PART 2 - The Anticompetitive Threshold

2.1 Overview

The anticompetitive threshold for mergers is set forth in section 92(1) of the Act, which provides that the Tribunal may make an order in respect of a merger[3] where it finds that the merger "prevents or lessens, or is likely to prevent or lessen, competition substantially".

A prevention or lessening of competition can only result from a merger where the parties to the merger are, or would likely[4] be, able to exercise a greater degree of market power, unilaterally or interdependently with others, than if the merger did not proceed[5].

Market power refers to the ability of firms to profitably influence price[6], quality, variety, service, advertising, innovation or other dimensions of competition in the manner described below. In evaluating whether the market power of the merging parties is likely to be greater than if the merger does not proceed, the focus is primarily on the price dimension of competition. Specifically, an assessment is made of whether prices would likely be higher than if the merger did not proceed. Alternatively, where the concern is with market power on the buying side, the focus of the assessment is upon whether the merger is likely to confer upon the merged entity, acting unilaterally or interdependently with others, an ability to depress the prices it pays to sellers to a level that is below the price that would likely prevail in absence of the merger[7]. To simplify the discussion, these Guidelines will focus solely on the price effects of a merger between sellers. However, where there is a significant level of non-price competition in a market that is defined in terms of either buyers or sellers, an assessment will be made of whether the exercise of market power is likely to result in lower benefits provided by this form of rivalry than if the merger did not proceed.

Where a merger is not likely to have adverse market power effects, it generally cannot be demonstrated that competition is likely to be adversely affected as a result of the merger,

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[3] All references to "merger" in these Guidelines include a "proposed" merger.
[4] In the Director's view, the word "likely" means "probably", and not "possibly". Therefore the word "likely" connotes "probably" throughout this document.
[5] Where the Director is concerned with only a part of a merger, or where a remedial order with respect to only part of a merger would sufficiently address the Director's concerns, then the comparison would be between the market power that would likely be exercised if no order where made and that which would likely be exercised if an order were made in respect of part of the merger. Future references in this document to the making of an order in respect of a merger should be taken to include the making of an order in respect of a part of a merger.
[6] The assessment of the likely price effects of a merger generally involves an assessment of the merger's likely effect of on output. Output and price may also be affected by anticompetitive effects of a merger on non-price dimensions of competition.
[7] However, a merger which simply enables a buyer to gain volume discounts that are, or would be, available to others who purchase similar quantities would not, on this ground alone, be considered to be anticompetitive. The same may be true where a merger is likely to enable buyers to offset the exercise of market power by sellers in the upstream market.

notwithstanding that the merger might have additional implications for other industrial policy objectives.

2.2 Lessening Competition

A merger can lessen competition in two different ways. The first is where it is likely to enable the merged entity to unilaterally raise price in any part of the relevant market. The second is where it is likely to bring about a price increase as a result of increased scope for interdependent behaviour in the market. 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 raise prices. Interdependent behaviour includes an explicit agreement or arrangement with respect to one or more dimensions of competition, as well as other forms of behaviour that permit firms to implicitly coordinate their conduct, e.g., through facilitating practices, the interplay of market signals, or conscious parallelism[8].

2.3 Preventing Competition

Similarly, competition can be prevented by conduct that is either unilateral or interdependent. Competition can be prevented as a result of unilateral behaviour where a merger enables a single firm to maintain higher prices than what would exist in absence of the merger, by hindering or impeding the development of increased competition. For example, the acquisition of an increasingly vigorous competitor in the market or of a potential entrant would likely impede the development of greater competition in the relevant market. Situations where a market leader pre-empts the acquisition of the acquiree by another competitor, or where a potential entrant acquires an existing business instead of establishing new facilities, can yield a similar result.

Competition can also be prevented where a merger will inhibit the development of greater rivalry in a market already characterized by interdependent behaviour. This can occur, for example, as a result of the acquisition of a future entrant or of an increasingly vigorous incumbent in a highly stable market.

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[8] In DIR v. Imperial Oil et al, (CT-89/3, #390, January 26, 1990), the Tribunal observed that the two issues that should be "the focus of attention in any merger case (are): possible emergence of a dominant firm; (and) enhanced ability for tacit collusion". (p.54). Earlier in the same decision it observed:

- "(One of the experts for the respondent) set out what he considered to be the two possible anticompetitive effects which the Tribunal should focus upon in considering any merger: whether the merger would lead to the merged firm acquiring a dominant market position; whether the merger would enhance the ability of firms in the market (in an oligopolistic situation) to engage in various implicit forms of collusion (with respect to price, market share, etc.). No one disputed the appropriateness of (this) conceptual framework...(p.36)."

Cf. DIR v. Air Canada et al, (1989) 27 C.P.R. (3d) 476 at 498, where the Tribunal observed: "It is generally accepted that where there are only two major competitors in a market there is increased opportunity to engage in collusive behaviour".

2.4 Substantiality

In assessing whether competition is likely to be prevented or lessened substantially, the Bureau generally evaluates the likely magnitude, scope and duration of any price increase that is anticipated to arise as a result of a merger. In general, a prevention or lessening of competition will be considered to be "substantial" where the price of the relevant product is likely to be materially greater, in a substantial part of the relevant market, than it would be in the absence of the merger[9]; and where this price differential would not likely be eliminated within two years[10] by new or increased competition from foreign or domestic sources. What constitutes a "materially greater" price varies from industry to industry, and may be a differential that is less than the "significant" price increase that is postulated for the purpose of market definition.

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[9] This price differential will be referred to as "a material price increase" for the remainder of these Guidelines. Given that relevant markets are ordinarily defined on the basis of a 5 percent test, price increases of 5 percent or greater will occur across the entire relevant market, whereas lesser price increases may occur in only a part of the relevant market.

[10] Cf., note 45.