Draft Revised
Merger Enforcement Guidelines

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

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Draft Revised Merger Enforcement Guidelines

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to submit comments on the Competition Bureau's Draft *Merger Enforcement Guidelines* (the Draft MEGs) issued for public consultation in June 2011. The CBA Section appreciates the opportunity to contribute to Bureau policy and once again welcomes the Bureau's initiative to consult with the competition bar and business community.

As the CBA Section noted in its December 2010 *Submission on Merger Enforcement Guidelines Consultation*[1] (the December Submission), it is important that the *Merger Enforcement Guidelines* (the MEGs) reflect both the body of Canadian merger and related jurisprudence and the approach used by the Bureau during the merger review process in order to foster the Bureau's goals of transparency and predictability. While there were diverging views in the CBA Section as to the extent to which revisions should be made, at that time the CBA Section expressed the view that the current MEGs issued in 2004 (the 2004 MEGs) could usefully be revised, but that substantial revisions were not required. We identified specific areas that may have warranted revision or expansion. In this submission, we address the proposed revisions advanced in the Draft MEGs but generally refrain from repeating earlier suggestions that the Bureau has not pursued in the Draft MEGs.[2]

II. GENERAL OBSERVATIONS

Generally, the CBA Section welcomes the Bureau's efforts to improve transparency by outlining its enforcement approach. However, the Bureau's enforcement is constrained by the substantive provisions of the *Competition Act* and the relevant jurisprudence as it has evolved.

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[1] National Competition Law Section, Canadian Bar Association, *Submission on Merger Enforcement Guidelines Consultation*, September 2010, http://www.cba.org/CBA/submissions/pdf/10-84-eng.pdf

[2] As set out in our December Submissions, the CBA Section does not intend to detract from its earlier recommendations with respect to certain aspects of drafts of the MEGs and the *Efficiencies Bulletin* that were not ultimately accepted in the final versions of those publications.

The CBA Section is concerned that in some instances, the Bureau has articulated a flexible approach that may not necessarily accord with the jurisprudence, and which detracts from transparency and certainty. The result is to increase the costs incurred by parties to conduct multiple analyses and gather information that the Bureau says is required to determine whether issues exist.

Similarly, in a number of respects, the Draft MEGs are stricter and afford less room for merger proponents to argue their case than do the 2004 MEGs. As a result, the Draft MEGs introduce new uncertainties, particularly in the areas of market definition and entry. It is unclear why the Bureau proposes to make these troubling changes, because there has been no new case law since the 2004 MEGs, and the existing case law on market definition is clear. It is understandable that, to the extent some of these changes were implemented in the 2010 *US Horizontal Merger Guidelines*, similar changes might be implemented in Canada for consistency of approach to cross-border mergers. However, the differences in substantive law and enforcement experience in other jurisdictions should be kept in mind. Changes to the Canadian guidelines should be made only when warranted.

In various Sections of the Draft MEGs (e.g., Sections 2.11, 2.13, 5.1 and 7.3), the two-year timeframe for assessing competitive effects and entry has been replaced with references to whether entry would occur "quickly enough". This change detracts from certainty and transparency. The CBA Section urges the Bureau to consider reverting to the “within two year” period or, alternatively, further qualifying the “quickly enough” test by articulating (1) which factors may affect the appropriate timeframe for assessing the timeliness of entry, (2) which factors may increase or decrease the relevant period, and (3) how such factors would be applied. Further, the Bureau should confirm that the timeframe will be longer than the one year timeframe for market definition, which is necessary for the concept of entry to have any meaning.

All footnotes grounding the 2004 MEGs in case law have been removed from the Draft MEGs. The CBA Section urges the Bureau to reconsider the deletion of these footnotes, as they assist in identifying the legal principles and precedents informing the MEGs and by which the Bureau is bound. Indeed, the Bureau has had a welcome tradition of including such footnotes (even in summarizing the case law) in its other guidelines and bulletins.

While it may be understandable to remove footnotes citing case law where the legal principles are constantly evolving through an extensive body of case law,[3] there have been few contested cases in Canada (and no decision in a contested merger case since publication of the 2004 MEGs). This indicates the risk that the footnotes would require constant monitoring and updating is low. The eventuality of new Competition Tribunal jurisprudence should not detract from the value of case references today. In any event, the competition bar and the business community will factor in developments in the case law when using the MEGs.

III. COMMENTS ON SPECIFIC PARTS OF THE DRAFT MEGS

Part 1 – Definition of Merger

The CBA Section is pleased that the Bureau has expanded the discussion of significant and partial interests and interlocking directorates in the Draft MEGs. In particular, the separation of the jurisdictional question of whether a "significant interest" is a merger (in Part 1 of the Draft MEGs) from the substantive question of whether a partial interest or interlocking directorate is likely to prevent or lessen competition substantially under Section 92 (in Part 10 of the Draft MEGs) is a helpful addition to the 2004 MEGs. While the expanded discussion on these points is welcome, the CBA Section encourages certain clarifications.

In assessing whether a partial acquisition constitutes a merger, the CBA Section is concerned that the lengthy list of potentially relevant factors identified in Section 1.6 of the Draft MEGs will be perceived as a checklist against which to measure behaviours. While guidance on the signposts that the Bureau looks at in its assessment of whether any particular minority interest confers material influence is helpful, not all the factors listed in Section 1.6 involve an ability to influence the business. For example, the dividend or profit share of the minority interest, the status or expertise of the acquirer relative to other shareholders, or access to confidential information − without more − do not necessarily entail an ability to materially influence the behaviour of the target entity. If the Bureau maintains the list of factors in Section 1.6, it should comment on the relevant significance of various factors in its assessment.

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[3] To illustrate, in the United States, there is considerably more jurisprudence and other disclosure available such as the 71 page 2006 Commentary on the Merger Guidelines which contains extensive case references and illustrative examples.

In discussing whether an interlocking directorate constitutes the establishment of a significant interest, Section 1.16 of the Draft MEGs indicates that an interlocking directorate "would not typically qualify, in and of itself, as the establishment of a significant interest." Section 1.16, as currently drafted, leaves open the question of when an interlocking directorate, by itself, would amount to the establishment of a significant interest. If there are instances where an interlocking directorate would independently amount to the establishment of a significant interest, the CBA Section encourages the Bureau to clarify this point through illustrative examples or a discussion of the factors that may result in that determination. For instance, in the discussion of whether a partial interest or an interlocking directorate is likely to prevent or lessen competition substantially in Part 10 of the Draft MEGs, the Bureau indicates, in footnote 49, that certain factors would be of particular relevance to its assessment of interlocking directorates. The Bureau should include a similar footnote as to when an interlocking directorate would, in and of itself, qualify as the establishment of a significant interest.

Additionally, in Section 1.16, the Draft MEGs indicate that the Bureau will look to the factors set out in Section 1.6 and any other relevant factors in assessing whether there is a "merger" for the purposes of the *Act*. However, most of the factors listed in Section 1.6 do not appear relevant to the determination of whether an interlocking directorate, by itself, establishes a significant interest. Rather, most of these factors appear to be factors that "in addition to" the interlocking directorate, indicate an ability to materially influence the target business. If specific factors in Section 1.6 are of greater relevance in determining whether an interlocking directorate establishes material influence, the Bureau should indicate this in the MEGs.

Section 1.7 of the Draft MEGs indicates that the Bureau presumes that notifiable transactions constitute the acquisition or establishment of a significant interest in the whole or part of a business. The MEGs should clarify that this presumption is rebuttable.

Section 1.17 of the Draft MEGs discusses how, in the Bureau's view, a variety of transactions (including joint ventures and contractual arrangements) may result in the acquisition or establishment of a significant interest. The MEGs should address when and under what conditions the Bureau would investigate these transactions under Section 92 of the *Competition Act* versus Section 90.1, with cross-reference to the *Competitor Collaboration Guidelines*. The interplay between Sections 92 and 90.1 can be significant given the limitation period imposed by Section 97 which does not apply to Section 90.1.

Part 2 − Anti-Competitive Threshold

In discussing mergers that prevent competition by foreclosing or forestalling entry by one of the merging firms, Section 2.11 of the Draft MEGs provides that in assessing potential entry, the Bureau would consider whether entry would likely occur "within a reasonable period of time" given the nature of the market in question. The Draft MEGs indicate, in footnote 11, that the Bureau may "consider longer timeframes when assessing the effects of a prevention of competition" than in assessing post-merger entry. Although the discussion of the Bureau's process for reviewing mergers that prevent competition is helpful, the CBA Section expects that divergent timeframes for assessing post-merger entry as opposed to prevention of competition would be the exception rather than the rule. In that regard, the Bureau should include factors and/or examples highlighting those circumstances or industries where the timeframes for assessing post-merger entry and prevention of competition would diverge.

Part 3 − Analytical Framework

Part 3, which is new, signals an important change in the Bureau's enforcement approach. Section 3.1 of the Draft MEGs states that market definition "is not necessarily the initial step, or a required step in the Bureau's review."

This is not consistent with long established case law.[4] While the CBA Section appreciates the need to maintain flexibility in its enforcement approach, the Draft MEGs should reflect the Bureau's actual enforcement approach, which should be guided and informed by the case law. The Draft MEGs offer no explanation as to why it is preferable to avoid market definition in a given case.

In principle, it will be challenging for the Bureau to assess whether a merger enhances, maintains or creates **market power** without a thorough understanding of the **market** affected.

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[4] See e.g. *R. v. Nova Scotia Pharmaceutical Society* [1992] S.C.R. 606 at 651 (SCC): "As a preliminary step, definition of the relevant market is required"; *(Canada) Director of Investigation and Research v. Southam Inc.* [1995] 3 F.C. 557 at 608 (Fed. C.A.): "It is universally accepted that a merger must be examined in terms of its likely effect on competition within a relevant market"; *(Canada) Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1992) 41 C.P.R. (3d) 289 at 297(Comp. Trib.): " In order to determine the likely effects of any merger or acquisition it is first necessary to determine the boundaries of the *relevant* market" (emphasis in original).

The CBA Section agrees with the statements in Sections 3.2 and 3.3, that market definition "is not an end in itself", that the "ultimate inquiry is not about market definition but rather about whether a merger prevents or lessens competition substantially" and that in some cases, "anti-competitive effects would result under all plausible market definitions".[5] The CBA Section also notes that "the Bureau generally defines the relevant markets" because of the information this exercise provides for its assessment. However, until the Tribunal and the courts decide otherwise, in our view the Bureau cannot dispense entirely with the market definition exercise. The Draft MEGs still outline at considerable length the market definition methodology of the 2004 MEGs, thus acknowledging that the Bureau is far from abandoning the market definition concept.

The CBA Section has particular difficulty with Section 3.3, which states that "while the Bureau generally defines markets, it may elect not to do so in cases in which other reliable evidence of competitive effects is available". This statement is untenable in light of the case law, and seems to go too far in view of the need to assess market power in relation to a market, as indicated above. It also seems to confuse the assessment of competitive effects with the market definition exercise which does not assess competitive effects. In fact, the Bureau's analysis of competitive effects must occur within the framework of a defined market.

The possibility that the Bureau may dispense with market definition introduces new uncertainties into merger analysis. Under what circumstances and in what types of cases or industries will the Bureau not define markets?[6] What "other reliable evidence of competitive effects" will oust market definition? If the Bureau is to rely upon such evidence, the Draft MEGs should provide guidance on this novel concept. Further, the Draft MEGs do not in fact provide much guidance as to how adverse competitive effects would be demonstrated in the absence of market definition.[7] The Draft MEGs offer the example in Section 3.3 of a completed merger that has resulted in a material price increase, but that is an exceptional case with limited relevance

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5 The discussion in Section 3.2 of the Draft MEGs should be clarified to refer to geographic market, not just product market.

6 When the Draft MEGs state in Part 3 that market definition may not be required, they are presumably referring to unilateral effects involving product and/or geographic differentiation. If that is the intent, it should be made more explicit. Conversely, the reference in Section 6.28 - "Market concentration is a necessary but not sufficient condition" - underscores that market definition is required in coordinated effects cases.

7 To illustrate, Sections 6.13-6.18 do not actually provide much guidance on establishing market effects without market definition.

to most merger reviews, which are generally prospective. Even then, it would have to be demonstrated that the price increase was attributable to the merger. It would be helpful to indicate the methodologies the Bureau would use to assess competitive effects where market definition is not pursued.

Part 4 − Market Definition

Much of the language of Part 4 is taken from the 2004 MEGs. Nonetheless, this might be an opportunity to reiterate a fundamental point that is often misunderstood. The 2004 MEGs changed the 1991 MEGs to define markets in terms of whether a hypothetical monopolist "would" (not "could") impose a SSNIP. Thus, it is not enough that a 5% (or other significant amount) increase could be imposed and make the hypothetical monopolist at least $1 better off (i.e. a "profitable" price increase). It is the profit maximizing price that must exceed the SSNIP. In other words, if the hypothetical monopolist in the candidate market would be $1 better off with a 5% price increase, but would maximize profits at a 2% increase, then the relevant market must be broader. The difference in practice can be significant. In short, the language of the MEGs could be revised to make this "would" versus "could" distinction clearer.

The last sentence of Section 4.3 is problematic. The presence or extent of market power should not influence the definition of the market itself as distinguished from an analysis of whether any lessening or prevention of competition is substantial. Further, since many markets in which significant competition issues arise involve pre-existing market power, using a smaller SSNIP would lead to artificially small markets in many cases.

Section 4.16 sets out a useful discussion of primary and secondary products. The CBA Section finds this discussion somewhat too binary, as suggesting either a single system market or two separate primary and secondary markets. In reality, there may be buyers who will expect or actively encourage the development of a secondary market when none exists at the time of purchase of the primary product, and count on that occurring in their decision to buy the single product initially. The examples in section 4.16 involve cases where secondary markets evolved from “locked-in” primary markets, where the primary supplier was initially the only supplier of the relevant secondary products.

Section 4.18 of the Draft MEGs raises the issue of two-sided markets. While two-sided markets may warrant consideration, the mere mention of two-sided markets, without more, does not

address their complexity, nor does it provide a sufficient basis for understanding the Bureau's views on, and approaches to, an assessment of these markets. The CBA Section encourages the Bureau to expand the discussion of two-sided markets throughout the MEGs. For example, changes on one side of the market (e.g, adding together the subscribers of two networks) may very well affect the other side of the market by making it more valuable to users – even though users may have reduced choice and face an absolute price increase, they may very well be better off from the use of a more valuable network. This is a non-exhaustive example of the kind of further explanation that might be helpful.

Part 5 − Market Shares and Concentration

There is no counterpart in Part 5 of the Draft MEGs to the corresponding Section in the 2004 MEGs on "participating in the market through supply responses". It is not clear why this reference has been deleted, since this can be an important competitive constraint.

While the Draft MEGs now include a helpful Section on bid markets (i.e. Sections 6.21-6.22), the Bureau might consider pointing out in Part 5 that in bid situations, market shares are less meaningful, in addition to the existing note that an SLPC is less likely where there remains a minimal number of viable bidders post-merger.

Part 6 − Unilateral Effects

The expanded discussion of the economic theories behind unilateral effects is a helpful addition. The Draft MEGs shift from a focus on firms distinguished primarily by their products and their capacities to separate discussions of markets featuring differentiated products, homogenous products, and bidding and bargaining.

For differentiated products,[8] the Draft MEGs contain a more detailed examination of the closeness of competition between the products of the merging firms, and how that can be measured using diversion ratios. However, what is not noted is that it can frequently be difficult to calculate, or estimate, diversion ratios. Understanding the customer preferences that underpin diversion ratios can also be accomplished using qualitative measures, such as examinations of the parties' own documents for win-loss data and customer surveys, as the

[8] The discussion is framed in terms of product differentiation, but presumably the same applies to geographic differentiation. This should be made explicit.

Draft MEGs acknowledge at Section 6.18. The CBA Section believes it would be beneficial to clarify when the Bureau will expect a quantitative analysis to be undertaken and when a qualitative analysis will be sufficient.

The statement in Section 6.14 – "Any sales that were previously lost to the firm's merging partner will be captured by the merged firm" – is too categorical. Sales may be lost to other firms, depending on relative pricing, differentiation and a number of other considerations.

In Section 6.16, it is not clear what "when buyers are sensitive to price increases" adds or why it is any more relevant here than elsewhere. For example, the same phrase appears in Section 6.19 in respect of homogenous products.

Because diversion ratios are a backward looking measure, the Draft MEGs rightly acknowledge that it is important to assess the likely responses to the merger of buyers and rival firms. To truly reflect the dynamism of the market, it is important to examine the potential for product repositioning and the role of niche sellers, as is done in Section 6.17.

It is not clear why the bulleted factors in Section 6.19 are any more relevant to homogenous, as opposed to differentiated, markets. An expansion of the Bureau's reasoning would be useful.

For the new discussion of bidding and bargaining markets, the CBA Section applauds including the clear statement in section 6.22 that "a merger involving two sellers is unlikely to prevent or lessen competition substantially" where "there are many bidders or potential suppliers that are equally or similarly situated as the merging parties." The Bureau might replace "many" with "a number of" or "sufficient" since only a few bidders may be an effective discipline.

The Bureau might consider adding text in or after Section 6.39 along the lines of footnote 54 to reflect that mergers can also create, not just remove, mavericks.

Part 7 – Entry

Further to the general observation above, when assessing the timeliness of entry in response to a merger, Section 7.3 of the Draft MEGs substitutes the stipulation that entry "normally must occur within a two-year period" with "must occur quickly enough to deter or counteract any material price increase owing to the merger." Although in using the qualifier "normally" the

current MEGs leave open the possibility that entry may need to occur earlier than two years, the Draft MEGs, in stipulating that "entry must occur quickly enough", seem overly restrictive when considering that a material price increase may be instituted shortly following completion of the merger. If the merging parties credibly are able to increase prices the day after the merger, must entry be likely to occur on that day? What if entry is likely to occur within a month, three months, six months, a year, or two years after the merger occurs? Are these timeframes considered "quickly enough"?

In short, the proposed change introduces uncertainty over what period of time will be considered "reasonable". This new standard also may be far too demanding of merging parties, in that (unlike the 2004 MEGs) it now requires entry "must occur quickly enough to deter or counteract **any** material price increase owing to the merger" (emphasis added).

Parts 8 and 9 − Countervailing Power and Monopsony

As noted in the CBA Section's December Submission, a number of factors outlined in the guidance documents of other jurisdictions (e.g., refusing to buy other products produced by the supplier, delaying purchases, or using market power in another geographic market unaffected by the merger) merited inclusion in the MEGs, and those have now been incorporated. In addition, it is useful to include the discussion of monopsony issues in the MEGs, as the "one stop shop" approach for merger guidance is preferable to searching for policy papers submitted to various forums by the Bureau.

In Section 9.1, lower input prices will not necessarily result in "a corresponding reduction in the overall quantity of the input produced or supplied". Absence of price discrimination is required for an output effect, whether monopoly or monopsony. Although monopsony is sometimes viewed as the mirror image of monopoly, in practice price discrimination is often more feasible in upstream markets – e.g., individual negotiations with suppliers. Thus, even where upstream bargaining power may increase, there often may not be a corresponding output effect. Moreover, many upstream markets are narrower than, and derivative of demand in, downstream markets – in which case, even an output effect upstream may not produce a downstream effect or loss of consumer or total welfare.

Part 10 – Minority Interest Transactions and Interlocking Directorates

We welcome the discussion of the Bureau's analytical approach as to whether a partial interest or interlocking directorate is likely to prevent or lessen competition substantially. However, the Bureau may consider clarifying a number of points.

For example, in Section 10.2, the Draft MEGs state that the Bureau will begin its assessment with an "examination of the transaction as a full merger between the acquirer and the target firm." Where the Bureau concludes that a full merger would not likely prevent or lessen competition substantially, the Bureau would "not generally" undertake a more detailed assessment of the transaction. The CBA Section recommends identifying in the MEGs those situations where the Bureau would undertake a more detailed analysis despite its conclusion that a full merger would not likely prevent or lessen competition substantially, rather than relying on the qualifying statement that the Bureau would "not generally" undertake a more detailed review, perhaps in a footnote to Section 10.2.

While the Draft MEGs have retained the 10% voting interest threshold regarding acquisitions of a "significant interest" in Part 1 of the Draft MEGs, the Bureau has not set out "safe harbour" protections, such as *de minimis* thresholds, for interlocking directorates. Given Canada's relatively small population, interlocks are likely to be more common than in the U.S. for example, and so such protections would be welcome.[9] The CBA Section urges the Bureau to reconsider *de minimis* thresholds for interlocking directorates and to consider additional "safe harbour" thresholds for pre-existing minority interests as previously recommended.[10]

Including "safe harbour" protections in the MEGs would clarify the situations where an interlocking directorate or a partial interest may be of concern to the Bureau. However, should the Bureau not wish to set out additional "safe harbours" in the MEGs, the CBA Section encourages the Bureau to incorporate examples in the MEGs, highlighting those situations in which an interlocking directorate or partial interest may cause the Bureau concern.

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[9] National Competition Law Section, Canadian Bar Association, *Submissions regarding Draft Fee and Service Standards Handbook for Merger-Related Matters*, August 2010, at 7 http://www.cba.org/CBA/submissions/pdf/10-52-eng.pdf, and December Submission, at 8.

[10] December Submission, at 9.

Additionally, in Section 10.3, the Bureau says it is "generally not concerned" where an interlocking directorate "occurs solely through independent directors when the businesses do not compete." The CBA Section finds it difficult to envision a scenario where an interlock arising solely through independent directors of non-competing businesses would cause the Bureau concern. The Bureau should consider providing examples of when it may be concerned rather than relying on the "generally" qualifier.

The wording of Section 10.6 is somewhat confusing. If it is describing the mere acquisition of a passive minority interest in a target, then it would seem to follow that there was no ability to materially influence the target for purposes of Section 91 of the *Competition Act*.

Part 11 − Non-Horizontal Mergers

Section 11.2 of the Draft MEGs notes that non-horizontal mergers (NHMs) are generally less likely to harm competition than horizontal mergers and can frequently create significant efficiencies. Indeed, just as tied selling, exclusive dealing, market restriction and price maintenance are often pro-competitive and efficiency enhancing, vertical mergers should be treated as per se efficient unless they will clearly prevent or lessen competition substantially. Such acknowledgements in Section 11.2 are important and these realities ought to be a starting point in the Bureau's analysis. The Bureau should give additional guidance as to when it will require parties to provide detailed information on NHM or non-horizontal aspects of an otherwise horizontal merger, and what information parties should consider providing at the outset to speed the review process.

The discussion of NHMs in the Draft MEGs appears to follow several of the economic theories in the European Union's *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*.[11] Having regard to the paucity of non-horizontal merger cases in Canada, and the more significant experience in Europe with such cases, adopting analytical frameworks derived from the EU NHM Guidelines is not entirely unreasonable. However, the Bureau's application of these analytical frameworks should remain flexible, particularly as they are largely untested in Canada.

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[11] [2008] O.J. C 265/07 (EU NHM Guidelines). By contrast, Part 10 (Vertical Mergers) and Part 11 (Conglomerate Mergers) in the 2004 MEGs appear to be largely modeled after the U.S. *Non-Horizontal Merger Guidelines:* U.S., Department of Justice, *U.S. Department of Justice Merger Guidelines*, (1984), Part 4.

Any negative competitive impact that may potentially be raised by a vertical or conglomerate merger, either on the basis of unilateral or coordinated effects, heavily depends on whether the post-merger firm will have greater market power post-merger, than it did prior to the merger. As in the EU NHM Guidelines (and the 2010 U.S. *Non-Horizontal Merger Guidelines*), it would be helpful if the proposed Section on NHMs stipulated market share safe harbours (and any other relevant safe harbour thresholds) for unilateral and coordinated effects in respect of applicable markets (either upstream or downstream), as appropriate.

Unlike Part 10 (Vertical Mergers) of the 2004 MEGs, the proposed NHM Section no longer refers to the potential of a vertical merger to raise barriers to entry by effectively forcing new entrants to attempt simultaneous two-stage entry. Only if removing this discussion reflects a shift in the Bureau's analytic framework is it appropriate to leave the discussion out.

For Section 11.8, the CBA Section believes it is unlikely that the Bureau would have reasonable grounds to oppose a conglomerate merger on speculation of post-merger tying arrangements. In any event, Section 11.8 of the Draft MEGs should specifically state that competitive concerns that may arise with a conglomerate merger would generally only pertain to mergers where the products between the parties to the transaction are complementary or belong to the same product range. If the Bureau has a position on the potential of conglomerate mergers to raise barriers to entry, it would be appropriate to reference this in the proposed NHM Section.

The concerns about potential coordinated effects of vertical mergers expressed in Sections 10.5 to 10.7 of the 2004 MEGs have been kept in Section 11.9 of the Draft MEGs. Section 10.6 of the 2004 MEGs identified the conditions under which a vertical merger would not prevent or lessen competition substantially on the basis of it enhancing the ability of firms in the upstream market to monitor the prices of rivals at the upstream level. However, Section 11.9 of the Draft MEGs does not identify conditions. The proposed Section on NHMs should identify the conditions under which the Bureau will consider a vertical merger not to prevent or lessen competition substantially on the basis of potential coordinated effects either at the upstream or downstream level. Further, the reference in the second bullet in Section 11.9 to a conglomerate merger "reducing the number of rivals" is unclear.

It is particularly important to note that, like theories of raising rivals' costs (RRC) or reducing rivals' revenues (RRR), it is insufficient in the analysis of a NHM to simply find that there might

be an increased likelihood of input foreclosure (either partial or complete) as a result of the merger. Rather, it must be likely that the foreclosure will also lead to raising rivals costs and that will ultimately lead to materially higher prices or materially reduced output (i.e., have a negative welfare effect, after accounting for efficiencies). In other words, the conduct must be likely to occur (i.e., because it is profitable for the merged entity in a way that it was not pre-merger), and the strategy must be likely to create a 'price umbrella' under which the merged entity can profitably raise its prices for a material period of time and on a scale that will not attract entry or induce rivals to secure other sources of supply (or customers in the case of customer foreclosure) in due course.

Part 12− Efficiencies

The CBA Section believes that there is an opportunity in the revised MEGs for the Bureau to better articulate various issues in the treatment of efficiencies. As it stands, while Part 12 of the Draft MEGs is generally helpful, in some respects it is less clear than the 2004 MEGs. The Bureau should also address the status of its March 2009 Bulletin on efficiencies in merger review once the Draft MEGs are final. Since that Bulletin provided practical guidance on the Bureau's enforcement approach under the 2004 MEGs, and there are some notable changes in the approach to efficiencies in the Draft MEGs, a revised bulletin or incorporation of the relevant contents of the 2009 bulletin into the Draft MEGs is warranted.

The CBA Section welcomes the comment in Section 12.3 that the Bureau "will not necessarily resort to the Tribunal for adjudication of the issue [of efficiencies]". However, this is to some extent undermined by the statement in Section 12.12, which refers to an internal assessment of the efficiency trade-off before deciding whether to challenge a merger in the Tribunal. This statement should be modified to remind the reader that the Bureau may decide on the basis of its internal assessment that the parties have satisfied the efficiency defence in Section 96 without resort to the Tribunal.

The CBA Section notes with approval the helpful statement in Section 12.7 regarding cost savings being relevant to the Section 92 analysis.

The Bureau's demanding evidentiary requirements for efficiency claims set out in Section 12.10 (access to premises, information from operations-level personnel, etc.) suggest an extremely high hurdle before efficiency gains will ever be accepted. A high hurdle was clearly

not Parliament's intent in enacting Section 96. Moreover, excessive weight should not necessarily be placed on pre-existing documents relating to efficiencies as few companies will have fully undertaken the necessary due diligence required to assess the applicability of the efficiencies defence until a merger is proposed. Expert reports based on company data and created for the merger should be given equal weight as an evidentiary matter, as they were in *Superior Propane*.

Section 12.26 omits reference to the Tribunal's approach in *Superior Propane* on socially adverse effects, although a discussion appears in the 2004 MEGs. Given that the law has not changed, this omission leaves the impression that there is no precedent on the approach that may be taken and that the issue is much more unclear or undefined than it really is.

The Draft MEGs identify in Section 12.31 the additional requirement that efficiencies "offset" the anti-competitive effects of a merger. This is presented as yet another, additional hurdle to making an efficiency case, but the Draft MEGs offer no guidance even though they acknowledge the issue “has yet to be tested by the courts”.

IV. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they will be of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau’s convenience.