

# Intelligence MEMOS



From: Peter Glossop

To: Canada's Competition Law Community

Date: February 21, 2023

Re: **LET'S NOT AMEND CANADA'S PERFECTLY GOOD COMPETITION TEST**

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The federal Discussion [Paper](#) on The Future of Competition Policy asks whether the competition test in the *Competition Act* should be replaced with another test that would more effectively capture certain types of mergers, especially those in the digital space.

This proposal, for which no case has been made, would significantly complicate the Competition Bureau's assessment of M&A transactions in Canada, and not just those in digital markets.

A merger is anti-competitive where it is likely to "substantially lessen or prevent competition" – SLPC is the term of art. This is a hurdle that ensures the government cannot block a transaction if it is unlikely to enable the merged firm to exercise "market power," which is essentially the ability to profitably influence prices in a market.

Historically, the Bureau identified few merger cases that raised significant market power issues. These cases often involved few players, high entry barriers, limited innovation and/or commodity products.

Markets in the digital economy can exhibit somewhat different characteristics than in the old economy.

The Discussion Paper suggests that the current SLPC test may not adequately address certain transactions given "the complexity, dynamism and pace of change in many markets, especially digital ones" and suggests that "non-price dimensions of competition" are not given sufficient weight in the competition analysis.

The underlying concern seems to be that the SLPC test is "impractical" because it does not allow for early enough intervention, particularly in markets characterized by dynamic change. The paper cites some trial balloons in other jurisdictions exploring possible changes to their substantive merger review standards.

Abandoning the SLPC standard would significantly complicate the review of M&A transactions. The existing standard offers a workable and predictable approach to merger review, which is flexible enough to consider future market developments and non-price elements of competition.

The Supreme Court of Canada extensively [analyzed](#) the SLPC test in its 2015 *Tervita* case, which involved northern BC landfills. The case provided valuable guidance to the legal and business communities and to the competition authorities.

The court made it clear that a merger should only be interfered with when there is a probability of a competition problem. Speculation that an issue may possibly arise sometime in the future is insufficient to challenge a merger.

The SLPC test is [similar](#) to those in all major peer jurisdictions, including the US, EU, UK, Germany, Japan and Australia. These jurisdictions do not apply a special test to digital markets. A generally similar test across jurisdictions facilitates cooperation and enforcement among authorities in relation to international transactions.

Since 1986, the merger provisions in the Act have permitted competition authorities to consider change and innovation in a market, along with any other relevant factors. In addition, in 2022 Parliament highlighted digital market issues by adding new factors, including "network effects," whether the merger "would contribute to the entrenchment of the market position of leading incumbents" and the effect of a merger on "non-price competition, including quality, choice or consumer privacy." These additional factors enable the authorities to address the dynamism of digital markets and already allow them to intervene where a merger threatens a SLPC in the unique environment of a digital market.

In summary, Canada's SLPC test accommodates issues that arise in the digital economy and is fit for purpose across all industry sectors. It needs no amending.

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