93. Factors to be considered regarding prevention or lessening of competition —

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COMPETITION ACT

COMPETITION ACT R.S.C. 1985, c. C-34

PART VIII MATTERS REVIEWABLE BY TRIBUNAL

MERGERS

93. Factors to be considered regarding prevention or lessening of competition —

In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

- **(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;**
- **(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;**
- **(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;**
- **(d) any barriers to entry into a market, including**
  - **(i) tariff and non-tariff barriers to international trade,**
  - **(ii) interprovincial barriers to trade, and**
  - **(iii) regulatory control over entry,**

  and any effect of the merger or proposed merger on such barriers;
- **(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;**
- **(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;**
- **(g) the nature and extent of change and innovation in a relevant market;**
- **(g.1) network effects within the market;**

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(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

[R.S.C. 1985, c. 19 (2nd Supp.), s. 45; S.C. 2022, c. 10, s. 264.]

COMMENTARY

Section 93 of the *Competition Act* sets out a non-exhaustive list of market-specific factors that could influence a merged firm's ability to lessen or prevent competition substantially by permitting it to maintain or enhance market power following the merger. Below we discuss the evaluative factors.

For a more extensive discussion on section 93 of the *Competition Act,* see the Competition Bureau's *Merger Enforcement Guidelines*.[1] In particular, see Part 6 - Anti-Competitive Effects, Part 7 - Entry, Part 8 - Countervailing Power, and Part 9 - Failing Firms and Exiting Assets.

(a) Foreign Products as Effective Competition

Subsection 93(*a*) enables the Tribunal to consider the extent to which foreign products or foreign competitors provide, or are likely to provide, effective competition to the merged entity as a factor in determining whether competition is likely to be prevented or lessened substantially.

The Bureau commonly evaluates the state of foreign competition in connection with mergers. For example, in connection with the acquisition of Organon BioSciences N.V. by Schering-Plough Corporation, the Commissioner considered the impact of foreign competition on Canada's animal health industry.[2] Importation of products from the U.S. was identified as a competitive alternative to domestic producers; however the degree of this competition was characterized as "low".[3] Similarly in connection with the merger of Abitibi-Consolidated Inc. and Bowater Incorporated, the Bureau examined the impact of foreign competition on Canada's newsprint industry and concluded that it was "limited".[4]

On the other hand, foreign competition appears to have been a significant factor in the Bureau's clearance of Transcontinental Inc.'s acquisition of Quad/Graphics Canada, Inc. in 2011.[5] In that case, the Bureau concluded that U.S. printing facilities were imposing competitive discipline on the retail flyer market in Canada, and that these facilities were likely to provide increased competitive pressure going forward.

(b) Failing Firm Considerations

Section 93(*b*) is second on the enumerated list of factors to be considered in analyzing whether a proposed transaction is likely to lessen or prevent competition substantially.

The Bureau's MEGs[6] focus on two principal issues in addressing the failing firm factor: (i) whether the business, or part of the business, of one of the parties to the merger has failed or is likely to fail; and (ii) whether there are alternatives to the merger that would likely result in a materially greater level of competition than if the merger were to proceed. The Bureau has also elaborated on its methodology for assessing failing firm claims in its news release regarding American Iron & Metal Company Inc.'s (AIM) acquisition of Total Metal Recovery (TMR) Inc. in 2020.[7]

Under the MEGs, a "failing firm" is one that is insolvent or is likely to become insolvent; has initiated or is likely to initiate voluntary bankruptcy proceedings; or has been, or is likely to be, petitioned into bankruptcy or receivership.[8] While the MEGs do not provide guidance on the projected time frame for insolvency that would satisfy the "likely to

become insolvent" criterion, the Bureau has made reference on at least one occasion to the fact that the target was "facing imminent insolvency". In its review of AIM's acquisition of TMR, the Bureau concluded that "TMR was a failing firm within the context of paragraph 93(b) because it was insolvent and had a high likelihood of bankruptcy filing in the immediate future".[9]

The Bureau considers numerous factors in assessing whether a firm is "failing" including, for example, the firm's most recent audited financial statements, projected cash flows, and denied loans. In its review of AIM's acquisition of TMR, the Bureau retained a financial expert to assist with this analysis, including various balance sheet solvency tests and statistical bankruptcy prediction models that have been established in the accounting industry.[10]

These considerations apply whether the failing firm claim concerns an entire company or is limited to a division or a wholly-owned subsidiary of a larger enterprise. Where only part of a firm is failing, issues such as transfer pricing within the larger enterprise, intra-corporate cost allocations, management fees and royalty fees will be examined.[11] The aim in such an analysis is to assess whether, and to what extent, the failing division or subsidiary has non-arm's length arrangements with other divisions of the company.

The second element of failing firm analysis examines whether any alternatives to the proposed merger exist and are likely to result in a materially greater level of competition than if the merger proceeds. The Bureau will thus consider potential acquisition by a competitively preferable purchaser as well as potential arrangements for retrenchment or restructuring of the distressed firm, with a view to comparing their likely outcome to that which would result from the proposed transaction.[12] While there is little concrete guidance on what constitutes a sufficiently rigorous search for an alternate purchaser in the current MEGs, the Bureau has suggested in previous guidelines that a search period not exceeding 60 days would ordinarily satisfy this criterion.[13] In its statement on AIM's acquisition of TMR, the Bureau indicated that extensive documentation will be required to prove the thoroughness of a search for a competitively preferable alternative. This includes "a complete list of potential buyers that were approached, together with contact information for those potential buyers, information related to the distribution of a Confidential Information Memorandum or similar document describing the operations of the target company to other firms, as well as responses to requests for expressions of interest".[14] Further, if one or more alternative buyers expressed interest in buying the failing firm, even more documentation will be required. This includes "all correspondence between the relevant parties, all draft and/or signed letters of intent as well as any draft purchase agreements, due diligence reports, internal correspondence related to a proposed transaction, as well as recommendations and decisions by senior management or shareholders of the relevant parties".[15] The Bureau may seek information from interested purchasers that did not enter into transactions with the failing firm.

The Bureau will conclude that a competitively preferable purchaser exists if there is a third party whose purchase of the firm, division or assets in question is "likely to result in a materially higher level of competition in the market" than would result from the proposed transaction.[16] However, this third party will not be considered a competitively preferable purchaser unless it is willing to pay a price for the relevant assets or business which exceeds the proceeds that the failing business could obtain through liquidation, in both cases after accounting for the costs of sale or liquidation.

If neither retrenchment nor a transaction with a competitively preferable purchaser is feasible, the Bureau will consider whether liquidation of the distressed firm would result in a "materially higher level of competition in the market" than if the merger in question were to proceed. That said, the Bureau indicated in its statement on AIM's acquisition of TMR that "[b]ecause liquidation is disruptive to all parties involved and may not result in an efficient allocation of resources, there are very limited circumstances under which the Bureau may determine that liquidation is the preferable outcome".[17] For example, liquidation may be preferred where it would facilitate entry or expansion by enabling new competitors to compete for the failed firm's assets.[18]

(c) Availability of Acceptable Substitutes

Under subsection 93(*c*), the Tribunal may consider "the extent to which acceptable substitutes for products supplied

by the parties to the merger or proposed merger are or are likely to be available" in determining whether a transaction likely will lead to a substantial lessening of competition.

Much of the Bureau and Tribunal guidance on substitutability can be found in the context of market definition. Nonetheless, the MEGs endorse the separate use of this factor in considering whether a transaction is likely to substantially lessen or prevent competition within the meaning of section 92. Generally, the Bureau will consider product and geographic substitutes that are included in a single relevant market to be "acceptable" within the meaning of this factor.[19]

The Tribunal considered the availability of acceptable substitutes in *Canada (Director of Investigation and Research) v. Southam Inc.*[20] Following an extensive discussion of whether "newspaper retail advertising services" constituted a relevant product market, the Tribunal evaluated whether Southam's acquisitions of the community newspapers *The Vancouver Courier* and the *North Shore News* had caused or were likely to result in a substantial lessening of competition given that Southam already owned both of Vancouver's daily newspapers, the *Vancouver Sun* and the *Vancouver Province*.[21] The Tribunal noted that display advertisers, who otherwise would place ads in community newspapers or daily newspapers, had at least one acceptable alternative location for advertisements should Southam raise prices for advertising in *The Vancouver Courier* and the *North Shore News*: flyers. The presence of an independent flyer business, Admail, would thus deter Southam from raising prices for display advertising in these community newspapers. For this and other reasons, the Tribunal concluded that Southam's acquisitions did not meet the threshold required for it to make an order under section 92 of the *Competition Act* in respect of newspaper retail advertising services.[22]

(d) Removal of a Vigorous and Effective Competitor

Subsection 93(*f*) permits the Tribunal to consider "any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor" in determining whether a merger is likely to result in a substantial lessening of competition. Such a competitor commonly is referred to as a "maverick",[23] although it is possible for a firm to be a vigorous and effective competitor without necessarily being a maverick.

A maverick plays a disruptive role and provides a stimulus to competition in the market.[24] In an industry characterized by the potential for coordinated behaviour, a maverick may have a strong incentive to deviate from this coordinated behaviour, thereby stimulating competition in the market.[25] For example, a firm may refuse to follow a price increase that has been implemented recently by all other major industry participants. This refusal may induce the rest of the industry to reverse the attempted price increase once it is clear that the maverick has chosen not to follow, as to do otherwise would result in losing sales to the maverick. While pricing mavericks are most common, firms also may act as technology or innovation mavericks by developing and introducing new products and services, or improvements to existing products and services, in an industry.

Because of its role in fostering competition, the removal of a maverick may have a more significant impact on the competitive dynamics of an industry than its market share alone would suggest. Where a maverick firm is acquired by another firm in the industry, it may cease to act as a competitive constraint on its remaining competitors. This may facilitate a coordinated exercise of market power by the remaining firms, where such collective action would not have been effective prior to the acquisition.

Concerns also may arise where a maverick is the acquirer, if the transaction reduces its incentive to continue acting as a maverick. Such transactions may lead to so-called "maverick complaisance", where the maverick stops competing as vigorously as it had done prior to the acquisition of its rival.

While the acquisition of a maverick more commonly suggests that the merged firm may have the incentive to raise prices, in theory, the acquisition of a maverick could confer on the merged firm the incentive to lower prices. This may occur under certain circumstances where the merger generates large cost savings and it is in the interests of the merged firm to induce a decline in industry prices.[26]

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(e) Barriers to Entry

Subsection 93(*d*) permits the Tribunal to examine various types of barriers to entry into a market.[27] The nature and extent of entry barriers are a key consideration in substantive merger review. This is because any attempt by the merged entity to exercise market power would be unsuccessful if entry into the market were easy. In such a scenario, excess profits would be quickly whittled away as firms began supplying the product or service in question, forcing the reinstatement of competitive conditions.[28] Regardless of the merging firms' combined market share or the industry concentration, it is very difficult to justify challenging a merger under the *Competition Act* unless significant barriers to entry exist.

Analysis under subsection 93(*d*) is not limited to determining whether barriers to entry exist at all, as it is generally accepted that some entry impediments exist in most markets. Rather, the analysis centres upon an examination of certain key issues, including: what must be done and what commitments must be made by potential competitors in order to enter on a scale that would be sufficient to eliminate a material price increase in the relevant market; what factors are likely to delay entry, and whether they are collectively likely to prevent such scale of entry from occurring within a reasonable period of time; and whether potential competitors are likely to enter, given the commitments that must be made, the time required to become an effective competitor, the risks involved and the likely rewards.[29]

In Canadian merger law, any factor that discourages potential entrants from entering a profitable industry may be characterized as a "barrier to entry" by the Competition Bureau. This leads to a wide conception of barriers to entry. The concept essentially encompasses any cost that an entrant must incur to enter an industry, which incumbent firms either did not incur at some point in the past or will not necessarily incur going forward.

Some barriers to entry include, tariff and non-tariff barriers to international trade, regulatory control over entry, sunk costs, and access to essential inputs and customers.

Another hurdle that new entrants often face is the lack of access to a distribution network. Adherents of Stigler's narrow approach to entry barriers may dispute the characterization of network building costs as entry barriers, at least to the extent that the incumbent faced the same cost of building a distribution network.[30] Nonetheless, the Tribunal appears to consider lack of access in its approach to determining whether entry would be likely. For example, in *Southam*, the Tribunal pointed to lack of competitive distribution networks as a barrier for new entrants in the real estate print advertising market.[31] Potential foreclosure resulting from network effects is a variation on this barrier to entry.[32]

Footnote(s)

1 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

2 Competition Bureau, Technical Backgrounder, "Acquisition of Organon BioSciences N.V. by Schering-Plough Corporation" (May 30, 2008).

3 The Bureau cleared the transaction on the basis that remedies in other jurisdictions sufficiently addressed the Commissioner's concerns with respect to Canada.

4 Competition Bureau, Technical Backgrounder: "Merger between Abitibi-Consolidated Inc. and Bowater Incorporated" (October 30, 2007). After reviewing the transaction, the Commissioner concluded that he did not have grounds to challenge it under s. 92.

5 Competition Bureau, Technical Backgrounder: "Competition Bureau Statement Regarding Transcontinental's Acquisition of Quad/Graphics Canada" (April 10, 2012).

6 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

7 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

8 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html, at 13.3.

9 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

10 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

11 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011) at 13.5, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

12 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011) at 13.5, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html, at 13.7-13.10.

13 Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: September 2004) at 9.8.

14 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

15 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

16 This criterion, which appears in the 2011 MEGs, constitutes a slight reformulation of the test that was applied under the 2004 MEGs, which required that the third-party acquisition be "likely to result in a materially higher level of competition in *a substantial part of* the market" [emphasis added]: See Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: September 2004) at 9.8.

17 See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc., available online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

18 Mark Katz, Anita Banicevic & Jim Dinning, "Antitrust in a Financial Crisis – A Canadian Perspective" (2009) 8-4 Antitrust Src. 5 at 5.

19 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011) at 4.2 (footnote 17), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

20 (1997), 43 C.P.R. (3d) 161 (Comp. Trib.) [*Southam*].

21 The Tribunal concluded, in the context of product market definition, that the daily newspapers and the community newspapers were "at best weak substitutes for some advertisers" (see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1996] S.C.J. No. 116 at 18 (citing the Tribunal at 277), [1997] 1 S.C.R. 748 (S.C.C.)). Again, in the context of product market definition, it noted that a company's subjective belief that it competes against a certain category of firms does not necessarily mean that those firms are in the same product market. Indeed, in this case, the Tribunal concluded that Southam's belief that its daily newspapers competed against community newspapers for advertising was unfounded.

22 However, the Tribunal found that the acquisitions were likely to lead to a substantial lessening of competition in a separate relevant market for real estate print advertising.

23 The 2010 U.S. *Horizontal Merger Enforcement Guidelines* describe a maverick as "a firm that plays a disruptive role in the market to the benefit of customers" (2.1.5).

24 Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011) at 6.38, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

25 Competition Bureau, Technical Backgrounder, "Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc." (April 2005).

26 Jonathan B. Baker, *Antitrust Law and Economics*, 2d ed. by Keith N. Hylton (Cheltenham, U.K.: Edward Elgar Publishing Limited, 2010) at 244 (footnote 39).

27 *Competition Act*, R.S.C. 1985, c. C-34, s. 93(d).

28 See *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd*. (1992), 41 C.P.R. (3d) 289 (Comp. Trib.).

29 Although these factors were set out in the Bureau's 1991 *Merger Enforcement Guidelines* (at 4.6.1), which have been superseded, the factors themselves remain relevant to the assessment of whether barriers exist that are likely to deter entry.

30 For further discussion see: R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, "What Is a Barrier to Entry?" (2004) American Economic Review, American Economic Association, vol. 94(2), pages 461-65; Corinne Langinier (2004) "Are Patents Strategic Barriers to Entry?" *Journal of Economics and Business*, Elsevier, vol. 56(5) at 349-36; Richard Schmalensee (1981) "Economies of Scale and Barriers to Entry", The Journal of Political Economy, Vol. 89, No. 6 at 1228-38.

31 *Canada (Director of Investigation and Research) v. Southam Inc*., 43 C.P.R. (3d) 161 at 475, [1992] C.C.T.D. No. 7 (Comp. Trib.): "The letter from the *Real Estate Weekly* also discusses problems with publications run by the real estate boards in other cities; these were cited with approval by the proponents of Home and Realty. One of the difficulties mentioned is the absence of home delivery."

32 Networks effects are mentioned in the Bureau's MEGs (at 7.17) as additional factors that deter entry.

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