EYE ON BUSINESS

Contemplating competitor collaborations

BY MARK KATZ

Joint ventures are very popular business arrangements, as they offer participants the potential to share the risks in developing and commercializing new products, to facilitate expansion into new markets and to generate synergies in production and distribution. In the mining industry, joint venture arrangements can involve sharing the significant financial and operating risks in exploring and developing mining properties.

However, joint venture arrangements can raise serious competition issues – and potentially lead to costly problems – when the collaborations are between industry competitors. It is critical, therefore, that any prospective joint venture involving competing entities be vetted for potential antitrust concerns as part of the planning and development process.

> "It is very important that prospective joint venture partners carefully evaluate any potential competition issues before proceeding with an arrangement."

Joint ventures between competitors may yield anti-competitive results if, for example, they reduce the ability or incentive of the joint venture partners to compete against each other outside of the arrangement, or involve information exchanges and other practices that could facilitate price-fixing and other types of collusion.

Since competitor collaborations can be both pro-competitive and anti-competitive, they present especially thorny challenges for antitrust enforcement authorities and the courts. If too lenient an approach is taken by authorities, the joint venture could restrain competition in the relevant industry; if the approach is too strict, a beneficial economic arrangement may be stifled or chilled.

A recent U.S. case, *In re Sulfuric Acid Antitrust Litigation*, is a perfect illustration of the conundrum represented by competitor collaborations.

Two Canadian mining companies that produce sulphuric acid as a byproduct of their operations entered into an arrangement with several U.S. producers of sulphuric acid whereby the U.S. companies would stop producing and selling their own sulphuric acid in the United States and instead serve as the exclusive U.S. distributors of the Canadian companies' sulphuric acid.

A group of industrial customers in the United States sued the parties, alleging that their "shutdown agreements" would eliminate competition between the Canadian mining companies and the U.S. producers, reduce the total amount of sulphuric acid available in the United States and drive up the U.S. market price for sulphuric acid. The Canadian and U.S. companies countered that the arrangement would actually reduce prices for U.S. customers, because it would allow the parties to take advantage of the Canadian mining companies' lower production costs and the U.S. producers' distribution networks in the United States.

Much of the case revolved around the appropriate legal standard against which the plaintiffs's and defendants' competing claims should be judged. What is important is that the judges in the case – both at first instance and on appeal – agreed that there was at least a plausible argument that the arrangement would "increase competition" and promote "enterprise and productivity." Indeed, the judge who wrote the appeals opinion observed that the law should not be used to discourage new and innovative ways of doing business.

Although some slight differences exist, the situation in Canada is very similar to that of the United States. Under Canada's *Competition Act*, joint ventures between competitors can be prosecuted as criminal offences if they involve conduct such as price-fixing or market allocation. Plaintiffs also have the right to sue parties for damages. On the other hand, Canadian law also recognizes the potential benefit of joint ventures and thus provides for an alternative civil review process where there is scope to defend these arrangements, if challenged, on the basis of their pro-competitive effects. As in the United States, the difficult issue is where to draw the line between illegal and pro-competitive arrangements.

Because of the serious risks involved, it is very important that prospective joint venture partners carefully evaluate any potential competition issues before proceeding with an arrangement.

The first questions that should be asked in making this assessment are: what is the purpose of the joint venture, and what are the business justifications for any restraint on competition it may involve? This is a key threshold consideration, and coming up with a superficial explanation for what otherwise would appear to be anti-competitive conduct will not suffice. Care should also be taken to reflect the legitimate and pro-competitive justifications in internal company documents so as not to undercut the positive defence you may have to make.

Taking the time to address competition issues upfront can help avoid potential – and costly – problems down the road for your joint venture or other collaborative arrangement. CIM

Mark Katz is a partner in the Toronto office of Davies Ward Phillips & Vineberg LLP, practising in the firm's Competition and Foreign Investment Review group. He provides domestic and international clients with advice regarding the application of the Investment Canada Act and all aspects of Canadian competition law. He can be reached at mkatz@dwpv.com.