Competition Law insight
Antitrust law and policy in a global market

Canada: Update on efficiencies report

by Mark Katz, Charles Tingley and Elisa Kearney

published in the 14 March 2006 issue of
Competition Law Insight

Published by

Informa Professional
30-32 Mortimer Street
London W1W 7RE
United Kingdom

Subscription Enquiries

Justine Boucher
Tel: + 44 (0) 20 7017 5179
Fax: + 44 (0) 20 7017 5274
Email: justine.boucher@informa.com

Editorial Contacts

Editor: Max Findlay
Tel: + 44 (0) 20 8788 4004
Email: max@maxfindlay.com

Editorial coordinator: Eleanor Taylor
Tel: + 44 (0) 20 7017 5215
Fax: + 44 (0) 20 7017 5274
Email: eleanor.taylor@informa.com

Canada: Update on efficiencies report*

Last year, the Canadian Competition Bureau appointed a special advisory panel (the Panel) to provide an expert opinion on the role that efficiency gains should play in the merger review process under the Competition Act . In particular, the Panel was asked to consider whether changes should be made to section 96 of the Act, which provides that the Competition Tribunal cannot prevent a merger that "has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger".

The Panel's report

The Panel has now released its report, concluding that not only should the efficiency defence in section 96 be retained but efficiencies should become a regular and explicit consideration in the Act's merger review process. Specifically, the Panel recommended that:

(1) The Act should be amended to include efficiency gains as a factor to be considered in determining the threshold issue of whether a merger prevents or lessens competition substantially. Parties should be free to bring their claims of efficiency gains to the Bureau at the outset of a merger review without this being taken as an admission that the merger creates competition issues.

(2) The Act should also retain some form of efficiency defence for those rare but important cases in which a trade-off between efficiency gains and a substantial lessening or prevention of competition may be justified.

(3) The current standard for assessing efficiency gains developed in the case law is unsatisfactory. There should be a clear, predictable and politically acceptable standard. This is a policy question for the Canadian parliament to decide.

(4) Under whatever standard is adopted, the efficiency defence should not be permitted in cases of merger-to-monopoly.

Implications

The efficiencies issue has been a matter of acute interest in Canadian competition law ever since the *Superior Propane* case was litigated. In that case, the tribunal applied the efficiency defence in section 96 to uphold Superior Propane's acquisition of ICG, notwithstanding that the merger created a monopoly or near-monopoly in many propane markets in Canada. Since its loss in *Superior Propane*, the Competition Bureau has sought to revisit the whole issue of efficiencies under the Act, the Panel's appointment being the most recent aspect of this process.

The Panel's recognition of the continuing importance of efficiencies to merger review in Canada is a positive step. As the Panel stated, efficiency-enhancing mergers can be an important part of the solution to Canada's continuing decline in productivity. Consequently, it is disappointing that the Panel did not offer its opinion on what standard should be used in applying the Act's efficiency defence, leaving it for parliament to articulate the appropriate standard at some undetermined point.

Also questionable is the Panel's recommendation that the efficiency defence should not be applied in cases of merger-to-monopoly. The Panel did not attempt to define what it meant by "monopoly", thus leaving open for argument how much scope the efficiency defence might have in practice. Another potential problem is what would happen in the case of a merger that affected several markets, but resulted in a "monopoly" (however defined) in only one or a few of them.

The Advisory Panel's report on efficiencies is available on the Bureau's website at *www.competitionbureau.gc.ca*

** by Mark Katz, Charles Tingley and Elisa Kearney from Davies Ward Phillips & Vineberg LLP (Toronto)*