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### **Competition Bureau Issues Revised Merger Enforcement Guidelines**

Following a consultation process that was initiated in 2010, the federal Competition Bureau issued revised *Merger Enforcement Guidelines* (“MEGs”) on October 6, 2011.<sup>1</sup> This was not intended to be a major revision of the MEGs, but to provide an update to “reflect current Competition Bureau practice and current legal and economic expertise” with respect to the Bureau’s analysis of merger transactions.

“**Merger**”. The revised MEGs expand upon the broadly worded definition contained in the *Competition Act*.<sup>2</sup> In particular, with respect to the undefined phrase “significant interest”, the MEGs state that the Bureau considers “both the quantitative nature and qualitative impact of the acquisition or establishment of the interest”, and that a qualitatively significant interest is acquired where the acquirer “obtains the ability to materially influence the economic behaviour of the target business, including but not limited to decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights”. The MEGs include a list of factors that may be relevant to this analysis.

**Market Definition.** As was previously the case, the revised MEGs discuss market definition and the “hypothetical monopolist” test for defining relevant product and geographic markets. Under this test, the Bureau’s focus is on substitutability and demand responses to changes in relative prices after the merger. The relevant market is defined as the smallest group of products and the smallest geographic area in which a hypothetical monopolist would impose and sustain a “small but significant and non-transitory increase in price (generally, a 5% increase, for a one-year period). There is a

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<sup>1</sup> Available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

<sup>2</sup> At s. 91: “the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.”

significant change, however, in that the revised MEGs now state that while market definition analysis is generally undertaken, it “is not necessarily the initial step, or a required step.... Market definition, and the measurement of market share and concentration in the relevant market, is not an end in itself.” In cases where it is “clear that a merger will not create, preserve or enhance market power under any plausible market definition” or where “anti-competitive effects would result under all plausible market definitions”, the Bureau “need not reach a firm conclusion on the precise” nature of the relevant market.

**Minority Interests and Interlocking Directorates.** The MEGs include an expanded discussion of situations in which minority shareholdings or interlocking directorships could give rise to a “significant interest” that may constitute a merger. Such situations will be subject to review where they affect competition by influencing the pricing or other competitive incentives of the target, the acquirer or both.

**Non-Horizontal Mergers.** While horizontal mergers, between firms that supply competing products, are most often of concern to the Bureau, the revised MEGS expand upon the discussion of non-horizontal mergers. These are discussed in two categories: vertical mergers, between firms that produce products at different levels of a supply chain (e.g., between a supplier and a customer); and conglomerate mergers, between parties whose products do not compete but may be complementary may have an impact on competition.

**Other Changes.** The revised MEGs include discussion of certain economic concepts that reflect the 2010 revisions to the equivalent U.S. guidelines. These changes reflect the increased levels of co-operation among international competition authorities. Some commentators question the extent to which some of these changes in emphasis are supported by the wording of the *Competition Act* and existing case law and such arguments may be raised in litigated cases.

Please address any questions about the MEGs, mergers, or any other competition law matter, to Carol Anne O’Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

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