Intelligence MEMOS

From: Peter Glossop

To: CEOs of Canadian companies

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Re: # THE EFFICIENCY DIFFERENCE

The proposed merger of Superior Plus Corp.and Canexus Corporation potentially paves the way for efficiency-enhancing, anti-competitive mergers in Canada without the delay of litigation.

On June 27, 2016 the Canadian Competition Bureau issued a "no action letter" to the parties even though the transaction would substantially lessen competition (in the form of higher prices) in the supply of sodium chlorate, a chemical used to bleach wood pulp, in Eastern and Western Canada, and in the supply of chlor-alkali chemicals in Western Canada. The Bureau decided not to challenge the transaction because the efficiency gains were greater than its anti-competitive effects. These efficiencies included "elimination of overhead costs, freight optimization and the elimination of duplicate corporate services."

Canada has an explicit efficiencies defence in its Competition Act. The Competition Tribunal cannot order a remedy with respect to a merger which prevents or lessens competition substantially "if it finds that the merger...is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition…"

In contrast, on the same day the Bureau approved the transaction, the United States Federal Trade Commission filed an administrative complaint alleging that the transaction would violate the U.S. antitrust laws by significantly reducing competition in the North American market for sodium chlorate. There is no efficiencies defence to an anti-competitive merger under U.S. antitrust law.

Superior Plus terminated its arrangement agreement with Canexus on June 30, 2016, in part because Canexus did not agree to extend the outside date of June 29, 2016 to provide sufficient time for the parties to respond to the proceedings commenced by the FTC.

The key learning from the Superior case is that the Bureau is prepared to be pragmatic and allow an efficiency-enhancing merger even though it might be anti-competitive, without litigating the nature and extent of the efficiencies being claimed by the parties. The result in this case confirms the policy articulated in the Bureau's Merger Enforcement Guidelines, that it "will not necessarily resort to the [Competition] Tribunal for adjudication of the [efficiencies] issue."

This is now the second case in the last 18 months to be permitted on the basis of efficiencies. In January 2015, in the Tervita case, the Supreme Court of Canada permitted an anti-competitive waste disposal merger. In Tervita, the Court made it clear that the balancing of efficiencies and anti-competitive effects needed to be rigorous, and take into account quantitative and qualitative aspects.

The Tervita and Superior cases are most significant for purely domestic mergers, where the efficiencies defence can be applied to an anti-competitive merger without being frustrated by the potentially conflicting legal standard of another jurisdiction which does not recognize efficiencies as a defence. If the efficiencies clearly outweigh the anti-competitive effects, the transaction can be permitted by the Bureau without the delay of litigation in the Competition Tribunal.

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