

# Intelligence MEMOS



From: Brian A. Facey, Navin Joneja, and David Dueck  
To: Canadians Who Care About Competition Policy  
Date: February 17, 2022  
Re: **EFFICIENCIES EXCEPTION: LET'S KEEP IT**

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Canada's *Competition Act* has been [described](#) as one of the most economically sophisticated competition laws in the world largely due to the efficiencies exception in section 96.

Promoting the “efficiency and adaptability” of the Canadian economy is one the Act’s central purposes, reflected in the provisions contained in sections 86, 90.1, and 96. Consistent with this, the efficiencies exception ensures that the positive impacts of mergers are taken into account and appropriately weighed against potential negative effects.

That statutory purpose remains even more important in today’s competitive and fast-changing economic environment. Attempts to tinker with the efficiencies exception are bound to create business uncertainty and a significant risk of unintended consequences.

There remain strong policy reasons to keep it.

First, it effectively functions as a “cost-benefit” analysis to assess each transaction on its own merits and determine if the provable benefits of a transaction on productivity and innovation outweigh any potential predicted anticompetitive effects. It would be a mistake ignore or discount the productivity improvements and innovation through efficiencies a merger can provide.

Amending the efficiencies exception to consider efficiencies only as a factor in merger review (e.g., when they affect prices and consumer welfare), rather than as a standalone exception, would ignore many of the benefits efficiencies create for the Canadian economy.

Variable costs, not fixed costs, drive pricing decisions. Nonetheless, fixed cost savings – including economies of scale – are an important contributor to overall productivity. Any amendment to consider only efficiencies as a factor in merger review would disregard all economic benefits from fixed cost savings and result in an arbitrary distinction based on the extent to which costs vary with output in the short-term (a factor that varies from sector to sector.)

In addition, amending the efficiencies exception to consider only efficiencies as a factor in merger review also makes them largely irrelevant, as the test in section 92 has been interpreted to require an “ability” to raise prices, and efficiencies do not affect any such “ability.” Complex and likely unintended changes to the entire merger review framework of the *Competition Act* would be required.

Alternatively, some have argued that the efficiencies exception should be repealed because anticompetitive mergers can potentially reduce innovation or result in an [X-inefficiency](#) that is difficult to quantify.

We have [argued](#) otherwise, on these grounds:

The Supreme Court of Canada has left much room for considering quantitative and qualitative evidence regarding efficiencies, innovation, and anticompetitive effects where relevant. It has also pointed out that any assessment should be as objective as possible. Any decision seeking to block a merger (let alone one generating significant efficiencies for the benefit of the Canadian economy) should be based on the evidence, not speculative and subjective claims from the Commissioner of Competition.

Mergers can also generate dynamic efficiencies, improvements in product quality, and other benefits that are challenging for merging parties to quantify. One should not assume that any qualitative negative effects will necessarily be larger than the qualitative efficiencies.

If anything, the Competition Bureau’s approach to merger review has generally resulted in a significant bias against efficiency-enhancing mergers.

Meanwhile, many Canadian enterprises need to operate with economies of scale to maximize productivity, remain competitive internationally, adapt to changing economic conditions, and invest in innovative and environmentally sustainable technology. That is why Ottawa has made achieving economies of scale, efficiency, and adaptability a policy goal.

This goal is consistent with a key purpose behind Canada’s efficiencies exception. The Supreme Court’s *Tervita* decision noted that the efficiencies exception was introduced in part because a small domestic market in Canada often precludes more than a few firms from operating at efficient levels of production and that Canadian firms need to be able to exploit economies of scale to remain competitive internationally.

Consistent with this, the efficiencies exception has been used to clear a number of transactions where the merging parties competed internationally and had significant exports outside of Canada, including the [Superior/Canexus](#) merger and other efficiency reviews not made public by the Competition Bureau.

Finally, the efficiencies exception provides a flexible mechanism that recognizes the variety of ways mergers can lead to socially desirable outcomes. Mergers can generate carbon tax savings, facilitate greater investments in environmentally sustainable technology, or enable better healthcare. These benefits represent efficiencies to the Canadian economy, and the efficiencies exception ensures they can be taken into account in merger review. As a result, the efficiencies exception has only become more relevant to the Canadian economy with the passage of time, and any attempt to limit or repeal the efficiencies exemption would be a serious mistake.

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