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The Concept of Potential Competition – Note by Canada

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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Canada

1. Introduction

1. Canada's Competition Bureau ("Bureau") is pleased to provide this submission to the OECD Competition Committee's roundtable on "Potential Competition".

2. The Bureau, headed by the Commissioner of Competition ("Commissioner"), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the Competition Act ("Act")[1] and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

3. The concept of potential competition is relevant in a number of contexts under the Act, including under the criminal conspiracy, abuse of dominance, competition collaboration and merger provisions. However, in this submission, we primarily focus on the latter context by discussing the Bureau's experience in analyzing preventions of competition or the elimination of potential competition in merger reviews.

4. In particular, this submission discusses the concept of poised entry, including its anchoring in the assessment of barriers to entry into a market as well as how the Canadian jurisprudence guides the Bureau's approach to mergers involving potential competition and, specifically, how far off into the future entry can be at the time of the merger while still raising competition concerns under the Act.

2. Prevention of Competition Framework for Merger Analysis in Canada

5. To challenge a merger under section 92 of the Act, the Bureau is required to provide evidence before the Competition Tribunal ("Tribunal") that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In order for a merger to lessen or prevent competition substantially, as set out in section 92, it must be found that the merger is "likely to create, maintain, or enhance the ability of the merged entity…to exercise market power."[2]

6. From this language it is clear that the same threshold applies regardless of whether a lessening or prevention of competition is being considered. The Merger Enforcement Guidelines ("MEGs") describe a merger that may cause a substantial prevention of competition ("SPC") in the following way:

> *Competition may be substantially prevented when a merger enables the merged firm, unilaterally or in coordination with other firms, to sustain materially higher prices than would exist in the absence of the merger by hindering the development of anticipated future competition.*[3]

[1] The full text of the Competition Act is available online at: http://lawslois.justice.gc.ca/eng/acts/C-34/index.html.

[2] Merger Enforcement Guidelines 2.1: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf

[3] Merger Enforcement Guidelines 2.10.

7. The MEGS go on to provide a non-exhaustive list of examples of mergers that may lead to an SPC:

- the acquisition of a potential entrant or of a recent entrant that was likely to expand or become a more vigorous competitor;
- an acquisition by the market leader that pre-empts a likely acquisition of the same target by a competitor;
- the acquisition of an existing business that would likely have entered the market in the absence of the merger;
- an acquisition that prevents expansion into new geographic markets;
- an acquisition that prevents the pro-competitive effects associated with new capacity; and
- an acquisition that prevents or limits the introduction of new products.

3. Prevention of Competition Jurisprudence

8. Allegations of one or more SPCs have been considered by the Competition Tribunal ("Tribunal") in several of its past decisions. However, SPC allegations were overshadowed by concurrent allegations of a substantial lessening of competition ("SLC") and it was not until 2012 that the Tribunal addressed the analytical framework for the assessment of an SPC in detail.

9. The Tribunal first considered an alleged SPC in 1992 in a matter involving the acquisition of certain newspaper and advertising assets in the Vancouver area, including the North Shore News, a community newspaper with a well established presence. [4] At the time of the merger, the acquirer, Southam Inc. ("Southam") already owned the two Vancouver-area daily newspapers.

10. The main allegation was of an SLC in the supply of newspaper advertising services in various markets in the Vancouver area caused by the combination of Southam's dailies with two of the community newspapers and the real estate advertising publication.

11. However, the Commissioner, also alleged that Southam viewed one of those community newspapers as a strategic asset that could be used to create a third daily newspaper to compete with Southam's existing publications. That is to say the theory of harm was as described in the MEGs and set out above: an acquisition by the market leader that pre-empts a likely acquisition of the same target by a competitor.

12. Ultimately, the Tribunal determined that a lack of instances of community newspapers in other major markets being converted to dailies coupled with several examples of new dailies entering major Canadian markets without any connection to community newspapers was a sufficient basis to conclude that an SPC was unlikely.[5]

[4] Director of Investigation and Research v Southam Inc. [Southam]: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/465031/1/document.do

[5] Southam at pgs 212-13.

13. The second Tribunal decision involving an SPC related to Superior Propane Inc.'s ("Superior") acquisition of ICG Propane Inc. ("ICG") in 1998.[6]

14. In this matter, the Commissioner alleged a number of SLCs in many local retail propane markets as well as a likely SLC regarding national accounts. Additionally, the Commissioner alleged an SPC in the supply and delivery of propane, equipment and related services to customers in the Maritime Provinces where ICG, a current in-market supplier, had extensive expansion plans. This SPC is best described as the acquisition of a current market participant who had plans to expand and become a more vigorous competitor, including expansion into new geographic (local) markets.

15. Given the evidence presented by the Commissioner of these expansion plans and in an absence of any evidence or submissions by the respondents contradicting the Commissioner's position, the Tribunal concluded that there would be a likely SPC in the relevant area as a result of the merger.[7]

16. The third relevant Tribunal decision was issued in 2000. The matter involved an asset and share acquisition of BFIL by Canadian Waste that included the Ridge Landfill facility ("Ridge").[8] In his application, the Commissioner alleged an SLC resulting from the acquisition of Ridge in the disposal of institutional, commercial and industrial waste ("ICI Waste") in two Southern Ontario markets.[9]

17. As with the previously mentioned cases, the predominant harm alleged were SLCs. That said, additional harm was alleged in the form of an SPC from the anticipated development of new capacity at Ridge that would have put downward pressure on Tipping Fees for ICI Waste but for the transaction.[10] Here the acquisition was alleged to prevent the pro-competitive effects associated with new capacity.

18. The Tribunal was persuaded by the evidence and expert testimony put forward by the Commissioner and concluded that the merger was likely to increase Canadian Waste's share of future excess capacity in the market and prevent competition substantially.[11]

19. Finally, the most recent and by far most comprehensive Canadian jurisprudence on SPC comes from the Tribunal's 2012 decision[12] ("Tervita") along with subsequent appellate decisions from the Federal Court of Appeal ("FCA")[13] and the Supreme Court of Canada ("SCC").[14]

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[6] The Commissioner of Competition v. Superior Propane Inc., 2000 Comp. Trib. 15 [Superior]: *The Commissioner of Competition v Superior Propane Inc*.

[7] Superior at paras 240-246.

[8] *The Commissioner of Competition v Canadian Waste Services Holdings Inc.*, 2001 Comp Trib 3 [Canadian Waste]: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/464689/1/document.do

[9] Canadian Waste at para 5.

[10] Canadian Waste at para 203.

[11] Canadian Waste at para 204.

[12] *The Commissioner of Competition v CCS Corporation et al.*, 2012 Comp Trib 14 [Tervita]: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463327/1/document.do

[13] *Tervita Corporation v. Commissioner of Competition*., 2013 FCA 28 [Tervita FCA]: *Tervita Corporation v Canada (Commissioner of Competition)*

[14] *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 [Tervita SCC]: https://scc-csc.lexum.com/scc-csc/scc-csc/en/14603/1/document.do

20. The Commissioner's sole allegation in this matter was an SPC with respect to the disposal of hazardous waste into secure landfills in northeast British Columbia ("NEBC"), which resulted from the acquisition of Complete Environmental Inc. ("Complete") by CCS Corporation ("CCS").[15]

21. At the time of the merger, Tervita (formerly CCS) enjoyed a monopoly position for the disposal of hazardous waste into secure landfills in NEBC with its Silverberry landfill. Complete had, less than a year prior to the consummation of the merger, obtained a permit to open a secure landfill at its Babkirk site. Babkirk was located in close proximity to Silverberry and both were well situated near significant and expanding oil and gas drilling and production activity.

22. The Commissioner alleged and the Tribunal determined that the transaction represented an acquisition of a potential entrant that was likely to become a vigorous competitor. The case is described in more detail below.

4. Analytical Framework for the Assessment of Prevention of Competition

23. The Tribunal outlined the analytical framework for the assessment of an SPC in its Tervita decision. This framework was subsequently affirmed by the FCA and the SCC.

24. The analytical framework set out by the Tribunal is as follows:

> *In assessing cases under the "prevent" branch of section 92, the Tribunal focuses on the **new entry**, or the **increased competition** from within the relevant market, that the Commissioner alleges was, or would be, **prevented by the merger** in question. In the case of a proposed merger, the Tribunal assesses **whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale**, to result in: (i) a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial. **[Emphasis added]**[16]*

25. The framework above focuses on new entry that was or would be prevented by the merger and whether that entry would have been (i) timely, (ii) likely and (iii) sufficient in scale and scope to materially impact the level of competition in the relevant market for a period of about two years. Entry that meets the conditions of timely, likely and sufficient is referred to as poised entry.

26. The analytical framework set out by the Tribunal and courts in Tervita to assess a prevention of competition has been largely adopted in other contexts under the Act, like the abuse of dominance provisions in sections 78 and 79. Under those provisions, the assessment is focused on whether a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the results that competition has been, is, or is likely to be prevented or lessened substantially in a market.[17]

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[15] CCS Corporation later changed its name to Tervita and will hereinafter be referred to as Tervita.

[16] Tervita at para 123.

[17] Abuse of Dominance Enforcement Guidelines: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html

27. In addition, while there is no case law with respect to the analysis of SPC under the competition collaboration provision in section 90.1 of the Act, the Bureau has adopted a similar approach when assessing SPC in the context of existing or proposed civil agreements between competitors that may create, maintain or enhance the ability of the parties to the agreement to exercise market power.[18]

28. With that assessment requires an analysis of barriers to entry into the market. Barriers to entry and poised entry and the guidance from Canadian courts around these concepts will be explored in the following sections.

5. Barriers to Entry

29. In Canada, barriers to entry are an essential part of the analysis of any SPC (or SLC) and the Commissioner bears the burden of proving that barriers to entry into the relevant market(s) are high. This follows from the fact that, without sufficient impediments to entry, it is likely that any attempt by a merged firm to exercise market power post-merger will be thwarted by entry of new firms or expansion by existing firms and therefore an SPC or SLC finding cannot be made.

30. Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor.[19] In the context of barriers to entry, the entry contemplated must be qualified as effective entry. The MEGs describe the same three conditions of effective entry as referenced above for the assessment of entry prevented by a merger: (i) timeliness; (ii) likelihood; and, (iii) sufficiency. Likelihood and sufficiency are discussed briefly below while timeliness is explored in more detail given the attention received in the SPC context from both the Tribunal and the higher courts in Tervita.

5.1. Likelihood

31. In short, the MEGs consider the likelihood of entry as affected by the "commitments that potential entrants must make, the time required to become effective competitors, the risks involved and the likely rewards."[20] Barriers may need to be overcome to enter and compete at all, such as regulatory approval processes or acquisition of necessary equipment or may be more relevant post-entry, for example if it is necessary to achieve sufficient scale to effectively compete with incumbents.

32. The extent of these barriers and degree to which a potential competitor has already overcome or is well-positioned to overcome these barriers, as well as the risks associated with each, will go to the determination of the likelihood of entry into a market.

[18] Competitor Collaboration Guidelines 3.4.1: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04582.html

[19] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, at p. 330: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/465029/1/document.do

[20] Merger Enforcement Guidelines 7.6.

5.2. Sufficiency

33. New entry will need to achieve a sufficient scale and scope to have a material impact on competition in a market. The Bureau will consider any constraints or limitations on new entrants' capacities or competitive effectiveness.[21]

34. For example, in Propane, a key question considered by the Tribunal was whether sufficient "free customers" would be available each year, given the presence of exclusive contracts, to enable a new entrant to achieve the scale required to compete against the incumbents and not be at a material cost disadvantage.[22]

5.3. Timeliness

35. The MEGs describe the time it takes for a potential entrant to become an effective or viable competitor and its impact on the assessment of barriers to entry as follows:

> *In general, the longer it takes for potential entrants to become effective competitors, the less likely it is that incumbent firms will be deterred from exercising market power. For that deterrent effect to occur, entrants must react and have an impact on price in a reasonable period of time. In the Bureau's analysis, the beneficial effects of entry on prices in this market must occur quickly enough to deter or counteract any material price increase owing to the merger, such that competition is not likely to be substantially harmed.*[23]

36. In Tervita, the SCC defined lead time for use in assessing timeliness of entry. "The lead time required to enter a market due to barriers to entry ("**lead time**") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market."[24]

6. Poised Entry

37. As described above, prevention of competition cases in Canada focus on new entry and whether or not that entry may be determined to be poised in the sense that, in addition to being likely, it will be both sufficiently timely and on a sufficient scale to materially impact the level of competition in the market. This is consistent with the assessment of barriers to entry and courts have explicitly referenced the anchoring of the poised entry analysis in the scheme for consideration of impediments to entry.

38. This anchoring within the assessment of barriers to entry, and particularly with respect to the temporal dimension of market entry, was accepted by, qualified and expanded upon by the FCA in its reasons in Tervita. Justice Mainville wrote:

> *I accept this approach insofar as it serves as a guidepost and not as a fixed temporal rule. There may indeed be rare situations where it may be appropriate to expand the temporal analysis of poised entry beyond the temporal dimension of the barriers to market entry. In such circumstances, the Tribunal will be required to clearly justify why the entry is still "poised" at this later date. However, in most*

[21] Merger Enforcement Guidelines 7.7.

[22] Superior at para 134.

[23] Merger Enforcement Guidelines 7.3.

[24] Tervita SCC at para 71.

> *cases the temporal dimension of market entry should serve as an appropriate guidepost.*[25]

39. On appeal, the Supreme Court of Canada subsequently accepted this approach but cautioned its application in cases involving long lead times and SPC findings where the relevant entry is far into the future.

> *…it is important to emphasize that lead time should not be used to justify predictions about the distant future … in other contexts — for example, those where product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.*[26]

40. The courts have also opined on the initial entry into a market and the extent to which that entry date must be identified. Given that this entry point must, at least in most cases, fall within the temporal bounds of barriers to entry, the courts agree that it isn't necessary to predict with absolute precision when in the future entry will occur. According to the FCA, what is required is "a clear and discernable timeframe for market entry" but not one that need be "a precisely calibrated determination."[27]

41. With that guidance on the temporal guideposts that should serve to frame the analysis of potential entry prevented by a merger, the steps to be taken to enter the market and to become an effective competitor must be carefully examined.

6.1. Tervita

42. The Tribunal's assessment of the facts and evidence regarding poised entry in its Tervita decision and the subsequent deference to the findings of fact regarding entry by the higher courts offers support for SPC findings in Canada where the path to effective entry is, to some extent, both winding and protracted.

43. Indeed in its appeal to the FCA of the Tribunal's decision, Tervita asserted that the Tribunal engaged in unfounded "speculation regarding possible future events."[28] The same assertion was subsequently raised in its appeal to the SCC.

44. The owners of the Babkirk site and the associated landfill permit had not yet broken ground on construction of a landfill, though they had successfully completed the majority of a complex, time-consuming and risky regulatory approval process. Furthermore, the owners testified that their intention was to use the site primarily as a treatment facility rather than a landfill. The fact that they had not yet begun to construct the landfill combined with their stated intention to primarily treat waste at the site raised uncertainty about future competition in the relevant market.

45. Ultimately, given the totality of evidence, the Tribunal concluded that effective entry was likely at Babkirk and that competition was likely to be substantially prevented by Tervita's acquisition of Complete. The conclusion relied on the following:

- It would take a new entrant at least 30 months to open a new secure landfill;

[25] Tervita FCA at para 91.

[26] Tervita SCC at para 74.

[27] Tervita FCA at para 90.

[28] Tervita FCA at para 50.

- While the owners would start a treatment business at Babkirk, that business would fail because:
  - bioremediation treatment is ineffective in NEBC and does not work on many of the contaminants that are found in the waste at issue; and,
  - potential customers are not willing to transport their hazardous waste to the Babkirk site for bioremediation treatment;
- The market for disposal of hazardous waste in the area is exploding;
- The Babkirk site, with its regulatory approval to become a secure landfill, is an attractive asset to a third party secure landfill operator;
- The owners of Babkirk would have decided to operate a secure landfill at Babkirk or sold it to a third party who would have operated one;
- Babkirk would have been opened to compete with Tervita's nearby secure landfill within 21 months of the merger and would have been transformed into a full service secure landfill at the latest 6 months thereafter.[29]

7. Bureau Enforcement Post-Tervita

46. Since Tervita, likely SPC cases in Canada have been limited to mergers involving research and development of new products, generally mergers involving companies engaged in the development and production of pharmaceutical products where the companies typically have both lines of in-market products and pipelines of potential products in various stages of development. These mergers often lead to multiple SLC and/or SPC findings and a standalone SPC case would be even more rare.

47. For example, the Bureau's 2015 review of the merger involving Pfizer Inc. and Hospira, Inc. led to competition concerns with respect to four overlapping product offerings, including an SPC resulting from the acquisition of injectable antifungal product that Hospira had in its pipeline.[30]

48. In this and similar cases, the SPC analysis considers the extent to which the relevant pipeline product has progressed through Health Canada's regulatory approval process and requires a determination that sufficient alternative pipeline products do not exist that are at a similar or more advanced stage of development.[31] The business plans associated with the product's development and launch play a key role in determining the timeline for entry and the extent to which the new product will materially impact competition in the market. Such plans will be juxtaposed with information from competing drug developers on the status of their drug approval processes and their anticipated timing for entry.

49. Harm to innovation is another type of competitive harm often associated with future potential competition. Indeed innovation has played a central role in recent merger reviews where the Commissioner sought and obtained remedies, However, in both these cases, the harm to innovation was assessed as a SLC owing to the decrease in the competitive tension

[29] Tervita at paras 197-215.

[30] Competition Bureau statement regarding Pfizer's acquisition of Hospira (2015) [Pfizer/Hospira]: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03979.html

[31] Pfizer/Hospira and Competition Bureau statement regarding Teva's acquisition of Allergan's generic pharmaceuticals business (2016): https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/04065.html

between existing competitors in a market and thereby a loss of incentive to engage in efforts to enhance current product offerings.[32]

50. Conversely, in the Commissioner's case against the Toronto Real Estate Board ("**TREB")**[33] under the Abuse of Dominance provision (section 79) of the Act, the Tribunal did assess potential harm to innovation from the standpoint of an SPC. In that matter, the court adopted a framework in line with that used in the Tervita decision when assessing whether TREB's restrictions on member agents and brokers' ability to use and display certain real estate information over innovative digital platforms resulted in an SPC in the relevant market.

51. Specifically, the Tribunal noted in its 2016 decision that dynamic competition, including innovation, is the most important type of competition and consumers are deprived of the benefits of enhanced services when members are shielded from disruptive competition. The Tribunal concluded that:

> *by preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers such as […] from considerably increasing the range of brokerage services, increasing the quality of existing services, and considerably increasing the degree of innovation in the Relevant Market.*[34]

52. The framing of harm to innovation in a market as an SLC in the two merger case examples above contrasted against the Tribunal's approach in TREB as an SPC, even while all three cases relate to competition within a given relevant market rather than entry into new markets, suggests that these approaches are two sides of the same coin. What matters in Canada is whether the transaction is likely to create, maintain, or enhance the ability of the merged entity to exercise market power in a market.

53. Irrespective of the infrequency of recent SPC cases by the Bureau, there is clarity on the approach in Canada to the SPC analysis; it is flexible in how to contemplate the but-for world and the different ways that new entry may play out in the absence of the merger. The steps toward that entry and associated timeline for entry should be discernable and grounded in the evidence.

54. It is also worth noting, that in Tervita the SCC provided guidance to the Tribunal with respect to the steps to assess entry and the associated business decisions of the company seeking to enter:

> *In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.*[35]

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[32] Competition Bureau statement regarding the merger between Dow and DuPont (2017): https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/04247.html and Competition Bureau statement regarding Thoma Bravo's acquisition of Aucerna (2019): https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/04493.html

[33] *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 [TREB]: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do

[34] TREB at para 713.

[35] Tervita SCC at para 76.

55. Owing to this, business documents and statements made by business people involved in the relevant entry efforts can be crucial evidence. Additionally, records and testimony of third parties who may represent alternative purchasers relevant to a fulsome analysis of the but-for world will also be important. While this evidence can be buttressed by expert industry, economic and financial evidence, as the SCC states, the Bureau must be cautious not to make assumptions about the actions of business people that are not grounded in available evidence. This may require the use of formal powers to examine relevant business people under oath for insight into their plans and intentions.

8. Conclusion

56. This submission has provided an overview of Canada's competition law framework for the assessment of mergers involving theories of harm relating to the acquisition of potential future competition. Given the jurisprudence, the Bureau's analysis of transactions which may involve a poised entrant will follow the framework set out by the Tribunal in its Tervita decision that was ultimately accepted by both the higher courts.

57. Even in situations where the temporal dimension of barriers to entry is long, an SPC finding by the Commissioner can be expected if viable entry prevented by a merger may still be established, through the evidence, to have been likely to have occurred on a discernable timeline and through identifiable steps. As the Tribunal's Tervita decision shows, that path to viable entry need not be short or direct. That said, given the standard for the SPC (and SLC) test set out in the Act is one of a balance of probabilities, the effects of acquisitions of potential competitors assessed through the lens of the merger provisions of the Act will have to be more likely than not to occur.

58. Given the importance of mergers involving the prevention of competition both as a topic in antitrust today and for their significant impacts on markets and the broader economy, the Bureau will continue to use all available enforcement tools under the Act, wherever appropriate, to protect competition from mergers that eliminate likely future competition.