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Antitrust review of mergers in Canada has evolved over the past decade and a half from a relatively obscure administrative process into a critical component of transactions that involve competitors. Merging parties and other market participants are approaching these issues in an increasingly sophisticated and strategic manner, as can be seen from several recent private equity and public market transactions.

Negotiated Transactions

In private M&A deals, vendors and their advisers have refined auction processes to shift leverage away from any one potential purchaser in order to maximize value for the vendor. It is now commonplace for vendors to table a proposed agreement of purchase and sale containing provisions to ensure that the transaction receives expeditious regulatory review:

- Vendor-friendly conditions precedent may require the purchaser to close after the expiry of statutory waiting periods rather than upon receipt of a "no-action letter" or "advance ruling certificate" from the Competition Bureau.
- Cooperation covenants are specifying purchaser obligations along with vendor monitoring/participation rights in more elaborate detail.
- Purchasers are increasingly given tight deadlines to commence—and often complete—merger reviews.
- Significant breakup fees are frequently negotiated to protect the vendor against deterioration in the value of its business when a transaction fails to proceed because of regulatory impediments.
- Vendors now often attempt to get purchasers to agree in advance to remedy any competition law problems that may emerge by offering divestitures or other remedies up to some pre-agreed level ("hell-or-high-water clauses").

Bidders in a well-run auction will be judged in part on their regulatory risk profile and the steps they are prepared to take to manage it. Thus, while the foregoing items are all negotiable, bidders have a strong incentive to minimize derogations from vendor-friendly provisions. The auction process also increasingly puts bidders' counsel into a bid-advocacy role, with the vendor then typically turning to its regulatory counsel to evaluate the suitors.

Financial bidders have an obvious advantage when compared with strategic bidders who are also significant competitors to the target business. A particularly dramatic example is Verizon Communications' 2004 sale of its Canadian SuperPages business to Bain Capital, a leading private equity house with no competing Canadian business, for approximately C$2 billion. It was reported that Verizon declined a significantly higher financial offer from the other main Canadian competitor, Yellow Pages Group ("YPG") in order to be assured of an expeditious closing of the transaction prior to its year-end. Several months later, after business decisions by Bain had reduced competitive overlaps with YPG in eastern Canada, Bain was able to flip the SuperPages business to YPG for approximately C$2.55 billion in a transaction that received clearance without any major difficulty.

While competing bidders normally do not become competition law complainants while an auction is in progress, unsuccessful bidders are a potential source of challenges to negotiated transactions. A notable example is *Ultramar/Coastal Petroleum*, where MacEwen Petroleum (a customer of Coastal's Ottawa wholesale petroleum products business) was outbid by Ultramar and then spearheaded complaints by independent gasoline marketers, which resulted in the Competition Bureau negotiating a complex consent order settlement that was turned down by the Competition Tribunal. Absent MacEwen's active involvement, the bureau might not have insisted on a remedy, and the Competition Tribunal likely would not have found it to be inadequate.

Unsolicited Transactions

Hostile or unsolicited takeover bids raise somewhat different bidder-acquiree dynamics. The offeror will face pressure to minimize uncertainty by avoiding heavy regulatory conditions precedent and long delays. Ideally, this will be supported by front-end loading of competition law analysis and possibly confidential advance contact with the Competition Bureau.

The target will be confronted with a fundamental strategic decision as to whether to invoke competition law arguments as part of a defense strategy. A high-profile example is PeopleSoft Inc.'s attempt to persuade competition law authorities in the U.S. and other jurisdictions to prohibit a takeover bid by Oracle Corp. This led to a phase 2 review in Europe and an injunction suit by the U.S. Department of Justice after the *Hart-Scott-Rodino* second-request process was completed. However, the bid ultimately succeeded after Oracle was victorious in the protracted legal proceedings and no competing bidder emerged.

Under Canadian law, members of a target's board of directors or independent committee must exercise their fiduciary duties carefully when contemplating such a strategy. If successful, it can buy valuable time to obtain competing bids that offer shareholders an even higher premium and/or reduced regulatory risk. However, it may also eliminate or reduce the value of a bid that would have provided the highest value to shareholders. Thus, the safer course frequently will be to take a neutral posture on regulatory issues and leave any opposition to alternate bidders.

Competing bidders in a takeover contest will normally compare their regulatory prospects and this may factor into negotiations with the target as well as the offer disclosure documents sent to shareholders. There is no legal impediment to a bidder drawing competition concerns that would arise on an alternate bid to the attention of the Competition Bureau. Indeed, the bureau welcomes (and often seeks) such interaction. However, it is clear that the bureau's role is to assess each transaction separately against the "substantial lessening or prevention of competition" standard in the *Competition Act*, rather than simply picking the transaction it regards as competitively preferable.

In the relatively rare case of two bids by significant competitors, the bureau could conclude that both were problematic, neither were problematic, or one was problematic and the other was not. The bureau considered such situations in the bidding

for Riverside Forest Products and Microcell Communications in 2004:

- International Forest Products ("Interfor") was the white knight that emerged after an unsolicited bid for Riverside from Tolko Industries. The Interfor bid likely raised fewer competition issues, but Interfor was subsequently outbid by a revised offer from Tolko, which was prepared to close and provide a "hold separate" commitment pending completion of the bureau's review of the competitive effects of its combination. The hold separate expired 30 days later, without Tolko and the bureau agreeing on an appropriate resolution of the case. Tolko has since integrated its operations with Riverside, and the bureau has not taken steps to challenge the merger.
- Rogers outbid Telus to acquire Microcell. The bureau ultimately cleared the deal after a thorough review and issued a background statement explaining its decision to allow a four-to-three consolidation in the wireless telephony market. However, the bureau did not disclose anything about its assessment of the Telus bid (which would also have led to a four-to-three consolidation), and Telus did not indicate whether regulatory considerations were a factor in its decision not to counter Rogers's bid.

Marketplace Complaints

Long and detailed merger reviews most frequently occur when the bureau receives credible complaints from customers, competitors or other market participants (e.g., suppliers, trade unions, *etc.*). However, recent court decisions in the U.S. (*F.T.C. v. Arch Coal* and *D.O.J. v. Oracle)* and in the E.U. (*AirTours, Schneider* and *Tetra Laval)* have emphasized that customer and competitor concerns cannot be accepted uncritically and that it is important to differentiate facts from opinions. The Competition Tribunal would very likely apply the same standard in adjudicating a contested merger proceeding in Canada. However, the bureau still attaches considerable significance to customer and competitor complaints in its merger investigations.

Market participants are routinely contacted by bureau staff to obtain or confirm factual information, and in the course of such interviews bureau staff will solicit their views on the likely competitive effects of a transaction. It is now also common practice for market participants with serious concerns to retain counsel (and possibly an expert economist) to make submissions proactively to the bureau and to act as information resources for bureau staff as they proceed with the assessment of submissions from the merging parties. This process is somewhat less interactive than, for example, that in Europe, due to strict confidentiality rules and policies which minimize the bureau's disclosure of information received from merging parties or complainants. Nevertheless, bureau staff normally will give merging parties a general sense of issues raised by complainants to allow them a meaningful opportunity to respond.

A high-profile example of the potential role played by competitors can be seen in Bell Canada's publicly announced opposition to the Manitoba Telecom Services Inc. ("MTS") bid for Allstream Inc. In addition to the *Competition Act* arguments, Bell sought injunctive relief based on certain commercial contracts between it and MTS. While the injunction application was denied, Bell and MTS eventually negotiated a large settlement and separation before the bureau had finished an in-depth inquiry.

Minority shareholders are another potential source of complaints. For example, the bureau cleared the merger of West Fraser Timber and Weldwood of Canada under a consent agreement that required the parties to divest interests in certain sawmills and timber harvesting rights. A minority shareholder of the assets to be divested—Burns Lake Native Development Corp.—challenged the parties' divestiture arrangement in the Competition Tribunal. The tribunal ultimately dismissed the application, but the case underscores the importance of considering complaint risks from all potential quarters and at all stages of the merger review process.

Crafting Solutions

If a merger is problematic from an antitrust perspective, timeliness and effectiveness will be the key considerations in working out a remedy that satisfies the Competition Bureau.

- A full divestiture will increase the likelihood that the remedy will be effective, since the entity that is being divested will have a proven ability to compete in the market and survive independently. The Competition Bureau's 2006 "Information Bulletin on Merger Remedies" articulates a strong preference for the divestiture of stand-alone functioning businesses.
- The bureau has preference for "fix it first" solutions that would involve precompletion divestitures or agreements to effect divestitures to any approved "up-front buyer" simultaneously with the completion of a merger. When it is not possible to "fix it first," as will in practice frequently be the case, divestitures should ordinarily be completed within three to six months, according to the bulletin. If the merging parties fail to do so, a trustee will be appointed to complete the sale without any guaranteed minimum price.

Working out a timely remedy can be critically important to a merger. For example, in the proposed takeover of Falconbridge by fellow Canadian mining giant Inco in 2005/2006, the parties' apparent inability to agree quickly to divest a Norwegian refinery led to a drawn-out merger review in the European Union. The time lag gave Xstrata an opportunity to mount a rival bid for Falconbridge that was ultimately successful. Inco itself became the subject of a bidding war that was won by CVRD. (The deals that were ultimately consummated presented no material competition issues.)

Helpfully, the remedies bulletin indicates that in international deals the bureau may rely on remedies in foreign jurisdictions when the assets to be divested are primarily located outside Canada. This is consistent with past practice and, if the bureau does not require separate action to be taken in Canada, it can helpfully reduce duplication of effort when international solutions adequately address Canadian concerns.

Implications for M&A Practice

In this environment of heightened sensitivity to and use of *Competition Act* merger considerations to challenge transactions, regulatory risk assessment should be a fundamental element of strategic decision making for vendors, targets, bidders and other interested parties. In addition to assessing the *Competition Act* issues on the merits, it is vital for all parties to evaluate the risks that others will attempt to make strategic use of regulatory review processes and to consider the potential consequences of such actions. Parties who pay insufficient attention to the strategic use of the *Competition Act* review process do so at their peril. ■

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