wished for less coordination, as when both the Bureau and the FTC recently cooperated in issuing simultaneous challenges to the proposed Staples/Office Depot transaction.

But in some cases, not even close cooperation will mean that the agencies reach the same conclusions. A very interesting example of this divergence occurred in June when

the Bureau and the FTC announced opposite enforcement positions on the proposed merger of two Canadian-based industrial chemicals companies, Superior Plus Corp. and Canexus Corporation.

The Superior/Canexus merger was announced on October 6, 2015, with Superior proposing to purchase all of the issued and outstanding shares of Canexus. Based in Canada, but with operations in North and South America, Canexus and Superior each produce sodium chlorate and chlor-alkali products that are used primarily by the pulp and paper industry.

The transaction was subject to pre-merger notification and approval under both the Canadian Competition Act and the U.S. Hart-Scott-Rodino Act; and the transaction underwent a lengthy review in both jurisdictions. On June 27, 2016, the FTC announced its conclusion that the proposed merger would significantly reduce competition in the North American market for sodium chlorate, resulting in anti-competitive reductions in output and higher prices. Given this conclusion, the FTC filed an administrative challenge to the transaction and sought a temporary restraining order and preliminary injunction in U.S. federal court, pending the outcome of the administrative proceeding. The FTC took this step, notwithstanding Superior's offer to divest up to an aggregate of 215,000 metric tonnes of sodium chlorate production capacity, effectively reducing its post-merger market share of U.S. sodium chlorate sales to approximately 35%.

The Bureau issued its own press release the next day, on June 28. The Bureau also concluded that that the transaction would likely result in anti-competitive effects, specifically a substantial lessening of competition for the supply of sodium chlorate in both eastern and western Canada. The Bureau stated that customers of Superior and Canexus could face materially higher prices for these chemical inputs and would have limited options for alternative supply as a result of the merger. Nonetheless, the Bureau announced that, unlike the FTC, it would not be opposing the Superior/Canexus transaction, given the application of the Competition Act's efficiencies defence.

Where merging parties claim that a proposed transaction will generate efficiencies, section 96 of the Competition Act offers a defence that requires an assessment of whether cognizable merger-specific efficiencies will or are likely to outweigh the likely anti-competitive effects of the transaction. In this instance, Superior submitted a detailed analysis prepared by an expert to support its claims of efficiencies. The Bureau also retained its own external efficiencies expert to evaluate the purchaser's claims. In the

end, the Bureau concluded that the "anti-competitive effects of the merger would be clearly outweighed by the efficiency gains from the transaction", including cost savings from the elimination of overhead costs, freight optimization and the elimination of duplicate corporate services.

Although the Canadian and U.S. merger review systems are very similar to each other, both in terms of substance and process, the agencies' divergent conclusions in Superior/Canexus underline that differences – and important ones at that – do exist. Thus, for example, while the U.S. antitrust agencies do take cognizable efficiencies into account as part of their overall assessment of a merger's likely competitive impact, they do not apply an equivalent to the Canadian efficiencies defence. As such, evidence of a merger's efficiencies may be determinative in Canada but not in the United States, given the distinct legal frameworks involved.

From a purely Canadian perspective, the Superior/Canexus case is also interesting because it demonstrates that the Bureau remains willing to clear mergers that may lead to significant anti-competitive effects provided that there is persuasive evidence tendered by the parties that offsetting merger-specific efficiency gains are likely to arise.

This is particularly noteworthy because the efficiencies defence has been a thorn in the side of the Bureau ever since it was enacted. The defence has been a particular point of contention of late, following a decision of Canada's Supreme Court that allowed a merger to monopoly to proceed on the basis of (not particularly significant) efficiencies. In the wake of this decision, Canada's current Commissioner of Competition, John Pecman, has expressed scepticism about whether the defence is being applied too broadly and in a manner that is inconsistent with Parliament's original intent. It was also commonly thought that the Bureau's default position would be to litigate efficiencies issues rather than clear transactions on that basis (although the Bureau's published guidance at least leaves open the possibility that it will, "in appropriate cases", conduct its own trade-off analysis and not necessarily resort to adjudication).

One suspects that the evidence of efficiencies presented by Superior must have been extremely strong to get the Bureau to agree to clear the transaction without a fight. The especially cynical amongst us would also not be surprised to see the Bureau now utilize this case (and the well-publicized difference in outcome south of the border) to argue that the efficiencies defence should be curtailed through future legislative reform.

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