Competition Bureau Canada
Bureau de la concurrence Canada

SUMMARY OF THE CONSULTATIONS ON EFFICIENCIES (2004–2005)

Canada

In September 2004, the Competition Bureau launched a three-phase consultation process on the treatment of efficiencies under the *Competition Act*.

- In the first phase, the Bureau issued a consultation paper and invited written submissions, which were complemented by roundtable discussions held across Canada.
- In the second phase, Bureau officials met with their counterparts from other member nations of the Organisation for Economic Co-operation and Development at an international roundtable to discuss the treatment of efficiencies in other jurisdictions.
- In the third phase, an advisory panel of economic, business and international trade experts was asked to submit a report about the role that efficiencies should play in the context of Canada's economy in the 21st century. The panel was also asked to consider the relevance of the various types of efficiency, particularly that of dynamic efficiency, to Canadian competition policy.

BACKGROUND

The notion of competition contributing to the efficiency of the Canadian economy has been a topic of discussion in legal, business and political circles for nearly 40 years.

In 1969, in one of a series of reports on Canada's economic framework legislation, the Economic Council of Canada expressed concern that due to the small size of the domestic market, Canadian firms operated inefficiently, which affected the prosperity of all Canadians.

The Economic Council concluded that there might be situations in which a merger limits competition and yet still provides benefits to Canadians by promoting greater efficiency in the way products or services are provided. This opened the discussion as to whether, under Canadian law, a merger that appeared to be anti-competitive might be subject to an "efficiencies defence."

From 1969 to the mid-1980s, a series of Government Bills were introduced to amend the *Combines Investigation Act* (the predecessor of the *Competition Act*) to, among other things, include consideration of efficiency gains in merger review. However, the language of these proposals differed in several important ways from the efficiencies defence that was included in the *Competition Act* in 1986.

The current *Competition Act* makes four references to efficiency:

- Section 1.1 refers to one purpose of the Act in terms of efficiency: to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy."
- Section 82 refers to the notion of efficiency as it relates to the implementation of foreign judgments in competition matters.
- Section 86 refers to efficiency gains generated by specialization agreements.
- Section 96 refers to efficiency gains generated by mergers.

In particular, section 96 allows the Competition Tribunal to authorize a merger that has brought about or is likely to bring about gains in efficiency that "will be greater than, and will offset, the effects of any prevention or lessening of competition" resulting from the merger. As such, an efficiencies defence has been available in Canada for 20 years.

The efficiencies defence has been very rarely invoked. To date, the Competition Tribunal has referred to efficiency in six merger cases, but has only given detailed consideration to the efficiencies defence in two: *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* and *The Commissioner of Competition v. Superior Propane Inc.* The latter is the only case in which the courts have interpreted section 96.

In the Superior Propane–ICG Propane case, the Competition Tribunal allowed the merger to proceed on the basis of efficiencies, despite the fact that it would substantially limit competition in many local markets across Canada, as well as the market for coordination services for national account customers. The Commissioner of Competition appealed the decision and the Federal Court of Appeal sent the case back to the Competition Tribunal for redetermination, finding that the Tribunal had made an error in law in its first decision. Following a further hearing, the Tribunal again found that the efficiency gains of the merger outweighed the anti-competitive effects and allowed the merger. The Commissioner appealed this decision, but the Federal Court of Appeal upheld the Tribunal's redetermination.

The case, which ran from 2000 to 2003, drew considerable interest in Canada's economic and legal circles. A private member's bill (C-249) was introduced in Parliament with the intent of changing the law regarding the efficiencies defence in response to the Superior Propane case.

Bill C-249 would have repealed the existing efficiencies defence in sub-section 96(1) in favour of an approach that would have made efficiency a factor in merger review to be considered along with the other factors set out in section 93. The Bill also included a "consumer benefit" requirement, with possible benefits including competitive prices and improved product choice.

Committees of both the House of Commons and Senate studied the Bill. One recurrent theme among the submissions to the committees was that the role of efficiencies under the *Competition Act* would benefit from broad public debate, particularly in light of the changes to Canada's economy resulting from free trade, globalization and technology, among other things. This opportunity presented itself with the demise of Bill C-249 at the time of the federal election call in May 2004.

PHASE ONE: NATIONAL CONSULTATIONS

The Bureau drafted a consultation paper in the summer of 2004 and released it that September.

The paper had two parts. Part 1 reviewed the current treatment of efficiencies in Canada under the *Competition Act*, focussing on the Bureau's enforcement practice, as outlined in the *Merger Enforcement Guidelines*, and on the Superior Propane case decisions. Part 1 also examined the legislative history of section 96 and looked at issues related to the burden of proof and other evidence requirements in efficiency cases. Part 1 concluded with a summary of the treatment of efficiencies in the United States, the European Union, the United Kingdom and Australia.

Part 2 set out five proposals that could serve as the basis for discussion on the treatment of efficiencies under the *Competition Act*:

- maintaining the status quo;
- maintaining the current efficiencies defence with the addition of an explicit exception prohibiting the application of the defence when a merger creates a monopoly or near-monopoly;
- reviewing efficiency as one factor in the overall assessment of a merger under section 93 of the *Competition Act*;
- allowing an assessment, post-merger, of the merger outcomes to determine whether the predicted claims of efficiency gains were achieved; and
- allowing for the consideration of efficiency gains in specialization agreements, joint ventures and strategic alliances.

The Bureau hired the Intersol Group to receive written submissions and to conduct consultations with stakeholders and other interested parties about the options.

WRITTEN SUBMISSIONS

Nearly three dozen written submissions were received from law firms, consumer and industry groups and foreign competition authorities. The written submissions covered the advantages and disadvantages of each option in considerable detail from a wide variety of perspectives, ranging from the effects on international trade to the importance of the stability of the law.

Some of the ideas that came up in the written submissions for each of the five options are listed below. A complete summary of the written submissions is available online, as are the written submissions themselves.

Status quo

Supporters of maintaining the status quo identified a number of reasons why this option was preferable, including the following:

- *The status quo is unique*. It is a made-in-Canada solution that recognizes the characteristics of the Canadian economy. The size of the Canadian market and the nature of global competition mean that concentration in some sectors is inevitable and desirable. Canadian firms must have the size and capacity to compete effectively against larger competitors.
- *The status quo is consistent with the public interest*. An efficiencies defence should be available for mergers that increase Canadians' overall wealth. Competition policy focussed on efficiency is vital for Canada's economic development.
- *The status quo has passed the test of time*. The current efficiency provisions resulted from considerable study, and it is inappropriate to make substantial policy changes without further study. There is no evidence that the current provisions are unworkable or that parties are abandoning transactions because they are concerned about how the current standard may be applied.

Opponents of the status quo identified a number of reasons for change, including the following:

- *The status quo places too much value on efficiency*. Promoting efficiency is not the only objective of the *Competition Act*, and yet the efficiencies defence allows it to override all the other objectives of competition policy.
- *The status quo is restrictive in application and scope*. The efficiencies defence has rarely played a role in Bureau decisions. In fact, the Competition Tribunal makes the final determination as to whether mergers may generate efficiency gains. As a result, the Bureau's ability to fully consider efficiency gains during merger review is limited.
- *The status quo is complex and more difficult to apply than other options*. The status quo requires parties to lead evidence regarding not only the correct measure of anti-competitive effects under a particular standard, but also to lead evidence as to what the standard should be. The status quo also requires identifying different classes of customers and determining the weights given to income redistribution effects. The implementation of this approach is extremely difficult and controversial.

Merger to monopoly or near-monopoly

Those in favour of an exception to the efficiencies defence for mergers that lead to monopolies gave a number of reasons for their support, including the following:

- *An exception would not allow efficiency gains to justify anti-competitive mergers*. Competition law should prevent companies from merging to the point that they create a monopoly. Companies should not be allowed to increase market power through mergers in the name of increased efficiency.
- *An exception would promote competition*. The current approach loses sight of why efficiency is valued: efficiency results in lower costs, which lead to lower prices and, in turn, enhanced consumer welfare, international competitiveness, and timelier introduction of new products

and services. Allowing a merger to monopoly because of efficiency gains without considering consumer effects would undermine these very aims.

Opponents of the exception provided a number of reasons to reject this option, including the following:

- *The exception would be too prohibitive*. Monopolies are not illegal in Canada. The danger in not allowing an efficiencies defence for mergers to monopoly is that it could stop a merger to monopoly that would increase social well-being.
- *The exception would be inefficient*. Efficiency gains should be central to the review of any transaction, including mergers to monopoly. To deny an efficiencies defence in these cases would seem to ignore the paramount importance of efficiency.
- *The exception would be inconsistent*. Efficiency would be allowed to override all other objectives of competition policy for most mergers, but the same would not be true when the merger led to a monopoly. The effects of a merger to monopoly should not be analyzed differently from the effects of any other merger.

Reviewing efficiency gains as a factor under section 93

Supporters of eliminating the efficiencies defence and simply assessing efficiency gains as a factor under section 93 noted a number of advantages of this option, including the following:

- *The factor approach would balance the purposes of the Competition Act*. This option would allow the four purposes set out in section 1.1 of the Act to be balanced in each merger review. The factor approach would acknowledge the importance of efficiency, while preventing it from overriding the other objectives of merger control.
- *The factor approach would make efficiency gains a regular part of merger review*. The factor approach would allow firms and the Bureau to take efficiency gains into account more often in merger analysis. It would make more sense to treat efficiency as just one of many factors to be considered, given that the various factors would have to be weighed differently depending on the circumstances of the case.
- *The factor approach would be in line with the practices of Canada's trading partners*. Canada's merger provisions would align with, most notably, those of the U.S. and the European Union, reducing the costs and uncertainty for firms forming transnational mergers.

Opponents of the factor approach gave a number of reasons for rejecting this option, including the following:

- *The factor approach would not give efficiency the weight it deserves*. Making efficiency just one of many factors might lessen its importance. Efficiency should be given paramount importance and any move that diminishes its importance would lead competition policy in an undesirable direction.
- *The factor approach would weaken Canada's ability to reach the goals of the Competition Act.* Changing to a factor approach would cause the Canadian economy to lose the important efficiency and productivity benefits that section 96 was designed to capture, and that are recognized in section 1.1 as the central goal of the Act.

- *The factor approach would change the definition of substantial lessening of competition.* Only dealing with efficiency gains under section 93 could obscure the meaning of *substantial lessening or prevention of competition*. Efficiency gains and anti-competitive effects are apples and oranges—the ability to exercise market power has nothing to do with efficiency.

Participants in the consultations were also asked to consider a factor approach with a consumer benefit requirement. Supporters of this option suggested that this would be in line with major trading partners' practices and noted that Canada is the only major jurisdiction that does not have an approach to efficiency gains rooted in a consumer surplus standard.

Opponents of this option noted that focusing solely on consumers ignores efficiency generally, and dynamic efficiency in particular.

Post-merger assessment of merger outcomes

This option would allow the Competition Tribunal to state in its decisions that a successful efficiencies defence ultimately relies on a post-merger assessment of whether efficiency gains have in fact been generated. If the efficiency gains are significantly less than predicted, the merger case could be re-opened and the merger possibly dissolved.

Supporters of post-merger assessment were in favour of this idea for a number of reasons, including the following:

- *Post-merger assessment would increase the chance that predictions became reality*. There would be increased certainty that predicted efficiency gains would materialize. The possibility of review and dissolution of the transaction would provide a strong incentive to the merging parties to ensure that predicted efficiency gains are achieved.
- *Post-merger assessment would be a useful empirical tool*. It would be beneficial to know more about the degree to which merging firms achieve the efficiency gains they anticipate, and this data would be helpful for fine-tuning future merger review policy.

Opponents of the post-merger assessment option had a number of reasons for rejecting this proposal, including the following:

- *Post-merger assessment would create uncertainty and inhibit efficient mergers*. This option would create considerable uncertainty for merging parties, since their newly integrated firm could be dissolved. Parties may be hesitant to take the necessary steps to integrate, thus delaying expected efficiency gains and damaging the competitiveness of the newly merged firm. Dissolution some time after the merger has taken place would be highly disruptive.
- *Post-merger assessment would be difficult to administer*. A heavy administrative burden for the Bureau and Competition Tribunal would result from the need to monitor transactions post-merger. This is not the best use of the Bureau's resources.
- *Post-merger assessment is impractical and cost prohibitive for firms*. This approach would be very costly for merged companies. To achieve maximum efficiency gains, the firms might have to completely integrate their operations, making any subsequent dissolution highly problematic.

Allowing for the consideration of efficiency gains in specialization agreements, joint ventures and strategic alliances

Respondents suggested that any changes in this area must ensure that the *Competition Act* facilitates rather than inhibits the kind of strategic alliances and innovative business arrangements that companies increasingly need to operate effectively in the global marketplace. In addition, respondents noted that if a new civil strategic alliance provision were enacted, it would make sense to make the treatment of efficiencies consistent with the merger provisions, since the analytical framework would be essentially the same.

ROUNDTABLES

As a follow-up to the written submissions, Intersol held a series of roundtable discussions in Vancouver, Toronto and Montréal in January 2005.

Participants were asked to discuss the options in the consultation paper, state their preferred option and answer specific questions about it. Some of the issues raised at these sessions are summarized below. A summary of the roundtables is available online.

Status quo

Many participants supported maintaining the status quo. They suggested that the objective of the merger provisions is to allow mergers that will improve the economy for Canadians. The cost-analysis approach works best when it is used as a defence, which is the status quo. Supporters also noted that the status quo allows the efficiencies defence to operate as intended and, as a result, encourages the dynamic development of Canada's economy. It was also suggested that the status quo be maintained until a detailed study examines what types of efficiency are relevant to competition policy, and what legislative framework offers the best policy and outcomes.

Opponents of the status quo expressed concern that the Bureau does not currently consider efficiency gains when determining a substantial lessening of competition. Language that specifically encourages the Bureau to consider efficiency gains would be beneficial. It was also suggested that, in the current situation, the rationale used in the *Superior Propane* case creates uncertainty, and that the Bureau could provide more certainty by specifically addressing how it will treat efficiencies.

Merger to monopoly or near-monopoly

The creation of special provisions to deal with mergers to monopoly or near-monopoly did not garner much support. Participants argued that the existing law, properly applied, would make it very difficult for such a merger to proceed. They added that in cases in which monopolies are likely — such as natural monopolies — government intervention is inevitable. Some participants did worry, however, about local monopolies.

Participants also pointed out that consumers are not concerned about whether a monopoly is allowed to form, but rather how high prices will rise. Finally, concern was expressed that mergers to monopoly would be blocked even when consumers would actually benefit from the merger.

Reviewing efficiency gains as a factor under section 93

Reaction to the factor approach was mixed. Supporters of this option noted that the factor approach does the best job of balancing the various objectives of the *Competition Act* and would prevent situations in which efficiency could override other objectives. It was also noted that this approach would allow the Bureau to consider efficiency gains at the onset of merger review, which might allow competition concerns to be resolved faster, without litigation. Supporters of this approach emphasized that nearly every country other than Canada uses a factor approach.

Opponents of the factor approach noted that efficiency is important to the economy and is often the motivation behind mergers, and feared that the factor approach might relegate efficiency to a lesser role. It was also noted that this approach would allow the Bureau too much discretion, posing a great risk that certain efficiency gains would be excluded from consideration. Opponents also suggested that the factor approach creates significant problems in terms of case preparation. Merging parties would not analyze efficiency gains in the same way they would for a defence.

Hybrid approach

Participants made a number of suggestions for a hybrid approach that would combine a defence and a factor approach. Participants noted that the advantage of this type of approach was that it would preserve the redeeming features of a factor approach, while allowing a defence when most needed. However, participants expressed some concern about the difficulty of weighing efficiency against a substantial lessening of competition. It was suggested that the defence be maintained for the few times it would be needed, while finding a simple way to weigh efficiency as a factor in merger review.

Post-merger assessment of merger outcomes

Many participants saw post-merger assessments as an opportunity to collect valuable empirical data. These assessments could provide useful information on how to identify problems with efficiency projections.

However, there was also concern that the possible dissolution of a merger resulting from missed short-term targets would generate too much uncertainty. Re-opening mergers after the fact would be impractical, and could create a chill. Many mergers do not create all projected efficiency gains because these are very difficult to predict and demonstrate. It was also suggested that monitoring would pose an unreasonable burden on the Bureau.

PHASE TWO: CONSULTATIONS WITH INTERNATIONAL COMPETITION AUTHORITIES

The second phase began with a consultation with representatives from other jurisdictions, timed to coincide with a meeting of the Organisation for Economic Co-operation and Development in October 2004. Representatives from Australia, Canada, the European Union, Mexico, the United Kingdom and the United States attended. Additional written submissions were received from Germany, Japan, Norway, Sweden and South Africa.

The international representatives were asked to comment on, among other things, the types of efficiency they generally consider, whether the approach requires that efficiency bring benefits to consumers and the circumstances under which efficiency gains are allowed.

Some of the ideas that came out during the roundtable and in the written submissions are described below. An extensive summary of the roundtable is available online.

Overall, the foreign jurisdictions can be classified into three groups.

- Those that have an efficiencies defence. In these countries, the promise of efficiency gains can be put forward as cause to disregard the anti-competitive effects of a merger. South Africa falls into this group.
- Those that consider efficiency as one factor among many in evaluating mergers. In these countries, increased efficiency can be put forward as one factor favouring a merger but not as an overruling objection to all other factors. Jurisdictions in this group are the European Union, the United States, Japan, Mexico and Norway.
- Those that have a hybrid approach. Australia, for example, treats efficiency gains as a factor in evaluating mergers. However, Australian law provides for granting immunity to mergers that are found to generate a net public benefit. In the United Kingdom, efficiency gains are treated as a factor in merger review. There is also provision to assess benefits to consumers separately and this can operate as an efficiencies defence.

Participants expressed a common view about the challenge of considering efficiency in merger review. The types of efficiency considered and their measurement have a direct consequence on the complexity of the exercise. However, participants also indicated that flexibility is key for assessing the efficiency gains resulting from a merger. There is no seminal rule.

Participants also said that the onus of proving the efficiency claims falls on the merging parties.

Participants observed that efficiency gains resulting from a merger should be achieved over a limited time period. Taking a longer view would increase the difficulty to establish, with a certain degree of certainty, whether the gains would in fact be achieved. Participants recognized that certain types of efficiency gains would be easier to determine and verify than others.

With regard to post-merger reviews and monitoring merger outcomes, participants said that the constraints of post-merger reviews are mostly practical. For example, in cases in which anticipated efficiency gains are not realized as predicted and price increases occur, it may be difficult to recreate a competitive environment after the merger has been consummated. It may also raise issues of fairness and legal uncertainty for firms that have consolidated their activities.

Participants indicated that there are no express rules against merger to monopoly or near-monopoly in their jurisdictions. However, in practice, they indicated that it would be unlikely that a merger to monopoly would be allowed based on efficiency. Participants would primarily focus on remaining or likely remaining competition.

PHASE THREE: ADVISORY PANEL

The third phase of the consultations centred around the work of an advisory panel on efficiencies that began meeting in March 2005 and submitted a report in August 2005.

The panel was asked to provide a broad overview of the general economic and business context in which the efficiencies defence and other provisions of the *Competition Act* operate in Canada. In particular, the panel was asked to consider the arguments that link the need for Canada's approach to efficiency in merger review, to the nature of the Canadian economy. To this end, the panel considered how the economy and business environment have evolved since 1986.

In addition, since the economy has evolved differently in different sectors, the panel looked at whether these differences are relevant for the consideration of efficiency gains under the Act and looked at the relevance of the different types of efficiency in Canadian competition policy, in particular, dynamic efficiency. Dynamic efficiency is the effect of a merger on the introduction of new products, the development of more efficient productive processes, and the improvement of product quality and service. In particular, dynamic efficiency refers to the efficiency of the framework for decision making over time.

Panel members reviewed the literature on the treatment of efficiency gains in Canadian merger law, the results of the consultation process and the input from other jurisdictions, and conducted an independent economic analysis of the factors that influence efficiency in the economy.

The panel came to four main conclusions.

Despite significant changes to the Canadian economy in the last 35 years, Canada still faces a significant productivity problem, and public policy tools, including competition policy, should continue to be used to promote efficiency.

The specific concerns that led the Economic Council of Canada to advocate an efficiencies defence in 1969 may be less salient today, since the tariff barriers protecting Canadian manufacturers have come down significantly and the Canadian economy is one of the most open in the world. For the most part, Canada's manufacturers are competitive and efficient, although there is evidence that Canadian manufacturing plants are smaller on average than their foreign counterparts. Nevertheless, given Canada's productivity gap with the United States and other countries, Canadians should be concerned about manufacturers' efficiency.

Of greater concern is the services sector, in which the productivity gap with the U.S. and most Organisation for Economic Co-operation and Development countries is larger. On average, Canadian service firms are not nearly as big, competitive or efficient as their American

counterparts. In addition, a number of important service industries (e.g. banking, telecommunications and media) still operate in a protectionist environment due to foreign ownership restrictions, very much like manufacturing did in the 1960s.

Mergers can contribute to improvements in the efficiency of firms and the productivity of the Canadian economy; therefore, merger review should involve regular and explicit consideration of the efficiency gains generated by a merger.

Mergers and changes of control can contribute to significant gains in productivity. Because mergers have the potential to contribute to such gains, the panel stated that efficiency gains should be a regular and explicit consideration in merger review. The Competition Bureau (and the Tribunal) should consider any evidence submitted about efficiency gains as part of its assessment of the competitive effects of a merger — that is, when determining whether a merger substantially lessens or prevents competition. In particular, the Bureau should consider whether efficiency gains counter any of the merger's negative effects on competition. This could occur, for example, when efficiency gains serve to increase rivalry in a market, prompt price decreases or create other consumer benefits, such as more innovative products. Both productive efficiency gains and dynamic efficiency gains should be considered in this analysis.

There may be rare circumstances in which competitive market forces have not resulted in firms' optimal efficiency. From a public policy perspective, this could justify allowing a merger that substantially lessens or prevents competition to proceed on the basis that it would produce sufficient offsetting efficiency gains; however, the circumstances in which an efficiencies defence may apply, and the applicable standards, should be more clearly defined.

The panel was not satisfied with the current standard, resulting from the Superior Propane case, for weighing efficiency gains against anti-competitive effects. At present, the *Competition Act* is silent on the issue of the standard. The Federal Court of Appeal in the Superior Propane case endorsed a standard called "balancing weights" as one possible standard that would meet the Court's requirements to weigh efficiency gains against effects, measured in light of all the purposes of section 1.1 of the Act. However, many view this standard as cumbersome and unpredictable. The panel agreed.

The panel recommended that Parliament define in clear terms the standard that any trade-off would have to meet, since this is fundamentally a policy question of who should benefit from the efficiency gains of an otherwise anti-competitive merger. Specifically, the issue of the standard bears on how the Competition Tribunal should take into account the negative impact of a lessening of competition on one segment of the Canadian population (i.e. customers) when assessing the benefits that efficiency gains may bestow on other segments.

An efficiencies defence should not be permitted in the case of a merger-to-monopoly.

While there may be circumstances in which allowing a merger to proceed based on an efficiency gains trade-off may contribute to a lasting improvement in efficiency, a merger-to-monopoly will generate its own inefficiency in the long run. Although this can be difficult to measure and parties may argue that inefficiency will not occur in their specific case, the eventual efficiency

losses resulting from the absence of competitive pressure are likely to be significantly larger than any short-term gains in efficiency resulting from the greater scale or scope of the merged entities. The panel therefore suggested that a trade-off between efficiency gains and competitive pressures is acceptable, but not when competitive pressure is completely or almost completely eliminated.

The panel also set out in its conclusions other characteristics of the framework for treating efficiency gains.

Competition Tribunal oversight. Given the complexity of many of the issues around efficiency, the panel stated that a "sober second look" by an independent third party such as the Tribunal is well justified. The Tribunal's review function would be even more important under the framework the panel proposed, since the Bureau would more regularly assess efficiency gains claims.

Accessibility. The efficiencies defence in section 96 has rarely been invoked or applied. One major reason for this is that parties must be willing to litigate the matter when they raise the defence. Since the panel recommended that parties should be able to bring their efficiency gains claims to the Bureau at the outset of a review, it also recommended that there should be no requirement that parties be willing to litigate when they do.

Predictability. Businesses and their advisors consider it critically important that they be able to predict with some degree of certainty the likely outcome of a Bureau merger review, which is not the case with the balancing weights standard adopted in the Superior Propane case. The panel recommended that the government introduce legislative measures to ensure predictability and that the Bureau publish clear administrative guidance on how it intends to approach efficiency in merger review.

Assessing dynamic efficiency. The federal and provincial governments have policies in place to promote innovation, and dynamic efficiency gains are a means to achieving this. However, merger-related claims for such gains are difficult to assess, even though some mergers in the past have yielded them. In part, this is due to the relatively long time frame over which such gains may appear. Thus, while competition policy should recognize dynamic efficiency claims, measurement problems preclude such claims being given special weight or time frames in merger reviews. The current Canadian practice of doing a qualitative assessment of claims of dynamic efficiency is appropriate and consistent with international practice.

CONCLUSION AND NEXT STEPS

The Bureau is taking into consideration all of the information it gathered during the three-phase consultation process in determining next steps in the area of the treatment of efficiency gains under the *Competition Act*. It has become clear that, among other things, further consideration of dynamic efficiency is warranted.