Intelligence MEMOS

From: Edward Iacobucci

To: Competition Law Observers

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Re: THE COMPETITION BUREAU'S APPROACH TO THE EFFICIENCIES DEFENCE

Section 96 of the *Competition Act* allows anticompetitive mergers as long as the efficiency gains from the merger outweigh the anticompetitive effects from the merger.

The Bureau recently called for the repeal of the defence, and the treatment of efficiency gains as simply another factor to consider in reviewing a merger. It advances four reasons for its position:

i. s. 96 allows mergers that are harmful to Canadians
ii. it is inconsistent with international best practice
iii. it suffers from a misguided policy intent
iv. it is difficult or impossible to implement

The Bureau's arguments are unpersuasive.

On the first, the Bureau observes:

> *Regardless of the size or scope of the private benefits brought about by the merger, a wide swath of Canadian consumers and businesses are harmed* ***in every case*** *where the efficiencies exception applies. (Emphasis in original.)*

While it is true that there will be winners and losers under the efficiencies defence, the Bureau takes an idiosyncratic approach to its cost-benefit analysis: the losses apparently count as harms to "Canadian consumers and businesses," while any gains from efficiency, whatever their size, are merely "private benefits."

As a matter of principle, efficiency analysis declines to judge who is a more worthy recipient of a dollar, a consumer or producer, but rather focuses on the creation of that dollar and its distribution to someone.

This may be controversial. As was well rehearsed in Superior Propane, there may be legitimate concerns about economic distribution if a dollar is transferred to a relatively wealthy producer (shareholder) from a less wealthy consumer. The Bureau does not advance these concerns in its recent statement. Rather, it seemingly regards gains to shareholders from efficiencies as less important or even irrelevant as a matter of principle given that they are merely "private benefits."

The Bureau fails to offer any reason why we should view the gains as "private," in contrast to losses to consumers and businesses, which are apparently not "private" but losses to Canadians. A consumer priced out of the market following a post-merger price increase realizes a loss. A shareholder of a merging firm realizes efficiency gains and sells at a higher price realizes a gain. What makes the latter private and the former not private?

Even more puzzling, why do losses to "Canadian businesses" count as non-private losses, while gains to merging businesses count as private gains? It is peculiar to say that gains to merging shareholders are private, while losses to shareholders of purchasing businesses are harms to Canadian businesses that matter.

Next, the Bureau observes that other countries have not adopted an equivalent to s. 96, and that we should thereby abolish it, noting that Canada has approved mergers that the US has stopped.

Disagreements over principle or facts with trading partners are commonplace in competition policy and are not a reason for either party to abandon what it believes to be the best approach. Indeed, given that the efficiencies defence leaves Canada's law more permissive on this dimension, Canadian law will not affect its partners: if they object to the merger, Canadian permission for the merger will not matter.

Turning to enforcement, quoting a recent case, Tervita, the Bureau states that the efficiencies defence was originally intended to ensure Canadian firms would be able to achieve scale and therefore compete in internationally. Yet, the Bureau observes, the defence applies in all markets, including solely domestic markets, not just those that cross borders.

Whatever the original intent, the argument that the efficiencies defence is desirable in promoting exports by enhancing the efficiency of domestic firms participating in international markets is not especially compelling.

If a market is international, there is less reason for domestic firms to be unable to achieve efficient scale: While domestic sales may not allow a Canadian firm to reach minimum efficient scale, the possibility of selling internationally presents an opportunity to achieve scale. Contrary to the Bureau's position, the defence is more important in local markets relative to international markets because scale economies may be harder to achieve in local markets without mergers.

The Bureau's final argument is that the practical difficulties of enforcing the efficiencies defence provide a further reason to diminish its importance. This is an empirical matter, but I am skeptical.

First, it is important to distinguish the statutory defence from its interpretation in *Tervita*. That decision required the Bureau to quantify all quantifiable anticompetitive effects of the merger prior to the parties assuming the onus of proving efficiency gains.

This case put too great of an enforcement burden on the Bureau: If the Bureau demonstrates qualitatively or quantitatively that a merger is likely to prevent or lessen competition substantially, the onus should be on the parties to prove that they qualify for the efficiencies defence. Amending the statute to undo *Tervita* would reduce the enforcement burden substantially and appropriately.

Second, all merger enforcement is difficult, but this is not a reason to abandon it.

The Bureau is unpersuasive in its call to repeal s.96.

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