

A Tale of Two Merger Reviews

Kluwer Competition Law Blog

July 6, 2016

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Please refer to this post as: Mark Katz, 'A Tale of Two Merger Reviews', Kluwer Competition Law Blog, July 6 2016, <http://competitionlawblog.kluwercompetitionlaw.com/2016/07/06/a-tale-of-two-merger-reviews/>

HERE IS AN ARTICLE BY MY COLLEAGUES ANITA BANICEVIC AND JOHN BODRUG ON A RECENT CASE IN WHICH THE CANADIAN AND U.S. AUTHORITIES REACHED DIFFERENT CONCLUSIONS ON A MERGER BECAUSE OF THE COUNTRIES' DIFFERENT LEGAL STANDARDS

On June 28, 2016, Canada's Competition Bureau announced that it had cleared Superior Plus Corporation's acquisition of Canexus Corporation despite the Bureau's conclusion that the transaction "would likely result in a substantial lessening of competition for the supply of various industrial chemical products in Canada". The Bureau attributed its decision to the unique availability of the efficiencies defence under section 96 of the Competition Act (which provides that a merger cannot be prohibited when the expected efficiency gains outweigh the likely anti-competitive effects of the transaction). The day before the Bureau's announcement, the Federal Trade Commission (FTC) announced that it is challenging the transaction because it would "significantly reduce competition in the North American market for sodium chlorate". Despite the disparate outcomes, these announcements and actions highlight not only the availability of the efficiencies defence in Canada, but also the increased level of coordination and cooperation between the Bureau and its U.S. antitrust counterparts in cross-border mergers.

Background

On October 6, 2015, Superior announced that it had entered into an agreement with Canexus to purchase all of its issued and outstanding shares. Based in Canada, but with operations in North and South America, Canexus and Superior each produce sodium chlorate and chlor-alkali products. 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. In its position statement describing its analyses, the Bureau stated that its conclusions were "supported by interviews with numerous stakeholders, including customers, competitors and distributors of the parties' chemical products as well as analyses carried out by independent economic and efficiencies experts".

As a result of its review, the Bureau concluded that the transaction would likely result in a substantial lessening of competition for the supply of sodium chlorate in both eastern and western Canada (sodium chlorate is used primarily by pulp and paper producers). In particular, the Bureau concluded 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". However, the Bureau's analysis did not end there. Where efficiencies are claimed, section 96 of the Competition Act requires an assessment of whether a merger has resulted in or will likely result in gains in efficiencies that outweigh the likely anti-competitive effects of the transaction. As part of the efficiencies analysis, the Bureau took into account factors such as the elimination of overhead costs, freight optimization and the elimination of duplicate corporate services. In this case, the purchaser provided 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".

The FTC, working closely with the Bureau, similarly determined that the merger would significantly reduce competition in the North American market for sodium chlorate. In particular, the FTC concluded that if the merger were to take place, the combined entity would have more than half of all North American sodium chlorate production capacity and the proposed merger would result in anti-competitive reductions in output and higher prices. However, the FTC's press release did not comment on efficiencies. Although 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.

Having concluded its review, the FTC announced that it had filed an administrative challenge and will be seeking a temporary restraining order and preliminary injunction in federal court, pending the outcome of the administrative proceeding. In Superior's press release regarding the FTC's decision to challenge the transaction, Superior explained that it had "proposed divesting up to an aggregate of 215,000 metric tonnes of sodium chlorate production capacity representing approximately \$42 million in annual operating EBITDA and effectively reducing Superior's post-merger market share of U.S. sodium chlorate sales to approximately 35%".

Implications

The availability of the efficiencies defence under section 96 has been a point of controversy and contention of late. Having lost a challenge to the Tervita transaction before the Supreme Court of Canada in 2015, the Commissioner of Competition has since stated: "It is questionable whether the outcomes in Superior Propane and Tervita reflect the intent of Parliament in 1986 when the efficiencies defence was introduced in the Act." In particular, the Commissioner has expressed a view that the efficiencies defence was intended by Parliament to enable Canadian companies to better compete internationally. In light of these public comments, it would not be surprising to see proposals for either the amendment or the removal of the efficiencies defence in the future.

In any event, for the time being the defence remains available to parties that are able to present compelling economic evidence regarding the efficiencies that are likely to be realized as a result of a proposed merger. That said, this same evidence may not be persuasive to the U.S. antitrust authorities, given the distinct legal framework involved.

Finally, the closely timed announcements by the Bureau and the FTC, and references to coordination and collaboration in their respective media releases confirm that the FTC and Bureau will continue to closely coordinate their reviews in certain cases.