Intelligence MEMOS

From: Calvin Goldman, Richard Taylor, Nicholas Cartel, and Larry Schwartz

To: The Hon. Francois-Philippe Champagne, Minister of Innovation, Science and Industry

Date: May 4, 2022

Re: PROPOSED REVISION OF THE EFFICIENCY DEFENCE FOR MERGERS IN *CANADA'S COMPETITION ACT*

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The Competition Bureau's 67-page submission to Senator Howard Wetston's *Competition Act* consultation process used about 20 pages to focus on merger provisions including the efficiency defence.

This attention is well deserved. The *Act's* merger provisions are the most significant area under consideration for potential amendment. Mergers can lead to structural changes to the competitive dynamics of a market. CEOs and board members generally spend more time discussing mergers than they do other possible issues encompassed by the *Competition Act*.

In its submission, the Bureau recommends the efficiencies exception in s.96 of the *Act* should be eliminated:

> *The* Act *may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger. The efficiencies exception should be eliminated, and instead efficiencies should be considered as a factor when considering the effects of mergers.*

We disagree.

The efficiency defence (its history is here) allows an anti-competitive merger when the gains in efficiency exceed and offset the anti-competitive effects that may arise from the merger.

As we outlined in our own submission to the Wetston consultation, eliminating the efficiency defence would give rise to a significant change in the application of the *Competition Act* and to a considerable extent negate the potential benefits of a properly applied efficiency defence.

Reducing it to a "factor" to be considered rather than a defence would turn efficiency into a discretionary variable rather than the paramount goal of the merger provisions of the *Act* as the Competition Tribunal and the Federal Court of Appeal found in the *Tervita propane* case.

The Supreme Court decision in that 2015 case has called into question how the efficiency defence should be applied.

The efficiencies from the merger in Tervita were negligible while the merger itself would likely lead to price increases of 10 percent. Given that the Commissioner of Competition did not quantify the anticompetitive effects, even a conceptual efficiency gain of $1.00 would have been sufficient to satisfy the test. In Tervita, the Supreme Court allowed the merger to proceed as the Commissioner of Competition had failed to introduce any quantifiable anti-competitive effects into evidence, and as a consequence, the Supreme Court held that such effects had a value of zero. As such, the merging parties' very modest efficiency gains were larger than the anti-competitive effects and, therefore, the efficiency defence was allowed and the merger permitted to proceed.

In its submission to Senator Wetston's consultation process, the Canadian Bar Association argued against limiting the application of the efficiency defence. It is in the best interests of business certainty and predictability, it said, that the Commissioner be required to put forward quantitative evidence estimating the anti-competitive harm that would result from the merger, in accordance with the decision by the Supreme Court in Tervita. In essence, the CBA's position is that the Commissioner should continue to have the burden of proof under s. 96.

Again, we disagree.

In our view, the Commissioner should bear the entire burden of proving every element of s.92, including that the merger or proposed merger is likely to prevent or lessen competition substantially in the relevant market. Respondents may then contest all the elements in this respect through cross-examination or offer independent evidence in the usual course of litigation.

In the event that respondents also elect to rely on s.96, they should bear the entire burden of proving every element of s.96, including the quantitative and qualitative gains in efficiency arising from the merger and that such will be greater than and offset any anti-competitive effects.

Thereafter, the Commissioner has the right to respond and to engage in cross-examination and lead its own evidence. In this manner, there is a clear delineation of the respective burdens of proof under ss. 92 and 96.

Moreover, in real world terms, respondents can be expected to have much greater knowledge of the relevant efficiencies from their experience operating and competing in the market.

The burden of proving a substantial lessening or prevention of competition and all elements rests with the Commissioner, as always.

However, the burden of proving the efficiency defence of s.96 should rest exclusively with the respondents in a one-step process that balances quantitative efficiencies and qualitative efficiencies against the quantitative anti-competitive effects and qualitative anti-competitive effects to enable a final determination as to whether the total efficiencies exceed and offset the total anti-competitive effects of the merger.

*Calvin Goldman, former Commissioner of Competition, is principal of the law office of Calvin Goldman, where Richard Taylor, a former deputy commissioner at the Bureau, is a senior analyst. Nicholas Cartel is a former federal Justice Department official and is partner in Cartel and Booth, and Larry Schwartz is a former member of the Competition Tribunal.*

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