Draft 2020 Vertical Merger Guidelines

CANADIAN BAR ASSOCIATION
COMPETITION LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 Competition Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the Competition Law Section.

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I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the U.S. Department of Justice Antitrust Division and Federal

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RECOMMENDATION

1. We recommend that the Vertical Merger Guidelines clarify: (a) what level of detail is typically required in evaluating the related product; (b) if (or when) there are situations where a full relevant market definition is needed for the related product; and (c) how non -products can also form part of the analysis.

B. Section 3: 20% Safe-Harbour Threshold Too Low

A merged firm generally does not have the ability to engage in anti-competitive foreclosure if it does not have some degree of market power in at least one of the downstream or upstream markets. By any comparison, the proposed 20% relevant market/20% related product market share safe-harbour threshold is quite low as a proxy for the lack of requisite market power for engaging in foreclosure.

It is also inconsistent with recent U.S. case law. For example, in AT&T/Time Warner, the U.S. Department of Justice Antitrust Division alleged ‡ – Š ƒ – ¬ ‹ ” ‡ … – ™ ƒ • – Š ‡ ò Ž ƒ ” ‰ ‡ • participant in [the multichannel video programming distributor] product market in the United – ƒ – ‡ • ó [3] ƒ • † ò Š ƒ • • ‘ ” ‡ – Š ƒ • v r ’ ‡ ” … ‡ • – ‘ ˆ • — „ • … ” ‹ „ ‡ ” • ‹ • ƒ – Ž ‡ ƒ • – ƒ ” • ‡ – ” ‡ • ó Despite these shares, neither the district court nor the court of appeals found that substantial anti-competitive effects were likely. Similarly, the screen for vertical mergers used in other jurisdictions around the world are higher, including the EU (30%), Japan (35%), France (30%), Brazil (30%) and China (25%). Of relevance – ‘ – Š ‡ ‡ … – ‹ ‘ • ‹ • ƒ • ƒ † ƒ ï • u threshold, which is applicable to both horizontal and vertical mergers.

RECOMMENDATION

2. We recommend using a higher market share screen for the relevant product market and related products (to

competitively benign mergers from anti-competitive ones. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine other competitive factors to arrive at a determination of Ž‹•‡Ž› …‘•‡’‡–‹–[5] This qualification appears to negate the value of the market share screen by saying that the safe-harbour threshold may not really be a safe harbour at all.

In a •‹•‹Žƒ” ˜‡‹•á –Š‡ ‡”–‹…ƒŽ ‡”‰‡” —‹†‡Ž‹•‡• •–ƒ–‡ challenge –Š‡ ‰‡ ˜‡”–‹…ƒŽ •‡”‰‡”ó ‡•’Šƒ•‹• ƒ††‡† –Š‡ safe-harbour threshold.[6] The purpose •ƒˆ‡ of a safe-harbour should also be to give the merging parties comfort that the Agencies would not extensively investigate these cases. The implication is that below-threshold vertical mergers could still face extensive review, even though a challenge would be unlikely, thereby risking the unnecessary expenditure of signif

RECOMMENDATION

6. We recommend that the Vertical Merger Guidelines: (a) recognize the difficulties

RECOMMENDATION

8.

conclusive evidence that vertical integration is unnecessary and, rather, could be evidence to the contrary

7. Vertical Merger Guidelines refer to other types of efficiencies that can be achieved from vertical mergers, such as quality improvements and increased innovation arising from coordination in product and R&D efforts.

8. Vertical Merger Guidelines give further guidance on the situations where the Agencies would consider behavioural remedies as opposed to structural remedies in the context of vertical mergers.