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Ms. Lourdes Da Costa
Competition Bureau
Industry Canada
Place du Portage 1
50 Victoria Street
Gatineau, Quebec K1A OC9

Dear Lourdes:

**Re: New MEG's (Draft March 2004)**

I am writing in my personal capacity to attempt to provide some input from my many years of experience in this area, which I hope you will find helpful. The promulgation of new merger enforcement guidelines gives the Bureau an opportunity to set out clearly a revised and updated approach to merger law in Canada, that is believed to be conceptually correct, without getting mired in detail. I am somewhat disappointed that the overall approach in the proposed MEG's seems to add to the liturgical side of the existing MEG's rather than demonstrating a freshness coupled with economic relevance, which relevance several of the officers in the Bureau have demonstrated in the last decade. Perhaps the numbering concept (which is more developed in the proposed MEG's than in the existing MEG's) is *de rigueur* in Ottawa today, but it is more suitable for biblical numbering than guidelines. The style is not helpful to understanding.

Under the "definition of merger," section 1.7 now states that the crossing of the thresholds of notifiable transactions is a *prima facie* indicator of the acquisition of a "significant interest." It is my submission that the Bureau must recognize explicitly, globalization in many industries and should abandon Canadian efforts to examine in detail mergers where Canada represents less than 10% of the global assets or gross sales of the merging entities. This is particularly true when both European and United States authorities are actively reviewing the merger. Canadian involvement is largely a waste of the resources of the Bureau, however interesting the issues may be. This is particularly true where the Canadian entities implicated are not "reporting issuers" under the Canadian Securities Administrators concepts.

I would also note, that even if the merging entities are Canadian based, scant attention should be paid to economic analysis where the impacts are 90% off shore and the U.S. or European regulators are actively considering the implications. In this situation some regard should also be paid to the international dumping codes which limit the ability to raise prices in the home market. I see no reference to such concepts in the proposed MEG's.

I also suggest that the Bureau should not involve itself in a merger where there is a federal or provincial regulator of that industry which must approve of the merger before it can be completed, unless that regulator seeks Bureau assistance. This should be clearly stated in the MEG's.

Turning to the "anti-competitive threshold" in Part 2, there is the same ancient economic concept of increased market power resulting in maintaining prices above the competitive level. Most of this economic theory was developed in the United States which can afford to adopt an aggressive stance in view of its large population (9 times that of Canada) and its international economic clout. Where it can require a threshold of five effective competitors in a market, Canada may be limited to a threshold of two vigorous competitors. In this regard I do think the Bureau should rethink non-compete covenants and require their elimination in even small mergers where the result is to eliminate an effective competitor; see for example *Doerner v. Bliss* (1980) S.C.R. I suggest this is very relevant to the anti-competitive threshold but is not mentioned in the proposals.

With respect to market definition, the economic models seem to reflect more of a "before internet" approach than a realistic twenty-first century view. Indeed I do not think those older models were used in the recent mergers of bookstores. The internet is also relevant in 4.3 but is not mentioned.

At the top of page 19, I suggest that you add to the 35 per cent rule "and the merger does not include a non-competition agreement."

The introduction of the concentration ratios used in the United States, especially the HHI referred to in footnote 53, heralds the continuation of a U.S. approach which can only hurt Canadian industry. As pointed out previously, Canada needs to articulate an approach that ensures the Canadian competitors are vigorous but viable. There needs to be less focus on concentration ratios and more focus on sustainability. Innovation is the real driver of increased productivity that in turn results in lower consumer prices. Naturally our friends in other countries would like the Canadian competitors to remain weak and enfeebled by a concentration ratio approach.

In section 5.20 I do not think high market concentration is nearly as important as barriers to entry when considering whether a merger should be approved. Indeed if there are no barriers to entry, high concentration is irrelevant. The focus should be on barriers to entry and that has been the approach at the Bureau, as I have heard it.

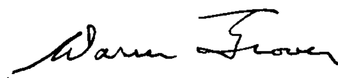
At section 6.8ff, provincial and federal grants are an important adjunct of entry in Canada. There is no attention given to the availability of government grants in the proposals, again reflecting a dated approach to market capitalism, which is being replaced by a mixed approach to corporate finance and competition in a more social democratic milieu. Often sunk costs of entry can be covered by a low interest capital infusion designed to increase employment.

In the efficiency part of the guidelines, there is need for much more emphasis on quantifying the extent of any anti-competitive effects, and establishing concrete benchmarks. Those benchmarks have not been addressed in the United States, as there is no broad efficiency defence in that country. If Canada does not amend its concept of efficiency it will have to somehow establish that lack of competition has a cost that can be calculated, not only in prices charged to consumer but in lack to innovation and lack of increased productivity, amongst other factors.

The failing firm of Part 9 fails to reflect the current concept of resuscitation through insolvency. This is a major trend in Canada and makes the "failing firm" a thinner argument to justify a merger. Perhaps the newer approach to insolvency and liquidation could be covered in section 9.10.

I hope the above is of some assistance and I look forward to reading a revised approach. While I know the concept of bank mergers is high in the political focus, the international financial markets seem to indicate that Canadian banks can now only be seen realistically as targets. Canada may have lost its window of opportunity in that area. Let us not expand that loss approach.

Yours very truly,



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WMHG/bp