



## > perspective

### Competition Bureau Explains Decision In Whirlpool/Maytag Merger

June 6, 2006

The Competition Bureau (the "Bureau") has released a "Technical Backgrounder" (the "Backgrounder") summarizing the main findings from its review of the acquisition of Maytag Corporation ("Maytag") by Whirlpool Corporation ("Whirlpool").<sup>1</sup> Members of the Davies Competition and Trade Law Group acted on Maytag's behalf in connection with this review.

The Bureau advised the parties in mid-March 2006 that it did not intend to challenge the transaction (which eventually closed on March 31, 2006 after U.S. approval also was obtained). The purpose of the Backgrounder is to explain the reasons for the Bureau's decision. One of the key points that emerges from the Backgrounder is that the Bureau will be prepared to allow a transaction to proceed even if the resulting post-merger market shares are relatively high, provided that other factors (such as the extent of remaining competition) indicate that the transaction is unlikely to substantially prevent or lessen competition.

---

<sup>1</sup> The Backgrounder was released on May 31, 2006 and is available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2113&lg=e>.

## **The Bureau's Analysis and Conclusions**

### ***Relevant Market***

The Bureau focussed its review initially on the main appliance categories in which the parties overlapped: washers and dryers ("laundry"); refrigerators; dishwashers; and ranges. Based on its investigations, the Bureau concluded that the primary concern was with the laundry category, and particularly with the washer segment of that category. For the purposes of its analysis, the Bureau divided this segment into two separate product markets: top-load washers and front-load washers. The Bureau acknowledged that the two types of washers are functionally similar and that there is an ongoing transition towards a single washer market based on convergence of pricing between front-loads and top-loads. However, the Bureau concluded that the prices for front-loads are still considerably higher than the prices for comparable top-load washers, which meant that it was appropriate to continue to distinguish between the two markets "at this point in time".

The Bureau concluded further that the relevant geographic market should be limited to Canada, notwithstanding that appliance manufacturing is global, with only three such plants remaining in Canada. In support of this conclusion, the Bureau took into account that: all appliance manufacturers have sales representatives in Canada and that the majority also have Canadian distribution centres, warehouses and customer support services; Canadian retailers tend to purchase from the Canadian subsidiaries of manufacturers rather than from the non-Canadian parent companies; and Canadian consumer preferences, product specifications and pricing tend to be somewhat different from other countries.

### ***Market Shares***

One of the interesting market share questions raised by the transaction was how to account for the fact that Whirlpool, Maytag and other appliance manufacturers sell their products both under their own brand names and to retailers for sale under "house brands". In other words, should market shares be calculated on a "brand" basis (i.e., limited to the manufacturer's own-brand sales at retail) or on a "manufacturing" basis (i.e., incorporating sales of all products manufactured, regardless if sold under another brand).

The Bureau decided in favour of determining shares on a "brand" rather than a "manufacturing" basis. The Bureau noted that retailers own and control their house brands, and are solely responsible for all pricing and marketing decisions. Retailers are also often responsible for their own warehousing and distribution and provide their own warranties and servicing. The Bureau also considered it significant that retailers can and do switch among manufacturers as there are no long-term manufacturing contracts in place.

Even on that basis, however, the Bureau concluded that a combined Whirlpool/Maytag would have post-merger shares exceeding 35% in both the total laundry market and the

top-load washer market (with the shares in the latter higher than the former). The Bureau uses a 35% market share threshold as a general indicator for mergers that may create potential competition issues.

### ***Evaluative Factors***

It is expressly stated in the *Competition Act* that a merger cannot be found to give rise to a substantial prevention or lessening of competition based solely on evidence of market shares or concentration. Accordingly, the Bureau examined the proposed transaction in light of several additional factors, including barriers to entry, remaining competitors and the countervailing power of customers. This analysis led the Bureau to conclude that grounds did not exist for opposing the transaction. In particular, the Bureau found that: effective competition would remain in the market from a combination of foreign and North American-based manufacturers; there was evidence over the past few years of numerous new entrants whose market shares had increased noticeably since their entry, in part because of support from national big-box retailers; Canadian retailers would continue to have relatively strong bargaining and purchasing power post-merger; and there was no evidence that the transaction would increase the likelihood of coordinated behaviour on the part of remaining manufacturers.

### ***Efficiencies***

Although efficiencies are relevant to merger review in Canada, they come into play only if the Bureau decides that the proposed transaction is likely to prevent or lessen competition substantially. In that situation, the existence of efficiencies may operate as a defence, if the parties can substantiate that the claimed efficiencies are greater than, and will offset, the effects of any prevention or lessening of competition.

Given the Bureau's conclusion that the Whirlpool/Maytag transaction would not prevent or lessen competition substantially, it was not necessary for it to analyze the parties' claimed efficiencies in any detail. The Bureau observed, though, that it "was conscious" that there would be "some" efficiencies resulting from the acquisition. (It may be noted in this regard that the U.S. Department of Justice's Antitrust Division concluded in its own analysis that the transaction would lead to "large cost savings and other efficiencies that should benefit consumers" and pointed to these efficiencies as one of the principal reasons underlying its decision not to challenge the acquisition.)

### **Implications**

Statements by the Bureau under the prior Commissioner's administration created some concern that the Bureau was moving towards a more rigid, structuralist approach in assessing the impact of market shares in its merger review process. In the context of evaluating several transactions, the Bureau indicated that it had adopted a standard pursuant to which mergers would likely be presumed anti-competitive solely on the basis

of exceeding certain market share thresholds and thus would only be allowed to proceed with satisfactory divestitures.

The decision in Whirlpool/Maytag appears to signal that there no longer needs to be the same degree of concern about a structuralist approach to merger review holding sway at the Bureau. Consistent with the clear intent of the *Competition Act*, the Bureau's analysis recognizes that market shares ought not to be the defining consideration in merger review and that other factors must be examined before deciding whether a transaction is likely to have anti-competitive effects.

*If you have any questions regarding the foregoing, please contact George Addy, John Bodrug or Mark Katz in the Toronto office (416-863-0900) and Hillel Rosen in the Montréal office (514-841-6400).*

*Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.*

*The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.*