Merger Enforcement Guidelines

Notice: These Guidelines were issued in March 1991. A number of changes to the Competition Act have occurred since then. In particular, section 6.2 and section 6.5 of Part 6 of the Merger Enforcement Guidelines no longer reflect current provisions of Part IX of the Competition Act addressing Notifiable Transactions and timing issues. Please refer to the Procedures Guide for Notifiable Transactions and Advance Ruling Certificates and the Fee and Service Standards Handbook. Readers should also note that in light of the decision of the Federal Court of Appeal in the Commissioner of Competition v. Superior Propane Inc., The Efficiency Exception Part 5 of the guidelines no longer applies. In cases where efficiencies are claimed, the Competition Bureau will apply the principles set out in the Commissioner of Competition v. Superior Propane Inc. and ICG Propane Inc. 2001 FCA 104.

These guidelines are issued to provide general guidance. Parties are encouraged to enter into early contact with the Bureau to discuss proposed transactions. The particular facts will determine how the Bureau assesses any proposed transaction. Parties contemplating a merger or acquisition should obtain appropriate legal advice when contemplating a possible transaction. The final interpretation of the Competition Act rests with the Competition Tribunal and the Courts.

INTERPRETATION

These Guidelines supersede all previous statements made by the Director of Investigation and Research or other officials of the Bureau of Competition Policy, including Information Bulletin No. 1 (entitled The Merger Provisions), that may differ from anything stated herein.

This document is intended solely to provide enforcement guidelines. As such, it sets forth the general approach that is taken to merger review, and is not a binding statement of how discretion will be exercised in a particular situation. Specific guidance regarding a specific merger may be requested from the Bureau through its program of advisory opinions. The Guidelines are not intended to be a substitute for the advice of merger counsellors. They do not represent a significant change in enforcement policy or restate the law. Final interpretation of the law is the responsibility of the Competition Tribunal and the courts.

For the sake of brevity the following abbreviations are used throughout these Guidelines:

- The Act refers to the Competition Act, R.S.C. 1985, c. C-34, as am. R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 189; R.S.C. 1985, c. 19 (2nd Supp.), Part II; R.S.C. 1985, c. 34 (3rd Supp.), s. 8; R.S.C. 1985, c. 1 (4th Supp.), s. 11;R.S.C. 1985, c. 10 (4th Supp.), s. 18; S.C. 1990, c. 37 ss. 27-32.
- "The Department" refers to Consumer and Corporate Affairs Canada
- "The Bureau" refers to the Bureau of Competition Policy, Consumer and Corporate Affairs Canada.

- "The Director" refers to the Director of Investigation and Research, of the Bureau of Competition Policy.
- "The Tribunal" refers to the Competition Tribunal.
- "The Guidelines" refers to this publication i.e. Merger Enforcement Guidelines.
- References to sections of the Act are referred to as "sections".
- References to parts of these Guidelines are referred to as "parts".

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Executive Summary

What Constitutes a Merger

In Part 1, the Guidelines address the Director's enforcement policy regarding section 91 of the Act, which sets forth the definition of the term "merger". In general terms, section 91 deems a "merger" to occur when direct or indirect control over, or significant interest in, the whole or a part of a business of another person is acquired or established. If a transaction does not come within the scope of section 91, it will not be subject to the merger provisions of the Act. The principal issue highlighted in Part 1 is the interpretation of the words "significant interest". The acquisition or establishment of a significant interest in the whole or a part of a business of another person is considered to occur when a person acquires or establishes the ability to materially influence the economic behaviour of the business of a second person; (e.g., block special or ordinary resolutions or make decisions relating to pricing, purchasing, distribution, marketing or investment). In general, a direct or indirect holding of less than a 10 percent voting interest in another entity will not be considered a significant interest.A significant interest may be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving incorporated or non-incorporated entities.

The Anticompetitive Threshold

Part 2 deals with the Director's enforcement policy regarding the statutory standard set forth in section 92(1) of the Act . In general, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would more likely be in a position to exercise a materially greater degree of market power in a substantial part of a market for two years or more, than if the merger did not proceed in

whole or in part. Market power can be exercised unilaterally or interdependently with other competitors. To date, most of the mergers that the Director has concluded would likely have prevented or lessened competition substantially have raised concerns about the ability of the merging parties to unilaterally exercise market power. However, the Guidelines indicate that a merger can also facilitate the ability of two or more competitors to exercise market power interdependently, through an explicit agreement or arrangement, or through other forms of behaviour that permit firms implicitly to coordinate their conduct. In the assessment of the extent to which market power will likely be acquired or entrenched as a result of a merger, the focus is primarily upon the price dimension of competition. Nevertheless, competition can be substantially prevented or lessened with respect to service, quality, variety, advertising or innovation, where rivalry in the market in respect of these dimensions of competition is important.

Market Definition

Part 3 of the Guidelines outlines the conceptual framework that underlies the approach taken to market definition, and describes the various factual criteria that are typically assessed in the case-by-case application of this framework. In general, a relevant market is defined as the smallest group of products and the smallest geographic area in relation to which sellers could impose and maintain a significant and nontransitory price increase above levels that would likely exist in absence of the merger.In most contexts, the Bureau considers a 5 percent price increase to be significant, and a one year period to be nontransitory. However, a different price increase or time period may be employed where the Director is satisfied that the application of the 5 percent or one year thresholds would not reflect market realities.

Where potential competition from new entrants or expansion by fringe firms within the market would require significant construction or adaptation of facilities, or overcoming significant difficulties related to marketing and distribution, it is considered subsequent to market definition, in the assessment of whether new entry into the relevant market would ensure that competition would not likely be prevented or lessened substantially.

Evaluative Criteria

Part 4 addresses the various evaluative criteria that are analyzed in the determination of the likely effects of a merger on competition in a relevant market. The first matter discussed is the significance of information relating to market share and concentration. Mergers generally will not be challenged on the basis of concerns relating to the unilateral exercise of market power where the post-merger market share of the merged entity would be less than 35 percent. Similarly, mergers generally will not be challenged on the basis of concerns relating to the interdependent exercise of market power, where the share of the market accounted for by the largest four firms in the market post-merger would be less than 65 percent. Notwithstanding that market share of the largest four firms may exceed 65 percent, the Director generally will not challenge a merger on the basis of concerns relating to the interdependent exercise of market power where the merged entity's market share would be less than 10 percent. These thresholds merely serve to

distinguish mergers that are unlikely to have anticompetitive consequences from mergers that require further analysis, of various qualitative assessment criteria such as those highlighted in section 93. No inferences regarding the likely effects of a merger on competition are drawn from evidence that relates solely to market share or concentration. In all cases, an assessment of market shares and concentration is only the starting point of the analysis.

The Guidelines then address the seven qualitative assessment criteria specifically mentioned in section 93 of the Act, together with two additional criteria that are often important to consider. As is the case with high market share and concentration, the presence of impediments to new competition that would impose on entrants a significant cost disadvantage, irrecoverable costs, or time delays is generally a necessary, but not sufficient precondition to a finding that competition is likely to be prevented or lessened substantially. In the absence of such impediments, a significant degree of market power generally cannot be maintained. Where future entry or expansion by fringe firms within the market would likely occur on a sufficient scale within two years to ensure that a material price increase could not be sustained beyond this period in a substantial part of the relevant market, the Bureau would likely conclude that the merger does not require enforcement action.

Similarly, information relating to either the failing firm or the effective remaining competition factors can be sufficient to warrant a decision not to challenge a merger. In cases where one of the merging parties is likely to exit the market in absence of the merger, and there are no alternatives to this exit that would result in a materially higher degree of competition than if the merger proceeded, the merger will generally not be found to be likely to contravene the Act. Likewise, where the degree of effective remaining competition that would remain in the market is not likely to be reduced, the merger likely will not be challenged.

Vertical and Conglomerate Mergers

At the end of Part 4, the Guidelines address vertical and conglomerate mergers. Such transactions rarely present sufficient grounds for enforcement action. Nonetheless, the Guidelines describe two limited situations where a vertical transaction may prevent or lessen competition substantially, and one circumstance where a "conglomerate" merger may do so. In each of these three situations, the potential anticompetitive effect of the merger is horizontal.

The Efficiency Exception

Please Note: This Part no longer applies. Readers should consult the decision of the Federal Court of Appeal in the Commissioner of Competition v. Superior Propane Inc. and ICG Propane Inc 2001 FCA 104.

In Part 5, the Guidelines address in detail the approach taken to the efficiency exception provisions of section 96. These provisions become operative where a merger has been

found to be likely to substantially prevent or lessen competition. The review of submissions relating to efficiency gains focuses primarily upon quantifiable production related efficiency gains. However, qualitative dynamic efficiencies can in certain circumstances also receive significant weight. The total efficiency gains that would not likely be attained if the merger did not proceed are balanced against the effects of any prevention or lessening of competition likely to be brought about by the merger. The focus of the evaluation of the magnitude of these anticompetitive effects is upon the part of the total loss likely to be incurred by buyers or sellers that is not merely a transfer from one party to another but represents a loss to the economy as a whole, attributable to the diversion of resources to lower valued uses.

Process Matters

Finally, in Part 6 the Guidelines briefly address various process related considerations such as timing, prenotification, confidentiality, information exchanges between merging parties and the relationship between the review processes of the Bureau and Investment Canada.