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## Navigating Canada's competition and foreign investment landscape

Canada's competition laws are more relevant to businesses and investors now than they ever have been. Legislative changes in 2009 and an increased willingness by Canadian competition authorities to enforce the law have made it important for investors or businesses considering investments in Canada to take into account the Competition Act and Investment Canada Act when structuring their affairs.

In this quiz, imagine you are in-house counsel for Uranimax Co., a mining company whose focus is the uranium market. Although it is sitting on some significant reserves, your company is still a relatively small player in the uranium market, as it has yet to actually start production. Over the years you have had more than your share of regulatory run-ins with the "folks in Ottawa." How do you think the following scenarios impact your obligations under the relevant legislation?

**1** Ever since the nuclear meltdown at Fukushima, your stock price has been depressed — so much so that the market thinks you are acquirable. Another relatively small player, Uranico Ltd., has shown an interest in merging with you. Given that neither of you has a great deal of revenues, the merger would fall below the mandatory notification thresholds in the Competition Act. The principals at Uranico want you to take their deal, saying that since the deal falls below the thresholds, there is no regulatory risk as far as the Competition Bureau is concerned. Are they right?

- (a) Yes. The deal falls below the mandatory notification thresholds, so there is no regulatory risk.
- (b) No. While the deal falls below the mandatory notification thresholds, the Bureau could challenge the deal any time up until closing.
- (c) No. The Bureau can challenge any merger, no matter its size, for up to one year after closing.
- (d) Yes. Although the Bureau could still challenge the merger, there is no risk of it doing so because it never has before.

**2** A Chinese company, Sinomineral, has also been kicking the tires. The company is among China's many state-owned mining enterprises. Sinomineral itself has a presence in Canada, but not in the uranium market. Is there any competition-related risk in accepting the deal?

- (a) Yes. Even though Sinomineral does not have a presence in the uranium market, other companies owned by the Chinese government may have, and because they have common owners the Competition Bureau could get involved.
- (b) No. There is no horizontal overlap between your services, so the Competition Bureau is unlikely to get involved.
- (c) No. Although affiliated companies of the buyer are usually investigated by the Competition Bureau, this requirement does not apply to state-owned entities.

**3** The Competition Bureau cleared the deal with Sinomineral. From a regulatory standpoint, can you close the deal and break out the champagne?  
Yes or No

**4** Sadly, the Chinese deal fell through. Uranico approaches you to join it in establishing a cartel. Again, Uranico is confident that the Bureau will stay out of your business, as the cartel will only be set up to export uranium, not sell it to Canadian buyers. Can you proceed?

- (a) No. All cartels are illegal in Canada.
- (b) Yes, but proceed with caution.
- (c) Yes. There are no restrictions on export cartels in Canada.

**1** (C) The Commissioner of Competition recently challenged a merger in *The Commissioner of Competition v. CCS Corporation*, even though the deal fell well below the mandatory reporting threshold. The Commissioner was successful before the Competition Tribunal and an order was made for the buyer to divest itself of the assets it had acquired. Pursuant to section 97 of the Competition Act, the Commissioner can challenge a merger for up to one year after closing.

**2** (A) Whether two companies are “affiliates” of one another, for purposes of the Competition Act, is dependent upon the concepts of “control” and “person.” If the same person can be said to control two companies, they are affiliates for the purposes of the Competition Act, which will have consequences on both the Competition Act’s mandatory reporting requirements and the Commissioner’s review of the transaction and its impact on competition.

To date, the Commissioner has not provided specific guidance as to how he will treat the entities that are related by being foreign state-owned. Depending on its facts, a merger with a foreign state-owned entity could run afoul of the Competition Act if, for example, another entity owned by the same foreign state is already in the Canadian market and both businesses, combined, represent a substantial share of the relevant market and are close competitors.

**3** (B) Investments by non-Canadians are reviewable pursuant to the Investment Canada Act if the investment is valued at \$5 million (for direct investments) or \$50 million (for indirect investments). However, the threshold for World Trade Organization member investors (such as China) was set at \$330 million for 2012. The proposed \$38 billion acquisition of Potash Corporation of Saskatchewan Inc. by BHP Billiton Limited was ultimately blocked following a review pursuant to the Investment Canada Act.

**4** (B) Export cartels, which are agreements between firms either to set prices for export or to divide the export market, are the subject of an express exemption under s. 45(5) of the Competition Act. However, participants in an export cartel must proceed with caution by, for example, running the cartel through a third party and not sharing each other’s confidential information, or risk violating domestic antitrust laws.

Nikiforos Iatrou and Scott McGrath are commercial litigators who focus on competition law.

### YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*



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