

CCB wins 'clean' remedy in Evonik merger, lawyers say

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- Settlement achieved regulator's goals
- Hydrogen peroxide plant in BC to be sold to third party

The Canadian Competition Bureau's settlement with merging chemical industry competitors **Evonik Industries** [FWB:EVK] and **PeroxyChem** achieved the agency's goals in a "clean" manner, antitrust lawyers said.

The agreement requires the parties to sell PeroxyChem's hydrogen peroxide plant in Prince George, British Columbia to peer United Initiators.

In November 2018, Germany-based Evonik agreed to acquire PeroxyChem in a USD 625m deal.

This is the sort of "clean sweep remedy that the Bureau likes," said David Rosner, a competition lawyer at Goodmans. Prior to the transaction, there were three independent competitors in the geographic market, he noted, and "as a result of this remedy, there are still three independent competitors."

"From the agency's point of view, this is an ideal result," agreed James Musgrove, a competition lawyer at McMillan. It "looks like a pretty clean divestiture," he said, calling the deal "straightforward" and "simple" and "about as classic a merger remedy as you can imagine."

Rosner argued that because it dealt with a non-notifiable merger and was started by a complaint from a pulp and paper customer, the case sends a message. It is "tangible evidence" that the CCB's **recently announced** focus on non-notifiable mergers is "producing results." Rosner said "there's a signal here" to market participants that "if you're concerned about a small merger's effect on competition, the Bureau may take action if they share your concerns."

Mergers with a total value over a certain threshold require prior notice to the CCB. Non-notifiable mergers are those valued under the threshold.

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Rosner said that the CCB appeared to have acted in concert with the US Federal Trade Commission in this case. "There was obviously a lot of cross-border work that took place," he said, noting that the CCB settlement was preceded by an **FTC action** in the United States District Court for Columbia.

As would be the case in Canada, the FTC alleged that the merger would reduce competition for hydrogen peroxide in a geographic market of the north-western US, British Columbia and Alberta. The merging parties offered the FTC the same remedy later accepted by the CCB, but the FTC did not accept the remedy because its claim for an injunction also alleged that the merger would reduce competition for specialty hydrogen peroxide products used by the oil industry in the south-eastern US.

The FTC ultimately lost its bid to stop the merger, with a judge declining to implement an injunction against the deal in January.

There is a "pretty clear" geographical separation between the production assets in this industry, because of the "very far distance" between the south-eastern and north-western US, Rosner said. "They saw little traffic over the mountains for this purpose ... Moving liquid costs lots of money and liquid tends not to travel especially far."

That supported the CCB's position that the US south-east is not part of the same geographic market as British Columbia and Alberta, he said.

Musgrove agreed, noting that hydrogen peroxide is bulky, heavy and dangerous to transport. The CCB concluded that the "costs of transporting it any further than from western Canada [...] would be prohibitive," he said. The CCB looked at a couple of manufacturing facilities in the US southeast but "concluded they were so far away that they wouldn't discipline the merger," he said.

As part of its economic analysis, the CCB considered whether other chemicals could be used in place of hydrogen peroxide. The agency's "conclusion was that hydrogen peroxide was sufficiently distinct" that other chemicals could not replace it to a significant extent, Musgrove said.

by Mark Coakley in Toronto

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