Intelligence MEMOS

From: Roger Ware and Markus von Wartburg

To: John Pecman, Commissioner of Competition; Navdeep Bains, Minister of Innovation, Science and Economic Development

Date: March 27, 2017

Re: COMPETITION POLICY SHOULD PROMOTE COMPETITION

In their recent E-Brief *Promoting Innovation and Efficiency by Streamlining Competition Reviews*, Brian Facey and Joshua Krane (Facey and Krane) promote a radical reorientation of the Canadian merger review process. In effect, Facey and Krane would turn the merger review process on its head, making its primary objective that of promoting efficiency and innovation and only a secondary goal that of protecting consumers from anticompetitive mergers.

In our view, their proposal does not fit well within a competition law framework for merger review. Competition policy, whether with respect to mergers or other areas, should have competition, and its benefits, as its primary focus. This is true whether there is an efficiencies defense or not (section 96 of the Competition Act provides for a trade-off of efficiency gains against a lessening of competition), and independent of the standard for measuring welfare gains and losses (In *Tervita* the Supreme Court of Canada sanctioned both a Total Surplus standard in which gains to consumers and producers are weighted equally and a Balancing Weights standard in which different weights may be used). Under neither of these welfare standards could the primary objective of Canadian merger policy be described as that of promoting efficiencies, or efficiencies and innovation. We do not believe that the *Tervita* decision materially changed this conclusion; rather, *Tervita* clarified the legal process within which claims of merger-specific efficiency gains should be evaluated. (We are not suggesting that *Tervita* has created the perfect framework: Roger Ware has commented on this elsewhere).

Further, Facey and Krane seem eager to abandon the critical concept of *merger specificity* with respect to claimed efficiency gains. An efficiency gain can only be termed merger-specific if the gain would not have occurred other than as a result of the merger. This concept is enshrined in section 96(1) of the Competition Act and developed further in the Merger Enforcement Guidelines and by the Competition Tribunal in key decisions. To abandon this condition in favour of a blanket endorsement of "efficiencies" would be both bad economics and bad competition law.

Finally, there is little support in academic research for the proposition that mergers are actually effective in promoting efficiency. For example, a recent study of US manufacturing industries found that while mergers tend to increase average markups, there is little evidence of plant- or firm-level productivity effects or other efficiency gains that can be attributed to the mergers and acquisitions. One reason for this is that pre-merger claims of expected efficiency gains are systematically overoptimistic and seldom fully realized.

Roger Ware is Professor of Economics at Queen's University and Markus von Wartburg is Vice President at Analysis Group.