

# Goodmans<sup>LLP</sup> Update

## Competition Bureau Issues Guidance on Efficiencies Claims in Merger Transactions

The Competition Bureau (the “**Bureau**”) recently published for public comment a “Practical Guide to Efficiencies Analysis in Merger Reviews” (the “**Guide**”). The Guide:

- highlights the unique and powerful role efficiencies play in Canadian merger review.
- demonstrates the importance and value of early stage estimation of efficiencies in potential M&A.
- describes the Bureau’s processes for evaluating efficiencies claims.

This guidance provides merging companies and their advisors with a roadmap for engaging with the Bureau in defence of efficiency-enhancing transactions.

### Background

Under Canada’s *Competition Act*, a merger found to prevent or lessen competition substantially cannot be prohibited if the gains in efficiency the merger is likely to bring about are greater than, and will offset, the merger’s competitive effects.

The operation of the “efficiencies defence” was discussed in a decision of the Supreme Court of Canada in 2015, *Tervita v. Commissioner of Competition*. See the discussion in our February 11, 2016 Update, *Impact of the Supreme Court of Canada Decision in Tervita*.

Since that decision, the Bureau has invested considerable effort and resources in quantifying the anti-competitive effects it believes may arise from mergers and evaluating efficiencies claims from merging parties, to assess whether efficiencies offset anti-competitive effects.

The Guide represents the first time the Bureau has provided general guidance about how it conducts this quantification and evaluation exercise. The Guide has been published in draft for public comment, which the Bureau is accepting for 30 days. Given the uniqueness and significance of the “efficiencies defence” for merging parties in Canada, the Guide is expected to elicit significant feedback.

### Insights and Positions

The Guide sets out the Bureau’s position on a number of technical issues in Canadian merger law, and offers important insights into how the Bureau conducts merger reviews. Among other notable features, the Guide addresses the following:

- **Process for Evaluating Efficiencies Claims.** The Bureau explains its desire to have detailed evidence about efficiencies presented early in its review of a merger. Early presentation of such evidence, including an expert report and the underlying evidence upon which it is based, gives the Bureau time to test the robustness of the efficiency projections, including through follow up information requests and (potentially) interviews of key employees. Where the Bureau does not have sufficient time to evaluate efficiency claims, the Bureau may seek a timing agreement from merging parties while its assessment of efficiencies continues (even though the parties may have completed their responses to the Bureau’s Supplementary Information Requests and be in a legal position to close).
- **Efficiencies Screens.** The Guide explains how efficiencies claims will be subject to five different screens to assess whether they are legally cognizable:
  1. Whether the claimed efficiency is a productive, dynamic or allocative efficiency; only efficiencies that fall into these categories are cognizable.

2. Whether the merger is actually required to bring about the efficiency (or whether the efficiency was likely to have occurred absent the merger - for example, as a result of an acquisition by a competing purchaser); only “merger specific” efficiencies are cognizable.
  3. Whether the efficiency results exclusively from a redistribution of income (e.g., savings from the merged entity’s increased buyer power that do not expand total output of the purchased product); savings to the merged company that result from redistributions of income are not cognizable under Canadian law.
  4. Whether the efficiency will accrue to Canadian shareholders or customers (or instead to persons outside Canada); only efficiencies that accrue to Canada are cognizable.
  5. Whether the “gains in efficiency would not likely be attained if the order were made.” These are “order-specific efficiencies” discussed below.
- **Order-Specific Efficiencies.** The Bureau explains that, on an initial basis, in many cases it will assess the efficiencies likely to be lost if the proposed merger were fully prohibited. However, where the Bureau’s concerns could be remedied with a narrower divestiture, the Bureau will assess what efficiencies are attributable to the specific business about which the Bureau has concerns. If a claimed efficiency is not specific to the narrower business about which the Bureau has concerns, the Bureau warns it may not have regard to the value of that efficiency (since such efficiency would not be lost if the business were divested). This aspect of the Guide’s approach has not been tested before the courts, and could result in head office or centralized efficiencies being disregarded where the Bureau has narrow concerns about a transaction that could be remedied with something less than a full prohibition.
  - **Innovation and Dynamic Competition.** Despite being ostensibly about efficiencies, the Guide also provides important insight into how the Bureau will assess effects on competition, particularly as it concerns dynamic competition and innovation. Among other things, the Guide explains that where innovation is highly differentiated from products already in the market, the Bureau “may rely on qualitative evidence to assess the harm resulting from a loss of dynamic competition.”

## Implications for Merging Companies in Canada

The Guide highlights the unique and powerful role efficiencies claims play in Canadian merger review following the Supreme Court’s decision in *Tervita*. The Guide makes clear that taking advantage of such efficiencies requires careful planning that will permit efficiencies to be identified and properly valued early in the M&A planning process. Where such planning occurs, there is a significantly increased likelihood efficiencies can be effectively deployed in defence of mergers that are subject to in-depth review by the Bureau.

For further information in relation to efficiencies claims in Canadian mergers, please contact any member of our Competition, Antitrust and Foreign Investment Group.

## Key Contacts



Michael Koch  
mkoch@goodmans.ca  
416.597.5156



David Rosner  
drosner@goodmans.ca  
416.597.4145

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