January 10, 2025

Consultation on Revisions to the Competition Bureau's Merger Enforcement Guidelines

Submission of Davies Ward Phillips & Vineberg LLP

Davies Ward Phillips & Vineberg LLP (Davies) is pleased to provide this submission to the Competition Bureau (Bureau) in response to the Bureau's November 7, 2024 Discussion Paper and invitation for comments on the Bureau's review of its Merger Enforcement Guidelines (MEGs) to better reflect current practices, the latest legal and economic developments and recent changes to the *Competition Act*.

The Davies Competition Group is recognized as a leader by clients, peers and third-party organizations. We represent a wide range of domestic and international clients and provide strategic advice and competition and foreign investment review representation on many of the most high-profile and complex transactions.

The views expressed in this submission do not necessarily reflect the opinions of any particular client of Davies.

We applaud the Bureau's initiative to update the MEGs and seek public comments on potential revisions, particularly revisions to address changes in the Bureau's practice arising from recent extensive amendments to the *Competition Act*. As discussed in our comments, key amendments include the addition of a reverse onus provision in section 92(2) and the repeal of the efficiencies defence in the merger provisions. New section 92(2) essentially provides that, if the Competition Tribunal (Tribunal) finds that a merger is likely to result in a significant increase in concentration or market share, the Tribunal shall also find that the merger is likely to prevent or lessen competition substantially, unless the contrary is proved by the parties to the merger.[1]

Comments

Our comments are focused on several key aspects of the MEGs and the implications of some of the recent amendments to the *Competition Act*. As discussed in more detail below, there are certain areas where further clarification or discussion would be helpful for the Bureau to include in the revised MEGs.

1. It would be helpful for the MEGs to provide guidance on what influences the Competition Bureau to clear, not just to challenge, a merger.

The Discussion Paper focuses on identifying a wide range of circumstances and possible theories of harm that might lead the Commissioner of Competition (Commissioner) to oppose a merger. While this is helpful, it would be both (i) of significant practical assistance to businesses in considering and structuring proposed

---

[1] Pursuant to sections 92(3) and (4) of the Competition Act: (i) "**concentration index**" means, in any relevant market, the sum of the squares of the market shares of the suppliers or customers, as applicable; and (ii) a merger is likely to result in a "**significant increase in concentration or market share**" if, in any relevant market, as a result of the merger,(a) the concentration index increases by more than 100; and (b) either (i) the concentration index is more than 1,800, or (ii) the market share of the parties to the merger is more than 30%. The concept of a concentration index is equivalent to the Herfindahl-Hirschman index that is used by U.S. courts and antitrust enforcement agencies.

transactions and (ii) provide a more accurate understanding to the general public for the MEGs to also identify considerations that may lead the Commissioner to clear mergers with competitive overlap, particularly mergers that exceed the new statutory concentration threshold contemplated by section 92(2) of the *Competition Act*.

It would be helpful for revised MEGs to continue to expressly acknowledge that most mergers do not raise competition concerns and that mergers are often procompetitive. In particular, it would be helpful to retain the comment currently in section 12.1 of the current MEGs that

> "…the Bureau's approach is to expeditiously identify those few transactions that may raise material competition concerns and provide quick clearance for remaining transactions to provide commercial certainty and allow parties to achieve any efficiencies as quickly as possible."

It would also be helpful to retain the observation in section 11.2 of the current MEGs that non-horizontal mergers frequently create significant efficiencies.

2. It would be helpful for the MEGs to clarify the significance of a merger exceeding the concentration and market share threshold contemplated by section 92(2) and address the types of evidence that may overcome a presumption triggered by section 92(2).

Based on many years of experience with merger reviews by the Bureau as well as U.S. and other competition law authorities, we expect that many (if not most) mergers exceeding the new concentration threshold contemplated by section 92(2) will not be challenged by the Commissioner. Many mergers will exceed the new concentration threshold, but, as the Commissioner has noted, the vast majority of mergers are not problematic and are cleared quickly by the Bureau.[2]

To illustrate the point, if the two parties to a merger have market shares of 8% and 7% respectively, there are four other competitors with 20% each, and one with the remaining 5%, then the post-merger concentration index is 1850 and the increase is 112, which exceeds the section 92(2) threshold. However, absent highly unusual circumstances, we would not expect the Commissioner to challenge such a merger.

Accordingly, it would be helpful for the revised MEGs to state that, while section 92(2) creates an evidentiary presumption in the context of a litigated challenge brought by the Commissioner before the Tribunal, exceeding the threshold identified in section 92(2) does not, in itself, imply that the transaction necessarily constitutes an actual substantial prevention or lessening of competition.

Similarly, the revised MEGs could usefully acknowledge that relatively lower concentration metrics above the section 92(2) threshold require relatively less evidence to rebut a presumption arising pursuant to that section. (Section 92(2) says nothing

---

[2] Matthew Boswell, Commissioner of Competition, Senate of Canada, National Finance Committee, December 13, 2023, 88:19: "The vast majority of mergers that we review at the bureau are not problematic. In fact, they're beneficial, and we wave them through in five or seven days after looking at them quickly. It's the problematic 5% or 10% of mergers that seriously harm the Canadian economy."

about the magnitude of the evidence required to rebut a presumption arising solely on the basis of the concentration index.)

Such a recognition would be consistent with the U.S. approach (which the Bureau has cited as an important rationale for proposing a reversal of the evidentiary onus as adopted in section 92).[3] While not required by statute, U.S. courts have placed an evidentiary burden on the merging parties where a challenged merger significantly increases concentration in a market. U.S. courts have held that the quantum of evidence defendants must produce to shift the burden back to the plaintiff is relatively low, particularly if the plaintiff relies entirely on market shares and concentration.[4]

Especially if a merger is only slightly over the concentration index threshold in section 92(2), the concentration itself should not be taken as evidence of a particularly significant lessening or prevention of competition. For example, in the absence of additional evidence led by the Commissioner, the fact of some vigorous and effective remaining competitors ought to be sufficient to "prove the contrary" – i.e., that the merger is not likely to prevent or lessen competition substantially.

It would also be helpful for the MEGs to provide examples of the types of evidence that can "prove the contrary" to overcome a presumed substantial prevention or lessening of competition arising from section 92(2). The Bureau's 2023 Submission helpfully acknowledges that evidence of low barriers to entry is one example of how merging parties could prove that a merger is unlikely to substantially prevent or lessen competition (section 1.4), but recognition of other specific relevant factors would be helpful. For example, U.S. cases have recognized a range of factors that can rebut a presumed substantial lessening of competition, including that (i) the merger enables the merged firm to offer new or enhanced services,[5] (ii) the merger will result in cost savings or increased output that will enable the merged firm to be a more effective competitor,[6]

---

[3] See s 1.4 of The Future of Competition Policy in Canada, Submission by the Competition Bureau, March 15, 2023 ("2023 Submission") states that: "… the merger provisions of the Act should be amended to allow for "structural presumptions" along lines that exist in the US."

[4] See *US v. Anthem Inc*., 236, F. Supp. 3d 171, at 213 (D.D.C. 2017) aff'd, 855 F.3d 345 (D.C. Cir. 2017), *US v. JetBlue Airways Corporation*, 24-1092, (1st Cir.) at 81-82, and *US v. Baker Hughes, Inc.* 908 F. 2d 981, 983 (D.C. Cir. 1990).

[5] The JetBlue decision provides the following examples at p. 101: *Deutsche Telekom*, 439 F. Supp. 3d at 207-209 (recognizing efficiencies such as the accelerated introduction of cellular service based on new technology); *US v. M.P.M., Inc*., 397 F. Supp. 78, 93 (D. Colo. 1975) ("service offered" by the new firm "was superior to that offered by either of the previously independent companies alone"); *FTC. v. Tenet Health Care Corp*., 186 F.3d 1045, 1054-55 (8th Cir. 1999) (explaining that in analysis of "the competitive effects of the merger" the district court should have considered evidence that the merger of two smaller hospitals would create "a hospital that is larger and more efficient" than the standalone hospitals and that "will provide better medical care than either of those hospitals could separately.").

[6] The Jet Blue decision cites at p. 101: *US v. Country Lake Foods, Inc*., 754 F. Supp. 669, 674 (D. Minn. 1990) (the merger would allow the combined company to "increase its capacity substantially," "lower [] costs," and achieve "other savings," enabling it to "compete head-to-head" with its "top selling" rival)."

(iii) sophistication of customers,[7] and (iv) weak market position of the acquired firm,[8] among other factors that undermine the predictive value of market share and concentration statistics.[9]

The Bureau has indicated a desire to make its guidelines less technical and more accessible to non-lawyers. With this overall goal in mind, we are concerned that the content and tone adopted by the Discussion Paper risks creating a general impression that the Bureau will challenge a much broader range of mergers than it has in the past. A discussion in the MEGs of the significance and application of section 92(2) of the Act, as well as factors that may lead the Commissioner to clear a merger, would be helpful to avoid expectations in the general public that the Commissioner will challenge a much wider range of mergers than is likely to occur.

3. It should not always be necessary to define markets or establish market shares for the Commissioner to conclude that a merger is not likely to prevent or lessen competition substantially.

It would be helpful for revised MEGs to acknowledge that, even with new section 92(2), it will not always be necessary to define relevant markets for the Commissioner to conclude that a merger is not likely to prevent or lessen competition substantially. The following commentary in section 3.3 of the current MEGs should remain applicable:

> "In some cases, it may be clear that a merger will not create, preserve or enhance market power under any plausible market definition. Alternatively, it may be clear that anti-competitive effects would result under all plausible market definitions. In both such circumstances, the Bureau need not reach a firm conclusion on the precise metes and bounds of the relevant market(s)…"

This would appear to be consistent with the Bureau's January 6, 2025 statement on its review of RONA's' acquisition of All-Fab which indicates that, in the Saskatoon area, the merger was likely to exceed the structural presumption threshold under any geographic market scenario. In contrast, the Bureau stated that, in Edmonton, while the concentration and market share measures would exceed the structural presumption

---

7 In Baker Hughes, *supra*, 982 – 983, the Court of Appeals identified (i) the misleading nature of the government's market concentration statistics and (ii) the sophistication of customers for the relevant product as providing "compelling support" for the trial court's finding that the prima facie case was rebutted. The Court of Appeals held that the parties did not have to prove that entry would be quick and easy in order to rebut the prima facie case.

8 *FTC v. National Tea Co*., 603 F.2d 694, 699-700 (8th Cir.1979) (weak market position of acquiring company made substantial lessening of competition unlikely); *US v. International Harvester Co*., 564 F.2d 769, 773-79 (7th Cir.1977) (company successfully rebutted prima facie case by showing, among other things, financial weakness of acquired company, strong level of competition in the relevant market, and tendency of the market toward even stronger levels of competition) and *Lektro-Vend Corp. v. Vendo Co*., 660 F.2d 255, 276 (7th Cir.1981) (acquired company's deteriorating market position both before and after acquisition rebutted prima facie case), cert. denied, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982).

9 E.g., in *US v. General Dynamics Corp*., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974), the fact that one party had only minimal reserves of the relevant product (coal) which were already committed under long term contracts rebutted a prima facie case arising from market concentration. See also: *FTC v. H.J. Heinz Co*., 246 F.3d 708 (D.C. Cir. 2001).

threshold under some market definition scenarios, those scenarios were not supported by the evidence and "[u]ltimately, the available evidence supported that effective remaining competition in Edmonton was enough to prevent an exercise of market power." Given the latter finding, it would seem unnecessary to definitively define relevant markets.

4. Market definition and determination of market shares should reflect commercial reality and take into account all factors (including supply side responses) that are relevant to assessing the possibility of exercising market power.

The Tribunal has stated that market definition should be grounded in commercial reality and in the evidence.[10] As stated in the P&H decision, "the purpose of identifying the relevant product (or geographic) market is to identify the possibility for the exercise of market power."[11] With that objective in mind, and particularly in the context of the new section 92(2), likely supply side responses of competitors should be taken into account in defining relevant markets and determining market shares where such responses are likely to impact post-merger competition. Section 4.2 of the current MEGs notes that market definition focuses on *demand* responses to changes in relative prices after a merger and suggests that *supply* responses may be considered at a stage subsequent to market definition:

> "Market definition is based on substitutability, and focuses on demand responses to changes in relative prices after the merger. The ability of a firm or group of firms to raise prices without losing sufficient sales to make the price increase unprofitable ultimately depends on buyers' willingness to pay the higher price. The ability of competitive suppliers to respond to a price increase is also important when assessing the potential for the exercise of market power, but the Bureau examines such responses later in the analysis—either when identifying the participants in the relevant market or when examining entry into the relevant market." (emphasis added)

As discussed above, section 92(2) has added greater relevance to market definition in the broader task of assessing the competitive effects of a merger. If other firms are likely to respond to a price increase by increasing output and sales or entering a market, it is now more important that the implications of such a response be taken into account at the market definition and market share stage. It is no longer a matter of indifference whether such supply responses are taken into account at the market definition/market share stage or at later stages in the competitive effects analysis.

---

10 *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited, 2022 Comp Trib 18* ("P&H") at paras. 228 and 232.

11 See P&H at par. 188, citing *Commissioner of Competition v Canadian Waste Services Holdings Inc,* 2001 Comp Trib 3 ("*Canadian Waste*") at para 39, aff'd 2003 FCA 131, leave to appeal refused, [2004] 1 SCR vii; *Commissioner of Competition v Superior Propane Inc,* 2000 Comp Trib 15 at par 47; *Director of Investigation and Research v Southam* (1992), 43 CPR (3d) 161 (Comp Trib) at pp 177–178. Similarly, U.S. courts have recognized that market definition is a pragmatic tool and the goal is to identify "the arena within which significant substitution in consumption or production occurs." *Ohio v American Express Co*. 585 U.S. 529, 543 – 44 (2018) (emphasis added).

Where it is necessary for the Commissioner to define relevant markets to assess a merger, there is no principled reason to defer accounting for the implications of supply responses on a potential exercise of market power to a later stage of the analysis, after imposing a reverse onus on the merging parties based on an assessment of only a demand response. In its decision in *Canadian Waste* (2001),[12] which was upheld by the Federal Court of Appeal, the Tribunal took into account likely future changes in the capacity of local waste disposal facilities at the market definition stage.[13]

Further, where significant supply side reaction to an attempted price increase is likely, it may be most appropriate to measure market shares on the basis of capacity or likely future sales rather than historical sales for the purposes of section 92(2). The market shares used for the purposes of section 92(2) should be the measure that best reflects the likely post-merger competitive dynamics.

5. Revised MEGs should recognize that efficiencies remain relevant to merger reviews.

While the second paragraph of section 2.10 of the Discussion Paper and section 2.1.1.2.2. of the Bureau's November 7, 2024 FAQs helpfully recognize that, in certain cases, merger specific efficiencies can enhance rivalry (i.e., increase the level of competition in a market), they also both state the Bureau expects that efficiencies will not usually affect its competitive analysis. These comments may create some confusion. In any event, it would be useful for revised MEGs to clarify the Bureau's view of the continuing relevance of efficiencies in its merger analyses following the repeal of the efficiency defence.

In particular, it would be helpful for revised MEGs to more clearly state that efficiencies such as cost reductions and product innovations are relevant factors to both (i) assessing the competitive effects of a merger and (ii) overcoming a section 92(2) presumption of a substantial prevention or lessening of competition. Indeed, efficiencies may be relevant as an "other factor" pursuant to section 93(h) of the *Competition Act*. Such an acknowledgment would be consistent with the Commissioner's statements before Parliament in respect of the recent amendments.[14]

---

12 *Canadian Waste*, at 61, 72, 92 and 100.

13 In *Canadian Waste*, the Tribunal assessed the geographic market for commercial waste disposal. Even though significant volumes of waste were currently being shipped from Toronto and other parts of Ontario to Michigan, Michigan was excluded from the relevant market on the basis of an expectation that the parties were likely to have significantly increased capacity at waste disposal sites in Ontario that would, going forward, make shipments to Michigan unprofitable. By implication, future anticipated capacity in the hands of competitors ought also to be taken into account in defining the relevant market.

14 Matthew Boswell, Commissioner of Competition, Senate of Canada, National Finance Committee, December 13, 2023, 88:34: "Your sense is exactly correct, sir, that the pro-competitive efficiencies of a merger could absolutely be considered in the framework of considering whether the merger substantially lessens or prevents competition. There is a line, section 93(h), that allows the tribunal and, of course, the bureau, to consider any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger. All our colleagues around the world look at efficiencies in their merger review in the sense of whether there are efficiencies that will be pro-competitive, that will enhance rivalry. Yes, we would absolutely look at that, and if they were there, then maybe the merger could go ahead."

Furthermore, as noted above, U.S. courts have taken into account the ability to offer new or enhanced services, cost savings and increased output as procompetitive benefits that can shift the burden of proof of anti-competitive effects back to the plaintiff.

It would also be helpful for the revised MEGs to refer to the comments of Justice Crampton in the Competition Tribunal's decision in *Tervita*,[15] identifying some situations where cost decreases could increase rivalry and promote competition.[16]

> "[388] There may well be situations in which any cost reductions or other efficiencies likely to be attained through a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more larger rivals, (ii) by increasing the merged entity's incentive to expand production and to reduce prices, thereby reducing its incentive to coordinate with other firms in the market post- merger, and (iii) by leading to the introduction of new or better products or processes."

If efficiencies create incentives for the merged firm to reduce prices, increase output or expand product variety or choices, then they may enhance competition by promoting competitive rivalry and making adverse effects on competition unlikely. Efficiencies may also make coordinated effects of a merger less likely by, for example, increasing the merged firm's incentives to expand production and differentiating its cost structure from competing firms. Increased innovation enabled by a merger can also result in a market that is less conducive to coordinated behaviour.[17]

Finally, the revised MEGs could usefully acknowledge that the purpose clause in section 1.1 of the *Competition Act* recognizes that promotion of the efficiency and adaptability of the Canadian economy is a purpose of the *Competition Act* that will be taken into account in applying the merger provisions of the *Competition Act*. In particular, in the context of the *Canada Pipe* abuse of dominance proceedings, the Federal Court of Appeal referred to the purpose clause and commented that "all of those purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition". The same principle should apply with respect to the merger provisions of the *Competition Act*.[18]

6. It would be helpful for revised MEGs to clarify the Bureau's views on how it expects to analyze a merger's impact on labour markets.

The Discussion Paper raises several aspects of the application of the merger provisions to labour markets that raise questions about the Bureau's intended approach in this regard. For example, section 2.6 of the Discussion Paper states that labour markets may

---

15 *Commissioner of Competition v. CCS Corporation et al*., 2012 Comp. Trib. 14 ("*Tervita*").

16 As Justice Crampton explained in *Tervita* at par. 372, competition is a rivalrous process that prevents the exercise of market power.

17 Section 6.30 of the current MEGs recognizes that differences in cost structure and rapid and frequent innovations make coordinated conduct less likely.

18 Canada (Commissioner of Competition) v. Canada Pipe Co. (F.C.A.), 2006 FCA 233, [2007] 2 FCR 3 at par. 48.

be narrow and subject to existing monopsony power. It also cites comments in recent U.S. merger guidelines to the effect that (i) labour markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers and (ii) the level of concentration at which competition concerns arise may be lower in labour markets than in product markets, given the unique features of certain labor markets. If the Bureau considers that labour markets are susceptible to competitive impact concerns in ways that do not typically arise when it is analysing a merger's impact on products or services supplied or purchased by the merging parties, it would be helpful for the Bureau to explain this position and the basis for it.

It would also be helpful for the Bureau to explain how it intends to approach market definition, determining market shares, and assessing the "substantiality" of any prevention or lessening of competition in labour markets.

That said, as a focus on labour markets in merger review is an evolving area, it may be most efficient for the Bureau to initially provide guidance by a less formal means that is more amenable to more frequent revision, such as a speech or a separate discussion paper.

7. Other areas in which the Bureau could usefully clarify its views.

Section 2.9. of the Discussion Paper, addressing innovation and dynamic competition, states that:

> "While the Competition Tribunal has recognized that innovation analyses often need to rely on qualitative evidence,[Footnote68] the Bureau has developed formal economic models to guide its assessments in recent reviews.[Footnote69]"

The footnote references are to two abuse of dominance cases and the Dow/Dupont merger. However, the referenced Dow/Dupont position statement does little more than acknowledge that the Bureau considered the merger's impact on innovation.[19] It would be helpful for the Bureau to amplify on the formal economic models that are guiding its analysis of a merger's impact on innovation.

Also, the Discussion Paper indicates that the Bureau is considering potential major revisions to its existing guidance on (i) the approach to bidding or bargaining markets, (ii) unilateral effects in homogenous markets, (iii) quantification of coordinated effects, and (i) non-horizontal mergers. Additional guidance from the Bureau in each of these areas would be welcome. To the extent that such guidance may address evolving theories or methodologies, these may also be areas where initial less formal and more easily amended guidance (such as speeches and discussion papers) may be more practical than including them in revised MEGs that are unlikely to be revisited for at least several years.

---

19 The position statement says: "The Bureau's review also revealed that each of the parties has innovation efforts directed at expanding and enhancing their respective cereal broadleaf herbicide portfolios. In light of this, the Bureau also determined that competition would be harmed because the loss of innovation rivalry would reduce the incentive to innovate and to bring new and more effective products to market in a timely manner."