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June 3, 2004

Ms. Lourdes Da Costa
Competition Bureau
Industry Canada
Place du Portage 1
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Lourdes:

**Re: Draft MEGs – Draft of March, 2004**

The Bureau is certainly to be commended on providing MEGs which bring the framework of Canadian merger review more closely into alignment with the EU and U.S. frameworks. The draft is coherent and easily read. It represents a significant achievement and advance.

Of course, there are many detailed comments which have been and will be made by others. All of these are worthy of attention, and some of them deserve incorporation in the draft before it assumes final form. We also have one technical point related to section 8.10 of the draft, upon which we will expand below.

Our principal point is that the MEGs exist in a changing world where evolving economic concepts and litigation provide a constantly swirling background. Consequently, review and revision of the MEGs should be an ongoing task for the Bureau.

For the EU the concept of merger guidelines is a new one. EU experience cannot, therefore, be that from which we, in Canada, can draw. But the U.S. has provided a clear example of guidelines which are subject to continuing scrutiny and revision[1].

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[1] See *Symposium: Celebrating Twenty Years of the Merger Guidelines,* Antitrust Law Journal, vol. 71, Issue 1, p. 155-218. See also Federal Trade Commission and Department of Justice, *Joint Workshop on Merger Enforcement,* held Tuesday, February 17 to Thursday, February 19, 2004 inclusive at the FTC Conference Centre, Washington D.C.: *"http://www.ftc.gov/mergerenforce/040218ftctrans.pdf"*

The continuing discussion and informed debate which has taken place with respect to the U.S. guidelines illustrates the very positive effect of periodic revisions to those guidelines. In Canada such periodic revisions are perhaps even more important. Here we do not have the benefit of frequent defining litigation. There is, therefore, a real possibility that we can, in our merger reviews, be left behind. The outstanding, and painful example is the treatment of efficiencies and the adoption of the total surplus standard in the initial MEGs. Had the MEGs been earlier amended with respect to efficiencies, the dramatic confusion of the Superior Propane case might well had been avoided.

Ours, therefore, is a simple request. That in the interest of all Canadians the Bureau realize the continuing centrality of the MEGs in merger review and the conclusions thereon drawn by the interested public: that the MEGs therefore be subject to periodic review and discussion. Too frequent change in the MEGs will cause uncertainty; too languorous an approach risks further Superior Propanes.

The one technical point which we wish to raise relates to Part 8 of the Draft MEGs, **The Efficiency Exception**. A minor element in that important part is found in section 8.10 which states:

> "Therefore, firms operating in markets that involve international trade and seeking to use the efficiency exception should provide the Bureau with evidence as to whether the merger will enable them to increase output."
>
> The attendant footnote states:
>
> > "increased output in this context is generally only possible with an associated decrease in price."

Many Canadian firms in the resource and other sectors are strongly committed to export activities. In instances where such Canadian firms merge there is characteristically a significant increase in the real value of exports in that because of the merger, the costs of Canadian enterprise are reduced. Increase in output however is not necessarily a result of the mergers. Where there is over capacity in Canada because industry patterns are changing there can frequently be a rationalization of output through efficiency gains and, in consequence, there may be a reduction in output.

In the same vein, prices for many Canadian products are established in world markets and the effect from a Canadian merger upon such prices will be negligible or non-existent.

We have therefore been led to the conclusion that section 8.10 of the Draft MEGs, and the underlying section 96(2) of the *Act* must apply only where a Canadian merger proponent seeks to rely upon the provisions of section 96(2) of the Act. Section 96(2) of the *Act* should therefore be identified in the Draft MEGs as a statutory provision of which merger proponents may seek to avail but is not a mandatory provision which applies to all mergers of all export oriented enterprises. Canadian firms should be encouraged to demonstrate efficiencies whether the narrow limitations of section 96(2) apply or whether the merging firms can demonstrate efficiencies apart from that section.

Thank you for inviting our comments.

Yours very truly,

**GOODMANS LLP**

**Per:** 

William P. Rosenfeld

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