News from... North America

Competition Law in Canada: Is Canada For Sale?

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As worldwide demand for natural resources pushes the Canadian economy (and the dollar) to new heights, a recent wave of mergers and acquisitions targeting the jewels of this economy has gained the attention of Canada's business community and Canadians in general.

Recently announced mergers have included the purchase of aluminium producer Alcan Inc. by the Anglo-Australian mining giant, Rio Tinto, and the acquisition of Canada's largest telecommunications company, Bell Canada, by a group of investors that includes US controlled private equity funds.

In the public's mind, these takeovers have highlighted the precariousness of Canadian ownership in the face of globalisation and there seems to be a growing sense in the country that Canadians are gradually losing control of their own economy. As a result, pressure is building on the political class to stem this perceived tide.

In this context, foreign businesses attracted by opportunities on the Canadian "Klondike" would be well-advised to first familiarise themselves with Canada's legal (and political) landscape and, in particular, with Canadian competition laws. Although Canada's Competition Act offers a broad range of strategic tools, it can also pose serious challenges.

As in other jurisdictions, a merger review by the Canadian authorities is often a turning point that defines the competitive profile of an industry for years to come. For the parties involved in the merger not to mention their clients, suppliers and competitors a merger review is a key moment.

The Canadian Competition Bureau is the authority responsible for performing merger reviews in Canada. When a proposed merger does not meet its approval, the Bureau may either come to an agreement with the merging parties or challenge the merger before the Competition Tribunal. In practice, merging parties nearly always wait for the Bureau's approval before completing their transaction.

As part of its review process, the Bureau typically takes into consideration the relative market share of each of the merging parties, the degree of economic concentration in the industry in question and the anticipated effect of the transaction on prices and production levels. The Bureau also looks at the variety and quality of products, as well as the effects the proposed merger would have on service levels, innovation and marketing for the products or services in question.

Any resulting gains in efficiency for the Canadian economy that might outweigh or neutralise expected anti-competitive effects are also taken into consideration, as is the impending failure of one of the parties. The precarious state of an industry may also be considered by the Bureau. Thus, the difficult conditions

affecting the North American pulp and paper industry may have been a factor in the recent decision by the Bureau not to oppose the merger of the Abitibi-Consolidated paper company with its American rival, Bowater.

As in Europe, the merger review process offers a unique window of opportunity for those who oppose a proposed transaction to request that it be subjected to conditions or even to ask that it be challenged altogether. However, the Canadian review process is generally less interactive than the European process.

Given the high volume of work being generated by the current wave of foreign acquisitions of Canadian businesses and the sensitive political context surrounding those acquisitions, one can be certain that Canada's Competition Bureau will not be idle at any time in the near future.