McMillan Binch LLP

McMillan Binch Competition/Antitrust Group

CANADIAN ANTITRUST REPORT

New Canadian Merger Guidelines Focus on Competitive Effects

The updated Guidelines issued by the Competition Bureau on 21 September 2004 are broadly consistent with mainstream economics and the general approaches of competition agencies in the United States and the European Union.

The most important changes to the Merger Guidelines involve significant new guidance regarding analysis of competitive effects.

- **Unilateral Effects** — In differentiated product industries, the ability to exercise market power unilaterally will be assessed by reference to whether the parties' products are next best substitutes for a sufficient number of customers to allow a profitable increase in the price of one of the products.
- **Coordinated Effects** — The ability of firms in an oligopoly to exercise market power on a coordinated basis will be based on the four-condition Stigler framework, with factors such as asymmetries and transparency considered in relation to those conditions. The need for a causal connection between the merger and the establishment or enhancement of the ability to behave on a coordinated basis has also been expressly recognized.
- **Prevention of Competition** — The Guidelines discuss 7 types of situations in which a merger that removes anticipated future competition may be challenged (eg. a dominant firm acquiring a company that is about to enter its market).
- **Vertical and Conglomerate Mergers** — Non-horizontal transactions will rarely be expected to raise concerns but the Guidelines do contain brief references suggesting that controversial "raising rivals' costs" and "portfolio effects" theories could be utilized.

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Four other aspects of the Guidelines are also noteworthy:

- **Broad Definition of "Merger"** — The Bureau has reasserted an expansive interpretation of its jurisdiction to examine the acquisition of a "significant interest" short of control, including arrangements that confer "material influence" on another person's business even with little or no voting equity and increases in the level of an existing significant interest without moving to a control position.

- **Narrow Approach to Market Definition** — The Guidelines continue to employ the theoretical "hypothetical monopolist methodology" with an orientation towards factors that would result in narrow product and geographic markets.

- **Strict Standards for Entry Arguments** — The Bureau will not accept ease of entry as a basis for clearing a merger unless persuaded that entry would be profitable at pre-merger prices and is likely to occur within two years on a scale that is sufficient to discipline the potential exercise of market power.

- **Continued Hostility towards Efficiency Defences** — The Guidelines acknowledge aspects of the *Superior Propane* decision in which a merger was allowed on the basis that anti-competitive effects were outweighed by significant efficiencies. However, it appears that the Bureau will interpret remaining areas of discretion in a manner that minimizes the scope of the defence and will vigorously scrutinize such claims when they are put forward by merging parties.

Overall, the new Guidelines suggest that Canada's Competition Bureau will operate a vigilant, sophisticated and balanced merger review regime.

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