PART 1 - The Definition of "Merger"

Section 91 of the Act defines a "merger" in terms of: "... the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

These words are broad enough to cover any manner in which control over, or a significant interest in, the whole or a part of a business of another person is acquired or established. With respect to corporations, "control" is defined in section 2(4) of the Act to mean de jure control, i.e., a direct or indirect holding of more than 50 percent of the votes that may be cast to elect directors of the corporation, and which are sufficient to elect a majority of such directors. However, the Act provides no guidance with respect to the meaning of the words "significant interest". Given that the Act is concerned with the market behaviour of firms, it is the Bureau's position that a "significant interest" in the whole or a part of a business is held when one or more persons have the ability to materially influence the economic behaviour (e.g., decisions relating to pricing, purchasing, distribution, marketing or investment) of that business or of a part of that business. Given the range of management and ownership structures which exist, a determination of whether a significant interest is likely to be acquired or established can only be made on a case by case basis.

A significant interest in a corporation may be found to exist when one or more persons, directly or indirectly, hold enough voting shares:

(i) to obtain a sufficient level of representation on the board of directors of the corporation to materially influence that board; or

(ii) to block special or ordinary resolutions of the corporation.

In the Bureau's experience, direct or indirect ownership of less than 10 percent of the voting shares of a corporation has generally been found not to constitute ownership of a "significant interest" in the corporation. Inferences are difficult to make about situations which result in a direct or indirect holding of between 10 percent and 50 percent of the voting shares of a corporation. However, within this range, a much greater level of voting interest is ordinarily required to materially influence a private company than a widely held public company. In recognition of this, the prenotification requirements of Part IX of the Act pertaining to private and public corporations are triggered at the 35 percent and 20 percent thresholds, respectively[1].

A significant interest can also be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving corporations, partnerships, joint ventures, combinations and other entities. In addition,

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[1] The prenotification provisions, which apply to high transaction-value mergers involving large firms are discussed in part 6.2 below.

loan, supply and distribution arrangements that are not ordinary course transactions and that confer the ability to influence management decisions of another business may constitute a "merger" within the meaning of section 91. Asset transactions that generally fall within the scope of section 91 include the purchase or lease of an unincorporated division, a plant, distribution facilities, a retail outlet, a brand name or intellectual property rights.

Persons already holding a significant interest in the whole or a part of a business may trigger the merger provisions of the Act by acquiring or establishing a significantly greater ability to influence the economic behaviour of the business. Therefore, movement from a minority, yet significant, interest to control would likely be found to constitute a merger. A merger can occur both at the time of the purchase of convertible debentures, non-voting shares or options and at the time of their conversion or their exercise[2].

Section 91 is broad enough to cover horizontal, vertical and conglomerate transactions. These Guidelines focus primarily on horizontal mergers. The two limited situations in which a vertical merger may prevent or lessen competition substantially, and the single situation in which a conglomerate merger may do so, are discussed in parts 4.11 and 4.12 of the Guidelines. Transactions that fall within the scope of section 91 because one company may directly or indirectly obtain the ability to elect a sufficient number of directors to the boards of directors of two competitors to materially influence these boards, or because representatives of two competitors respectively may be able to materially influence the board of directors of a third company, will be assessed in terms of whether competition is likely to be substantially prevented or lessened in the market in which the two competitors compete. In either case, concerns will generally not be presented if the board representation pertaining to one of the competitors is solely through "independent" directors, e.g., persons who are not employees, executives or members of the board of directors of the company being represented, and who do not have any other interest in that company.

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[2] However, the prenotification provisions would only be triggered upon conversion or exercise, provided that the thresholds discussed in part 6.2 are exceeded.