Canada: Transportation mergers

There is a new prior approval process

*by **John Bodrug, Richard Elliott** and **Mark Katz****

On 22 June 2007, amendments to Canada's principal federal transportation legislation, the Canada Transportation Act (CTA), came into force. The changes establish a new public interest review process for mergers involving transportation undertakings falling under federal jurisdiction. This new process is additional to – and to some degree supersedes – the current merger review process under the Competition Act. The CTA process has been enacted despite concerns about how it will apply in practice and the impact it may have on mergers in the transportation industry.

Public interest review under the CTA

The new CTA merger review provisions apply to transactions that involve a transportation undertaking and which are subject to pre-merger notification under the Competition Act.

Parties subject to the CTA will now have to submit their pre-merger notifications to the federal Minister of Transport as well as the Competition Bureau. The parties also will be required to submit information relating to the public interest aspects of the transaction, insofar as the effect on national transportation is concerned. The specific considerations to be addressed will be set out in guidelines.

Following notification, the minister will have 42 days to decide whether the proposed transaction raises any public interest issues. If it does not, the parties will be told that the public interest merger review provisions of the CTA do not bite. In that case, the usual review process and substantive provisions of the Competition Act will apply.

However, where the minister decides that a proposed transaction does raise public interest issues, he can direct the Canadian Transportation Agency (or anyone else) to investigate such issues and report back to him within 150 days. The usual Competition Act review process will then cease to apply, and the Competition Bureau will instead have to report any concerns about a "potential prevention or lessening of competition" to the minister and the parties within 150 days of being notified under the Competition Act. The Bureau's report will be made public immediately after the minister receives it.

Once the Canadian Transportation Agency and Bureau reports are received, the minister will recommend to the federal cabinet whether the transaction should be approved or not. Before making this recommendation, the minister will consult with the Bureau as necessary and also give the parties an opportunity to respond to any public interest or competition concerns raised.

The ultimate fate of the transaction will then be up to the federal cabinet. In deciding whether the transaction is in the public interest, the cabinet will be entitled to consider any undertakings proposed by the parties, and could approve the transaction subject to terms and conditions relating both to the public interest and any potential prevention or lessening of competition.

Failure to notify under the new CTA provisions is a criminal offence, as are closing the deal without cabinet approval where required and failing to adhere to any terms and conditions imposed by the cabinet. Penalties include fines and /or imprisonment.

Implications

The proposed amendments to the CTA were criticised on a number of grounds prior to enactment. For example:

The concept of "transportation undertaking" is undefined in the legislation, which creates uncertainty. The new review process undoubtedly applies to transportation businesses already within federal jurisdiction, such as inter-provincial or cross-border railways, airlines, pipelines, or trucking and shipping firms. However, it may also apply to businesses that provide important ancillary services to federal undertakings but which do not transport anything across provincial or international borders (for example, stevedoring companies).

Second, the new CTA process applies to mergers that "involve" transportation undertakings. So it may cover not only acquisitions of transport undertakings but also acquisitions by such undertakings, including acquisitions that do not necessarily involve the transportation of goods or persons (for instance, where an airline operator acquires a parts manufacturer).

Third, when the public interest process is invoked, the Competition Bureau will have to apply a different review standard to the one otherwise used to assess mergers under the Competition Act. Thus, the CTA requires the Competition Bureau to report to the minister on any concerns regarding a "potential prevention or lessening of competition" resulting from the proposed merger. This is a different – and lower – threshold than normally applies to merger review under the Competition Act, where the Bureau has to consider whether the proposed transaction is likely to result in a substantial prevention or lessening of competition. Although the Bureau proposes to go on applying the usual Competition Act standard to transportation mergers, it is not clear why the CTA establishes a different standard.

More generally, no clear explanation has been provided as to why the transportation industry requires a special review process that is different from that applicable to other industries. Following the introduction of the new process, some transportation mergers will now be subject to a two-tiered review (and even to a three-tiered review if the Investment Canada Act applies), with all the potential for conflict and delay that such multiple regulatory reviews will entail.

** John Bodrug, Richard Elliott and Mark Katz are partners in Davies Ward Phillips & Vineberg LLP (Toronto)*