CANADIAN BAR ASSOCIATION
ASSOCIATION DU BARREAU CANADIEN

April 08, 2026

Via email: jeanne.pratt@cb-bc.gc.ca

Jeanne Pratt
Acting Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Acting Commissioner Pratt:

Re: Draft Updated Merger Enforcement Guidelines

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA) (the "**Section**") is pleased to provide the following submission to the Competition Bureau's ("Bureau") consultation on the proposed updates to its Merger Enforcement Guidelines ("MEGs"), as reflected in the draft published for public comment on November 13, 2025 (the "Draft Revised MEGs").

The CBA is a national association representing over 40,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, and effective law reform, and offer expertise on how the law touches Canadians' lives every day. The Section comprises approximately 1,000 lawyers and promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

As the Section has emphasized in past submissions to the Bureau, the MEGs are a cornerstone guidance document for members of the competition bar and their clients. They are consulted daily to assist in analyzing existing and potential transactions, both to understand the Bureau's merger enforcement framework and to enable practitioners and their clients to approach merger review processes before the Bureau effectively and efficiently.

The Section commends the Bureau for the extensive effort and resources it has devoted to the Draft Revised MEGs. It is clear from the proposed revisions that the Bureau has carefully considered the comments it received in the first round of consultation. The Section welcomes the significant continuity between the prior version of the MEGs and the Draft Revised MEGs, reinforcing that the substantive test in the Competition Act (the "**Act**") for the assessment of mergers has not changed.

The MEGs undoubtedly represent some of the most significant guidance issued by the Bureau. This guidance offers much needed clarity to Canadian and international businesses and their counsel on the Bureau's approach in reviewing transactions. The CBA Section therefore believes that the timeline for the issuance of the final revised MEGs should take into account the upcoming appointment of a new Commissioner of Competition (the "**Commissioner**"), having regard to both the foundational nature of the MEGs and the importance of the new Commissioner having the opportunity to consider and finalize the guidance that will be issued regarding the Bureau's merger enforcement under the Act.

The Section's commentary in this submission focuses on key areas, including the Bureau's incorporation of the structural presumption at section 92 of the Competition Act into its approach to merger review, the elimination of a "safe harbour", which has been present in the MEGs since 1992, the need for greater transparency in merger review, and the treatment of pro-competitive effects. Additional comments are provided on several other points.

Treatment of structural presumption in the Bureau's merger review process

Certain portions of the Draft Revised MEGs leave the impression that the Bureau's approach to substantive merger review has changed as a result of the introduction of the statutory presumption in section 92(2) of the Act. The Section notes in particular the following comment in the Draft Revised MEGs:

> *Where a merger meets the prescribed thresholds set out in the Act, the Bureau will presume that the merger is likely to harm competition substantially. This presumption may be refuted when other evidence proves that the merger will not likely substantially harm competition.*[1]

The Section respectfully submits that it would not be appropriate for the Bureau to alter its approach to assessing the factors set out in the Act solely based on a finding of market share. While the Bureau may certainly choose to make a judgment when considering whether to proceed to adjudicated proceedings based on whether an analysis of the structural presumptions would strengthen its position before the Competition Tribunal, it would be inappropriate – and beyond the legislative purpose of section 92(2) - to incorporate a presumption of harm into the administrative review of mergers for the reasons described below.

(a) The MEGs should reflect that Parliament left the fundamental substantive test for merger assessment unchanged.

The Draft Revised MEGs clearly state that the evaluation of mergers under section 92 of the Act is based on an assessment of whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially ("**SPLC Standard**"). This appropriately reflects that recent amendments to the Act intentionally left the core substantive test for merger review unchanged.

Given that the SPLC Standard remains the fundamental basis for merger review, the Section has concerns about the apparent oversimplification of the SPLC analysis in the Draft Revised MEGs, arising from the significant emphasis on the structural presumption in the Bureau's approach to merger review. As part of Parliament's study into Bill C-59, which ultimately introduced rebuttable structural presumptions into legislation, the Commissioner recommended "U.S.-style presumptions" which are subject to rebuttal by the merging parties and "allow for **a full assessment of relevant factors**" [emphasis added].[2] Accordingly, it would be important for the Draft Revised MEGs to reflect that presumptions serve as guideposts for analysis while still allowing a full assessment of relevant factors.

Recommendation:

1. The Draft Revised MEGs should more clearly acknowledge that the structural presumption is a burden-shifting provision and does not change the Bureau's holistic assessment of a merger's effect on competition using the factors in section 93 of the Act.

---

1 Competition Bureau, "Proposed Merger Enforcement Guidelines" (November 13 2025) at para 66, ("**Draft Revised MEGs**").

2 See, Competition Bureau Submission to the House of Commons Standing Committee on Finance (March 1, 2024), online.

(b) Shifting the burden during the administrative review of a merger, whether explicitly or implicitly, would be procedurally unfair to the merger parties.

The Section is concerned that any over-reliance on the structural presumption as a proxy for a fully examined determination of potential harm to competition in the context of the Bureau's administrative review of transactions creates significant procedural imbalances between the Bureau and the merging parties. In this context, section 92(2) sets out the legal burdens of proof in an adjudicated proceeding before the Competition Tribunal, where parties at trial will have engaged in all pre-trial steps, including documentary and oral discovery. In particular, section 92(2) states that "if the ***Tribunal*** finds, on a balance of probabilities, that a merger or proposed merger results or is likely to result in a significant increase in concentration or market share, the ***Tribunal*** shall also find that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, unless the contrary is proved on a balance of probabilities *by the parties* to the merger or proposed merger." [emphasis added] This is entirely separate from an administrative review of a merger by the Bureau, which is not an adjudicative process and which process does not (and should not) contemplate burden shifting mechanisms.

In the alternative, should the Bureau pursue the application of the presumption as an analytical tool during administrative merger review, as a matter of fairness and due process, the review process must allow the merging parties to obtain information that allows them to meaningfully address the determination that the presumption is triggered, even though they do not have full rights of discovery available. In administrative merger control systems, this is known as "access to file". Absent such access, there is significant information asymmetry between the merging parties and the Bureau regarding both the application of the presumption and the scope of evidence that may rebut it.

For example, in Germany,[3] where presumptions are enshrined in legislation, the structural presumptions are balanced with robust "access to file" rights during the administrative investigation.[4] Merging parties can see the case file before a final decision is made, while the confidential information collected by the competition agency from third parties is appropriately protected. In addition to this, third parties with a "legitimate interest."[5] have a right to be heard, access to the file, and full rights of appeal against the agency's decisions.[6] These procedural fairness and transparency principles are fundamental and constitutionally protected in Germany's merger control regime.[7]

The Bureau's administrative review process does not afford the same procedural safeguards. Limited information regarding the basis for the Bureau's conclusions is shared with the merging parties, often due to concerns about the protections afforded by section 29 of the Act. The Section believes that there is more information about the basis for the Bureau's findings that can be shared with the merging parties during the review than is currently the case, without raising confidentiality concerns. For example, this could include which firms are included in the relevant market and why; the basis for geographic distinctions in the relevant market; the data relied upon to calculate share and/or product estimates; the total market size; and pre-merger HHI calculations, *etc*.

---

3 The Section notes that the Bureau's submission advocating for a structural presumption in Canada as part of the amendments process explicitly referenced Germany. See, Competition Bureau Submission to the House of Commons Standing Committee on Finance (March 1, 2024) at footnote 2.

4 See OECD, "The Use of Structural Presumptions in Antitrust – Note by Germany" (November 28 2024), online, and German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), s. 56, online, ("**GWB**").

5 GWB, s. 56(5).

6 ICLG, "Merger Control Laws and Regulations Germany (2026)" at para 4.4, online.

7 OECD, "Procedural Fairness: Competition Authorities, Courts and Recent Developments" (July 6, 2012) at p 48, online.

However, there are limits on what can be shared. The fundamental problem, including as a result of section 29 of the Act, is that the Canadian merger review process is not set up to accommodate an access-to-file right that would be required to accompany the shifting of the evidentiary burden to the merging parties in the course of the pre-litigation review of transactions. Rather, under the existing process, merging parties need to litigate before the Tribunal to see the evidence underlying the Commissioner's analysis and conclusion. As that is not practical or reasonable in most cases, given the time and cost to litigate under the existing procedural framework, merging parties rely on the Bureau to undertake an administratively fair assessment.

The merger review process, as currently constituted, therefore requires, as a matter of procedural fairness, that the Bureau examine a merger with a neutral lens and use its information-gathering processes and powers to view it holistically. The Bureau's role must be to examine the evidence, giving each factor attention and weight, and then conclude the substance, having examined all the evidence. The Bureau's assessment of the strength of its case in deciding whether to proceed to adjudication is a separate consideration. The purpose of the structural presumption is to apply to that narrow category of transactions for which the Bureau's holistic assessment concludes an SPLC is likely and which subsequently results in litigation before the Tribunal.

Recommendation:

2. The Section recommends that the Bureau make clear that it will assess a merger with a neutral lens, examining all available evidence neutrally to avoid concerns about procedural fairness. Applying or imposing legal structural presumptions in the context of an administrative merger review would require adjustments to the procedural safeguards and information disclosure associated with the exercise of the Bureau's enforcement discretion, some of which may require changes to the Act in addition to changes in Bureau procedures.

Increased transparency in merger review is essential to enable merging parties to present their case to the Bureau effectively.

In considering whether parties to a merger have rebutted a presumption, the Draft Revised MEGs state that the Bureau will apply a sliding scale: the greater the degree by which the thresholds are exceeded, the greater the need for "persuasive evidence" to overcome the presumption. While the Draft Revised MEGs suggest that evidence showing effective remaining competition, likely timely and sufficient entry, and other market-specific constraints on any potential exercise of market power by the merged firm are important in this regard, specific categories of rebuttal evidence that the Bureau considers to be persuasive are not identified. The Draft Revised MEGs would benefit from additional, detailed discussion of what, in the Bureau's view, would constitute sufficient rebuttal evidence, especially regarding the effectiveness of remaining competition, entry, and expansion, which are frequently key points in the analysis.

For example, regarding entry, the additions to Section 4.5 in the Draft Revised MEGs provide examples of evidence that may be indicative of significant barriers to entry (such as sunk costs, regulatory barriers, switching costs, network effects, *etc.*).[8] These examples relate to factors that would support an SPLC finding (rather than circumstances indicating low barriers). Stakeholders using the revised MEGs would welcome the Bureau's guidance on market conditions and associated evidence that would lead the Bureau to conclude that barriers to entry are not conducive to an SPLC.

The Section also submits that the MEGs should provide additional guidance with respect to the situations where the Bureau is able, in circumstances where a presumption is triggered, to quickly conclude the review of a matter without issuing a supplementary information request under section 114(2) of the Act or taking further investigative steps.

---

8 Draft Revised MEGs at para 273.

Recommendation:

3. The Draft Revised MEGs should provide more detailed guidance on the key points the Bureau will consider and on the type of information that would be considered compelling with respect to the SPLC analysis.

While the Draft Revised MEGs describe the factors and considerations assessed in the course of merger review, merging parties without very recent experience of Bureau merger review have very limited information about the Bureau's view of competition in their industry or in similar factual circumstances. Many administrative merger control regimes around the world publish reasoned decisions even in simple cases, providing clarity on the evidence used to reach an enforcement decision, on how to approach market definition, and the types of evidence found to be persuasive in an administrative merger review. The European Commission is a good example, among others.

Published summaries of the approach taken in merger reviews are especially important for building precedential guidance on market definition and the measurement of shares/concentration, and even more important if the Bureau intends to apply the structural presumption to its own administrative merger review process moving forward, as the Draft Revised MEGs imply.

Recommendation:

4. The Bureau should provide greater transparency in its review process by reinstating the practice of publishing position statements and doing so for as many transactions as possible.

Safe Harbour

Providing certainty to merging parties remains a key objective of the MEGs. Consistent with the Section's comments submitted in April 2025 in response to the initial consultation on the MEGs,[9] the Section submits that the Draft Revised MEGs do not provide sufficient guidance to merging parties on the types of transactions that are, in general, not likely to give rise to material competition concerns. From the perspective of advising clients on regulatory risk allocation and providing a degree of regulatory predictability, the Section recommends that the Bureau consider including a market-share "safe harbour" in the revised MEGs, caveated as appropriate.

A safe harbour is not inconsistent with the structural presumption. As noted, the presumption is a burden-shifting tool in litigation, not a finding of fact. There will be (and indeed are) many cases in which the Bureau finds no competition concern when unilateral shares exceed 30%. Conversely, the Draft Revised MEGs state that an SPLC can be found where merging parties do not exceed the structural presumption.[10] This is similar to the 35% safe harbour in the 2011 version of the MEGs, where it is stated that in the specific circumstances of a given case, the Bureau could find an SPLC in a horizontal merger where the combined firm's share was less than 35%.[11]

Further, from a practical perspective, the introduction of the presumption does not affect the Bureau's long-standing merger review under the same SPLC Standard that continues to apply since legislative amendments in 2024. For many years, the Bureau saw fit to maintain a safe harbour to provide guidance based on its own experience with merger review. There is no conceptual reason that this approach should change.

---

9 CBA, "Submission to the Competition Bureau on Merger Enforcement Guidelines Review" (April 2 2025), online.

10 Draft Revised MEGs at para 67.

11 Competition Bureau Merger Enforcement Guidelines, October 6, 2011, part 5.9.

While the Section appreciates that it could be confusing to maintain a unilateral safe harbour of 35% given the structural presumption is established at 30%, a safe harbour of 30% would be clear, consistent, and provide appropriate guidance to the business community.

Recommendation:

5. The Draft Revised MEGs should include a safe harbour concept for transactions where the post-merger combined share of the merging parties would fall at a level that is below the current 30% structural presumption threshold.

Clarification regarding the application of presumption in the analysis of coordinated effects

The Draft Revised MEGs imply a shift in the Bureau's approach to the assessment of coordinated effects, indicating, at paragraph 194, that a merger exceeding the structural presumption will be presumed to harm competition based on both unilateral and coordinated effects. In parallel, the Draft Revised MEGs otherwise retain most of the 2011 guidance on the assessment of coordinated effects, including the analytical focus on (amongst other things) the degree of market transparency, product homogeneity, and the ability to observe and punish deviations.[12] The Section recommends clarifying this approach.

For example, a market in which the merging parties hold 30% and 3% shares, respectively, and compete with no fewer than 13 other competitors with approximately 5% share each, would, according to the Draft Revised MEGs, be presumptively anti-competitive due to its susceptibility to coordination. It is not clear how a market structure of this nature would otherwise meet the analytical criteria the Bureau uses to determine whether a market is susceptible to coordination. Accordingly, the Section submits that the market share levels in the statutory presumption are not relevant to coordinated effects theories of harm.

Recommendation:

6. The Bureau should reconsider its guidance that the market share presumptions will be treated as indicating that coordinated effects are likely to result from a merger.

Role of pro-competitive benefits in merger review

The Section welcomes the acknowledgment in the Draft Revised MEGs that pro-competitive effects will be considered, along with other factors, in weighing the evidence regarding the impact of a transaction on competition. However, there are areas of the proposed section 4.7 of the Revised Draft MEGs that the Section considers would benefit from greater detail and/or clarification.

The Draft Revised MEGs indicate that pro-competitive benefits could be one factor assessed under the general provision at section 93(h) of the Act, which enables the Tribunal to assess “any other factor that is relevant to competition”. The Section suggests that it be clarified that pro-competitive benefits “are to be” rather than “could be” considered.

It is also important to acknowledge that several other enumerated factors in section 93 also lend themselves to the consideration of pro-competitive benefits. For example, section 93(g.3) identifies "any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy”. Pro-competitive effects on non-price dimensions of competition, including quality, choice, and consumer privacy, are just as relevant to the assessment of a transaction as any negative effects. Similarly, transactions can spur innovation; accordingly, the Section would expect that an assessment under section 93(g) will include the potential pro-competitive impact of a transaction on innovation in the relevant market(s), as well as any negative effects.

---

12 Draft Revised MEGs at paras 196-202.

Recommendation:

7. The Draft Revised MEGs should acknowledge the broader scope and importance of the assessment of pro-competitive benefits as part of the analysis of competitive effects under section 93 of the Act.

Further, while the Draft Revised MEGs prescribe certain conditions that the Bureau believes would be necessary to meet to demonstrate that pro-competitive benefits should be "counted" in the overall SPLC assessment, the Section submits that the Bureau reconsider the commentary on how such effects, if established, will be weighed against other assessment factors. The Draft Revised MEGs indicate that where "a merger otherwise presents significant competition concerns, even gains that are supported by rigorous evidence are unlikely to change our conclusions regarding harm to competition."[13] The Section respectfully submits that this statement is neither consistent with the language of the Act nor its stated purpose, and that the Draft Revised MEGs would benefit from removal or revision to reflect a more balanced approach**.**

The Section draws the Bureau's attention to guidance on this point issued by agencies in the U.S., the United Kingdom, and the European Union. Each of these jurisdictions articulates a more balanced approach to the weighing of such evidence:

- The U.S. *Merger Guidelines*[14] Identify similar assessment criteria to the Draft Revised MEGs (regarding merger specificity and verifiability) and note that the merging parties "must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition".
- The U.K. takes a similar approach, using a framework that seeks to determine if merger efficiencies will be timely, likely, and sufficient to prevent an SLC from arising; the greater the expected adverse effect of the merger, the greater the expected efficiencies must be.[15]
- The European Commission adopts similar assessment criteria, and notes within its commentary on verifiability that the efficiencies claimed must mean that the "Commission can be reasonably certain that the efficiencies are likely to materialize and be substantial enough to counteract a merger's potential harm to consumers".[16]

In summary, a position that robustly supported efficiency claims would never result in the Bureau altering its assessment of the merger's holistic impact on competition, making Canada an outlier amongst peer agencies around the world. More importantly, such a stance has the potential to be contradictory to the text of section 93, which acknowledges the relevance of pro-competitive benefits in the legal determination under section 92, and the purpose of the Competition Act, which "…is to maintain and encourage competition in Canada to promote the efficiency and adaptability of the Canadian economy".[17]

Recommendation:

8. The Draft Revised MEGs delete or revise the following paragraph: "Generally, when a merger otherwise presents significant competition concerns, even gains that are supported by rigorous evidence are unlikely to change our conclusions regarding harm to competition".

---

13 Draft Revised MEGs at para 2 88.

14 U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines" (December 18, 2023) at p 32, online.

15 Competition and Markets Authority, "Merger Assessment Guidelines" (March 18, 2021) at p 67, online.

16 European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulations on the control of concentrations between undertakings*, [2004] OJ, C 31/5 at 13.

17 Section 1.1.

The Section also notes that the Draft Revised MEGs contain no discussion of the relevance of the commercial rationale for a transaction to the assessment of potential pro-competitive benefits.[18] In many cases, ordinary course documents of the merging parties articulate a transaction rationale consistent with the pursuit of pro-competitive objectives. The relevance of evidence related to transaction rationale should be discussed in the Draft Revised MEGs.

Recommendation:

9. Section 4.7 of the Draft Revised MEGs discusses how the Bureau considers the commercial rationale for transactions and the ordinary-course documentary evidence related to such rationales.

Entry

Given the jurisprudence that has developed regarding the timeliness criterion in the entry analysis since the last iteration of the MEGs,[19] the Section considers that the Draft Revised MEGs offer an opportunity to more precisely define the timeliness of entry beyond the concept of a "reasonable time".[20] For example, jurisprudence has considered the concept of discernibility and has guided assessments of the lead time for entry based on the temporal circumstances of a given industry or market.[21]

Recommendation:

10. The Draft Revised MEGs should be revised to incorporate more detailed guidance on how entry timing is assessed in accordance with case law.

Vertical mergers

The Section continues to believe, as submitted in April 2025,[22] that it is not appropriate to apply the structural presumption to non-horizontal mergers, especially given that Parliament legislated that the presumption applies when a merger causes an increment in market share or market concentration. This fundamental point is not addressed correctly in the Draft Revised MEGs, which note at paragraph 229 that a share exceeding 30% is more likely to lead to a deeper investigation into a vertical overlap. The Draft Revised MEGs do not explain why the 30% share threshold – statutorily designed to shift the onus in merger litigation where the merger involves a horizontal overlap – should be used as a proxy for triggering in-depth assessment in a vertical context. Indeed, neither U.S. jurisprudence nor the U.S.' *Merger Guidelines* applies the structural presumption to vertical mergers. The jurisprudence recognizes that the presumption is designed to apply to "a merger which produces a firm controlling an undue percentage share of the relevant market".[23] By definition, a merger cannot increase the combined firm's market share in a purely vertical transaction, and the US agencies recognize this in the 2023 *Merger Guidelines* discussion of the role of market share evidence in vertical analysis.[24]

---

18 The only reference to "rationale" in the Draft Revised MEGs is at paragraph 267, in the context of discussing the verification of potential entry/expansion analysis.

19 In particular, *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 ("**Tervita**").

20 See Draft Revised MEGs at para 260.

21 Tervita at paras 68, 71-75.

22 CBA, "Submission to the Competition Bureau on Merger Enforcement Guidelines Review" (April 2 2025), online.

23 *United States v. Phila. Nat ' l Bank*, 374 U.S. 321, 363 (1963); see, e.g., *FTC v. Hackensack Meridian Health*, Inc., 30 F.4th 160, 172-73 (3d Cir. 2022); *United States v. AT&T, Inc.*, 916 F.3d at 1032.

24 See section 2.5 of the US "Merger Guidelines", which discusses vertical theories of harm and does not reference the structural presumption, online.

The Section also submits that the ability to foreclose should be grounded in a case-by-case assessment, rather than in assumptions about potential foreclosure based on market-share estimates. Moreover, elsewhere, the Draft Revised MEGs explicitly acknowledge that foreclosure cannot occur where "effective alternatives" exist for the merging parties.[25] However, the potential application of the presumption in the Draft Revised MEGs suggests that the Bureau will seriously question whether effective alternatives to the merged firm exist when such alternatives hold up to 70% of the supply of the input product.

Rather than using a 30% market share as *prima facie* evidence that a vertical merger is more likely to present the ability to foreclose, it would be useful for the Bureau to consider using a market-share safe harbor in vertical analysis by peer agencies. For example, the European Commission uses a 30% market share threshold as a safe harbour in non-horizontal merger review: provided the merging parties' upstream and downstream shares fall below this threshold, the transaction will *not* generally present any appreciable risk of foreclosure.[26]

Recommendation:

11. Paragraph 229 of the Draft MEGs should be reformulated to indicate that vertical mergers that involve market shares below 30% will normally not be considered to raise competition issues.

Conglomerate theories of harm[27]

As noted in the Section's April 2025 comments on the Draft Revised MEGs, if the Bureau intends to pursue conglomerate theories of harm based on unilateral effects, the discussion in Section 4.4.2 of the Draft Revised MEGs should be expanded. The Section acknowledges the Bureau's informal feedback during the recent CBA/Bureau roundtable that an ability/incentive framework, as in vertical mergers, likely does apply to conglomerate theories. However, further specificity on the types of evidence that differ between vertical and conglomerate theories of harm would help merging parties prepare for any such inquiry.

Recommendation:

12. The Revised Draft MEGs should be updated to explicitly state that conglomerate theories of harm generally employ a similar analytical framework to vertical theories, and to specify the types of evidence that may differ between the two.

Remedies

Like the 2011 iteration of the MEGs, the Draft Revised MEGs do not address the Bureau's approach to merger remedies. However, in light of the recent amendment to the legal standard applicable to remedies,[28] the Section understands that the Bureau may issue an updated version of its *Information Bulletin on Merger Remedies in Canada* in due course. In anticipation of that important step, the Section provides brief comments below on the interpretation of the "restoration of competition to pre-merger conditions" standard for merger remedies.

In applying the revised remedy standard, the Section proposes, consistent with peer jurisdictions that have a similar standard, that a restoration of competition standard should be grounded in an effects-

---

25 Draft Revised MEGs, para 226.

26 European Commission, "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2008/C 265/07) at para 25, online.

27 Draft Revised MEGs at para 239.

28 Section 92 (e) and (f).

based assessment of the impact of the remedy on competition, rather than tied to the creation of a market structure that is identical to the conditions that prevailed pre-merger.

Given that one of the Bureau's stated rationales for proposing changes to Canada's merger remedies standard is to bring the Act more in line with peer jurisdictions, [29] the Section has considered how the concept of restoring competition is interpreted in the U.S., the principal jurisdiction that employs this approach. In the U.S., the restoration of competition standard focuses squarely on restoring the competitive intensity lost through the merger, rather than prescriptively examining a remedy's effect on market structure or concentration levels. In cases including *FTC v. Sysco Corp.*, *United States v. Aetna Inc.*, [30] and *United States v. UnitedHealth Group Inc.*, U.S. courts have consistently examined whether a proposed remedy is likely to recreate the rivalry that constrained the merging parties before the transaction. This line of jurisprudence extends back to the Supreme Court's decision in *United States v. E.I. du Pont de Nemours & Co.* [31]

Recommendation:

13. The assessment of a proposed merger remedy under the new restoration standard should focus on the extent to which the remedy will achieve competitive intensity comparable to that of the pre-merger market, rather than on whether it will replicate exactly pre-merger market shares or other concentration measures.

Conclusion

The Section commends the Bureau for its timely publication of the Draft Revised MEGs and the open consultation. The Section would be pleased to discuss its comments further.

(original letter signed by Noel Corriveau for Dominic Therien)

Dominic Therien
Chair, Competition Law and Foreign Investment Review

---

29 Competition Bureau, "Examining the Canadian Competition Act in the Digital Era, Submission by the Competition Bureau" (February 8 2022) at 2.4, online.

30 *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 130 (D.D.C. 2022).

31 *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).