

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**Non-price Effects of Mergers - Note by Canada****6 June 2018**

This document reproduces a written contribution from Canada submitted for Item 4 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/non-price-effects-of-mergers.htm](http://www.oecd.org/daf/competition/non-price-effects-of-mergers.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 "Non-Price Effects of Mergers".
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")<sup>1</sup> and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.
3. This submission discusses the framework in Canada and the Bureau's experience analyzing non-price effects in merger reviews. In particular, this submission will focus on innovation as a non-price effect.<sup>2</sup>

### 2. Merger Analysis

4. 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."<sup>3</sup> In previous rulings, the Tribunal has found that market power is the ability for the firm to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition."<sup>4</sup>
5. The Bureau has provided guidance regarding the factors that are considered during a merger review in its Merger Enforcement Guidelines ("MEGs"). The MEGs elaborate on the Act's reference to market power and other dimensions of competition in a market:

*In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice,*

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<sup>1</sup> The full text of the *Competition Act* is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

<sup>2</sup> While particular focus is paid to innovation in this submission, the Bureau is equally dedicated to protecting other forms of non-price competition such as quality, product choice and service.

<sup>3</sup> Merger Enforcement Guidelines 2.1.

<sup>4</sup> The Commissioner of Competition v. Canadian Waste Services Holdings Inc., 2001 Comp. Trib. 2, 11 C.P.R. (4<sup>th</sup>), at para. 7.

*service, innovation and advertising – especially in markets in which there is significant non-price competition.*<sup>5</sup>

6. In general, the Bureau will investigate the potential impact that a transaction will have on all facets of competition to ensure that consumers, and the economy as a whole, are not harmed by an anti-competitive merger.

### 3. The Analysis of Innovation in Merger Review

7. Innovation is a key driver of economic growth and a vital contributor to overall welfare. As such, innovation has been a key priority for the Bureau and assessing its impact on dynamic competition has been a part of the Bureau's 2015-2018 Strategic Vision.<sup>6</sup>

8. The Bureau will consider non-price effects, such as harm to innovation, throughout the review process. The MEGs outline how a disruption to innovation can result from a merger:

*A merger may facilitate the exercise of market power by impeding the process of change and innovation. For example, when a merger eliminates an innovative firm that presents a serious threat to incumbents, the merger may hinder or delay the introduction of new products, processes, marketing approaches, and aggressive research and development initiatives or business methods.*<sup>7</sup>

9. As mentioned above, the concept of facilitating the “exercise of market power” is directly linked to the test set out in section 92 of the Act. Thus, the analysis of the impact of a merger on innovation, and other non-price effects, is conducted as part of the overall substantial lessening or prevention of competition (“SLPC”) analysis.

10. This is evidence that the Bureau is cognizant of the important role that factors such as quality, innovation and service play within the economy and is committed to protecting all forms of competition.

### 4. Recent Jurisprudence

11. The Supreme Court of Canada's (“SCC”) decision in the Commissioner's application to block Tervita's acquisition of Complete<sup>8</sup> has provided guidance regarding the necessity of quantifying anti-competitive effects. In the Tervita decision, the SCC stated that in cases where an efficiencies defence has been raised under section 96 of the

<sup>5</sup> MEGs 2.2.

<sup>6</sup> Full text available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html>.

<sup>7</sup> MEGs 6.9.

<sup>8</sup> Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3, [2015] 1 S.C.R. 161[Tervita]: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do>.

Act, “[t]he Commissioner’s burden is to quantify by estimation all quantifiable anti-competitive effects.”<sup>9</sup>

12. Section 96 of the Act provides that the Tribunal shall not make an order under section 92 if a merger “has brought or is likely to bring about gains in efficiency that will be greater than, and will offset” the anti-competitive effects. In *Tervita*, the SCC outlined a two-step approach where quantified effects are compared to quantified efficiencies and qualitative effects are subsequently compared to qualitative efficiencies. Then “a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue.”<sup>10</sup>

13. Recently, the Tribunal has provided further guidance regarding non-price effects and any obligations to quantify competitive effects to establish a substantial lessening or prevention of competition in the context of an abuse of dominance matter.

14. In 2011, the Bureau applied to prohibit certain practices of the Toronto Real Estate Board (“TREB”).<sup>11</sup> TREB is the largest real estate board in Canada and owns and operates the Toronto Multiple Listing Service system (“MLS”), which contains current property listings as well as historical information about the sale of residential real estate in Toronto. The Bureau submitted that, by restricting how member agents can provide information from the MLS system to their customers, these agents are denied the ability to provide innovative brokerage services over the internet.

15. The Commissioner brought forward arguments regarding anti-competitive effects including:

1. Reduced range of brokerage services;
2. Reduced quality of brokerage service offerings; and
3. Reduced innovation

16. Among other things, the Commissioner relied upon testimony by industry witnesses that operate in other geographic areas not bound by restrictions similar to those imposed by TREB. These comparisons were utilized as “natural experiments” to demonstrate the impact that TREB’s restrictions had on the market. The Tribunal agreed with the Commissioner and found that TREB had substantially prevented competition in the Greater Toronto Area residential real estate market. The Tribunal further provided guidance regarding the importance of non-price effects and the use of qualitative evidence:

*The Tribunal also recognizes that there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one.*

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<sup>9</sup> *Tervita* at para 125.

<sup>10</sup> *Tervita* at para 147.

<sup>11</sup> *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7 [TREB]: [http://www.ct-tc.gc.ca/CMFiles/CT-2011-003\\_Reasons%20for%20Order%20and%20Order\\_385\\_38\\_4-27-2016\\_8854.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_38_4-27-2016_8854.pdf). The decision is currently under appeal. The application was made under section 79 of the Act which examines the abuse of a dominant position. Similar to section 92, section 79 also includes an analysis of anti-competitive non-price effects. Unlike the merger provisions of the Act, the abuse of dominance provisions do not provide for an efficiency defense.

*This is because dynamic competition is generally more difficult to measure and to quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct. Such evidence can take the form of business documents, witness statements and testimonies, industry analysis, etc. As long as such qualitative evidence collectively meets the requirements of the applicable standard of proof of balance of probabilities, it can be sufficient to support with an application, even with limited quantitative evidence, or indeed none at all. In other words, no particular type of evidence is necessarily required. However, it bears repeating that the Commissioner ultimately bears the burden of proof and the Tribunal must be convinced on a balance of probabilities (Canada Pipe FCA at para 46).<sup>12</sup>*

17. While the TREB decision may not be in relation to a merger review, the court's acceptance of qualitative evidence to show non-price effects supports the importance of protecting competition on non-price dimensions such as quality, product choice, service, innovation and advertising.<sup>13</sup> The Tribunal ultimately acknowledged that even though it may be more difficult to measure, dynamic competition, including innovation, is the most important type of competition.<sup>14</sup>

## 5. Anti-Competitive Effects on Non-Price Competition

18. As outlined above, the SCC provided a two-step process for weighing anti-competitive effects against efficiencies. Given the Commissioner's burden to quantify all reasonably quantifiable effects, when possible the Bureau seeks to quantify non-price effects so they can be added to price effects and compared to efficiency gains. The Bureau has experience analyzing non-price effects in mergers such as McKesson/Katz, Dow/DuPont and Loblaw/Shoppers, and other mergers in the pharmaceutical industry.

19. One example where quantification of a loss in innovation may be possible is a scenario where, absent the proposed transaction, one of the merging parties was planning to launch a new product within a discernable time period. In this scenario, the Bureau would seek to understand where the new product would fit into the product space. Once this is done, the new product could be introduced into a merger simulation to examine its potential impact on the prices and output of other products in the market. By examining the pre and post launch market outcomes, one could determine the potential anti-competitive effects that the merger may have on competition.

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<sup>12</sup> TREB at para 471.

<sup>13</sup> It is worth noting that the Federal Court of Appeals has held that there is no obligation to quantify competitive effects under section 79 of the Act. This finding is currently under appeal.

<sup>14</sup> It should be noted that the Bureau has yet to have an example of a merger case where the quantitative efficiencies have outweighed the effects and the qualitative effects outweighed the efficiencies and as such has not had to test the "final determination" step of section 96 as set out by the Tribunal.

20. In instances where the product launch is not within a discernable time frame but innovation is a key factor in the industry, the Bureau may still rely on formal models to guide its innovation analysis. These models may require qualitative measures from the merging parties including, but not limited to:

1. Strategic objectives of innovation efforts;
2. Timelines associated with the commercialization of the innovation;
3. The likelihood that commercialization would occur; and,
4. The anticipated competitive impact of the innovation should commercialization be successful

21. The Bureau may then use quantitative techniques to predict the potential impact of the merger on incentives to innovate.

22. In some situations, it may be possible to map characteristics of the marketplace to dollar figures in order to obtain quantitative values that can be added to price effects and compared to efficiencies. For example, consider a merger of two retail stores. If the characteristic that was being examined was the overall service level at a retail store, the Bureau may examine a proxy such as the expected wait time to receive service. If a merger were expected to increase the expected wait time for consumers to receive service, this could be measured. In this scenario it may be possible for the Bureau to utilize studies to estimate a consumer's value of his/her time in monetary terms and therefore generate an estimate of the non-price effect that can be compared with price effects and efficiencies from the merger.

23. Alternatively, in some markets complete quantification may not be achievable. In these situations it may be possible to assign numerical values to certain measures of quality, such as the speed of delivery of a product, the number of options or product features available to consumers, or hours of operation. While these metrics may not be directly comparable to price effects and efficiency gains, they do allow the Bureau to examine a measureable, qualitative difference in the marketplace pre and post-merger.

24. For example, an alternative tool to measure service quality in certain industries would be to analyze the number of complaints that a store receives. The analysis may return that there is an expected increase in the number of complaints received post transaction which then provides an indication of the expected decrease in service quality post-merger. While this is a very simplistic example, it provides insight into the type of variables that may not be comparable to price effects but can be examined numerically.

25. Where direct quantification in the relevant market is difficult, the Bureau may supplement its analysis using natural experiments. Natural experiments are often useful in assessing a counterfactual by examining historical events that link changes in competitive conditions (e.g. entry or exit of firms, presence of certain competitors, products, services, and contractual practices) to changes in observable effects. In appropriate circumstances, the study of events and their impact on competition in one market can be very informative to an assessment of likely effects in another market. Natural experiments may be even more important in assessing non-price effects as they provide a more identifiable and measurable estimation of the effects of a change in the market against a baseline situation.

26. While the Bureau will seek to quantify the reasonably quantifiable anti-competitive effects in the context of merger reviews, the Tribunal's decision in TREB underlines the difficulty that exists in quantifying some non-price effects.

## 6. Conclusion

27. This submission has provided an overview of Canada's competition law framework for addressing non-price effects in merger reviews. Given the jurisprudence, the Bureau continues to strive to quantify the reasonably quantifiable anti-competitive effects from a merger, including any non-price effects. In situations where non-price effects cannot be quantified, the Tribunal has recognised the importance of qualitative evidence, in particular given the role dynamic competition plays in the economy. Given the importance of non-price competition to the economy, the Bureau will continue to use its enforcement tools under the Act, where appropriate, to preserve competition along this important dimension.