Canadian Competition Bureau releases revised merger enforcement guidelines

On October 6, 2011, the Competition Bureau ("Bureau") issued the final version of its revised Merger Enforcement Guidelines ("MEGs"). Intended to provide general direction on the agency’s analytical approach to merger review under Part VIII of the Competition Act, the revised MEGs supercede both the previous 2004 version and the 2009 Efficiencies in Merger Review bulletin.

Although the new guidelines do not introduce fundamental departures from the Bureau’s current policies and practices, they outline several nuanced shifts in the agency’s economic and legal thinking. Notably, the MEGs illustrate changes in the Bureau’s approach to the following areas:

- the role of market definition in the anti-competitive effects analysis
- the treatment of transactions involving interlocking directors and minority interests
- the analysis of non-horizontal mergers
- the efficiencies defence
- unilateral and coordinated effects, and
- the treatment of monopsony (buyer) power.

**Market Definition**

Reflecting in part recent changes to the US Federal Trade Commission’s Horizontal Merger Guidelines, the revised MEGs reduce the stated emphasis on market definition in the analysis of whether a proposed merger is expected to create or enhance market power. The new guidelines explain that the analysis of competitive effects forms part of an iterative process whereby any appropriate evidence in respect of market shares will be considered. While market definition will still be “generally
undertaken” where feasible and useful, such a determination is a tool amongst others in determining a merger’s likely competitive effects.

**Interlocking Directors and Minority Interests**

The revised MEGs clarify that minority interests and interlocking directors may be reviewed under the Competition Act merger provisions where either: (i) they confer sufficient influence to constitute a merger; or (ii) they are ancillary to a merger (e.g. one merging party already holds a minority interest or directorship in a third competitor). In assessing the competitive effects of a minority interest or interlock, the Bureau will consider:

- the extent of the influence of the acquirer or interlocked director and whether this influence may be used to persuade the target business to compete less aggressively
- whether the minority interest holder or director is provided with access to confidential information that could result in coordination between the two firms, and
- whether the minority interest or interlock may result in a change to the acquirer's pricing or other competitive incentives.

**Non-Horizontal Mergers**

The revised MEGs provide more detailed guidance on the Bureau’s analysis of vertical and conglomerate mergers. The new guidelines explain that the Bureau’s concern with respect to vertical mergers is whether the transaction may lead to a partial or total foreclosure of inputs or customers. In the case of conglomerate mergers, the Bureau will consider whether the transaction would provide the merged entity with ability and incentive to foreclose competitors by tying the sale of two products that are not both produced by the merged entity’s competitors.

**The Efficiencies Defence**

Incorporating the 2009 *Efficiencies in Merger Review* bulletin, the MEGs now contain an expanded discussion of the Bureau’s framework of analysis of efficiency claims made pursuant to sections 92 and 96 of the Act. Notable changes include a clarification of the parties’ burdens in advancing efficiency claims
and a discussion of the factors that the Bureau will consider in evaluating the merits of such claims. Consistent with recent public remarks by Bureau officials, the MEGs also state that the Bureau only will consider efficiencies where the merging parties provide sufficient supporting evidence in a timely manner.

Unilateral and Coordinated Effects

The MEGs contain an expanded discussion of the analysis of unilateral effects in differentiated product industries. Where products are close substitutes, the Bureau will examine whether the transaction will create an incentive for the merged firm to raise prices. This examination is shaped by an assessment of the number of buyers who would consider the products to be close substitutes, whether either firm has been a particularly vigorous and effective competitor, whether buyers are price sensitive and the anticipated response of rival firms and buyers. The revised guidelines also elaborate on the factors that the Bureau will consider in its analysis of coordinated effects and clarify that coordinated effects may be present with or without explicit agreement among firms and even if only a portion of the firms in the market are involved in the coordination. The revisions also introduce a discussion of bidding and bargaining markets in the assessment of unilateral competitive effects that has not been included in previous Bureau publications.

Monopsony Power

The revised guidelines incorporate the treatment of monopsony power previously set out the Bureau’s 2008 Round Table on Monopsony and Buyer Power submission to the Organization for Economic Co-Operation and Development. Buying power is said to be anti-competitive when a buyer has the ability to decrease the price of the relevant product below competitive levels by way of a reduction in the overall quantity of inputs purchased. The MEGs now contain an expanded discussion of the factors that the Bureau will consider in circumstances where a transaction would result in a merged entity that accounts for a significant portion of purchases of a product and barriers to purchasing the input are high.

Other Changes

The revised MEGs also expand on the Bureau’s definition of a “merger”, which has been clarified to be any transaction or appointment that creates the potential to materially influence economic behaviour. Additionally, the reference to the two-year
time period used in assessing whether new entrants would deter a merged entity from exercising market power has been replaced with a more flexible approach that focuses simply on whether entry is likely, timely and sufficient to prevent or counteract the effects of a material price increase.

**Conclusion**

The revisions to the *Merger Enforcement Guidelines* are intended to clarify and reflect the Bureau’s evolving approach to merger enforcement. Substantively, the updated MEGs do not reveal dramatic departures from current merger enforcement practices but do introduce nuanced shifts in the Bureau’s thinking and afford the agency a greater range of economic and analytical tools.

by James Musgrove, Daniel G. Edmonstone and Devin Anderson

For more information on this topic, please contact:

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*a cautionary note*

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