CHAPTER 6 - EFFICIENCIES[1]

OVERVIEW

In this chapter, the authors review the approaches of the various competition authorities in twelve different jurisdictions with respect to merger efficiencies. As a general observation, we note that no one modality for the treatment of merger efficiencies is necessarily correct or appropriate for all countries. The treatment of merger efficiencies will vary depending on a number of factors, including the nature of the particular economy in question, the degree to which it is integrated with the economies of other trading nations, its historical economic experience with competition and competition law, the goals of its competition law and the economic theory background, the extent of regulation and deregulation, and its size. What should be consistent among nations, however, is a recognition of the role that mergers play in the promotion of economic growth and development and the importance of taking merger efficiencies into account, either implicitly or explicitly.

A merger that enhances a merged firm's market power and increases prices generally results in a reduction in allocative efficiency[2] and the creation of "dead-weight loss", as consumers consume less-valued substitutes or forgo consumption and producers produce a less than socially optimal level of output. A "transfer of wealth" is also created when consumers continue to purchase the product or service at prices higher than they would have under more competitive conditions. In this sense their wealth is notionally "transferred" to producers, sellers and/or their shareholders.[3] However, in some jurisdictions, the wealth transfer itself may be seen as presumptively socially harmful, regardless of its economic effect.

Efficiencies generated by a merger can also have the effect of increasing consumer and/or producer/seller welfare due to the ability of the merged firm to provide its products or services at lower prices (or better quality) and/or at lower costs, resulting in an overall benefit to society. In fact, significant variable cost savings can result in lower prices, despite a lessening of competition. (Even fixed cost savings may lead to future price reductions.) A merger may also create dynamic efficiencies through the creation of new products or innovations. Moreover, there may be resource savings to other parts of the

---

1 Calvin Goldman and Michael Piaskoski (Blake, Cassels & Graydon LLP, Canada); Tony Woodgate and Oliver Gilman (Simmons & Simmons, England); Bob Baxt, Melissa Randall and Susannah Downie (Allens Arthur Robinson, Australia); and Ilene Knable Gotts (Wachtell, Lipton, Rosen & Katz, U.S.A.). The authors wish to thank Mauro Grinberg and André Marques Giberto (Araújo & Policastro Advogados, Brazil), Jochen Burrichter and Axel Beckmerhagen (Hengeler Mueller, Germany), Riki Nakato (Hibiya Sogo Law Offices, Japan), Professor Peter Townley (Acadia University, Canada), Professor Tim Hazeldine, (University of Auckland, New Zealand), and Brian Facey and Crystal Witterick (Blake, Cassels & Graydon LLP) for their valuable contributions.

2 "Allocative efficiency" occurs when goods and services are consumed and produced so that society's resources are allocated to their most valued use in production and consumption. This occurs when goods and services are priced at marginal cost. In the absence of external costs and benefits (externalities), a perfectly competitive market maximises allocative efficiency and thus the sum of consumer surplus and producer surplus. There is no dead-weight loss when allocative efficiency is achieved. (The foregoing applies *mutatis mutandis* to the case of merging firms acquiring buying power, which would result in lower-than-competitive prices but similar dead-weight losses.)

3 Such a transfer may also reduce efficiency to the extent that the transfer is used by producers to purchase exclusionary rights (*i.e.*, to create or raise barriers to entry). *See* Richard A. Posner, *Economic Analysis of Law*, 258 (3d ed. 1986) "If a monopoly or cartel has any expected monopoly profits, that expectation will induce firms to expend resources on forming and maintaining monopolies and cartels and, once they are formed (in the case of cartel), on engrossing as large a proportion of the sales of the market as possible through non-price competition. These resources will be (largely) wasted from a social standpoint."

economy, quite apart from the benefits to the consumers and producers directly affected by the merger, for example, those resulting in increased R&D activities. Productive and dynamic efficiencies are often primary rationales for mergers and are critically important for the creation of long-term economic growth and welfare.[4]

Although several competition authorities may consider the possibility of efficiencies being generated by a merger, many require the parties to produce considerable evidence to substantiate the likelihood and magnitude of their claimed efficiencies and to show that such efficiencies will be passed on as benefits to consumers in some reasonable time frame. Further, there appears to be inconsistency among the authorities as to how to treat merger efficiencies, including how they should be factored into merger review, what kinds of efficiencies should be considered, and whether efficiencies should be discounted as post-merger market shares approach uncomfortably high levels.

Efficiencies are most likely to be given less weight when the likely adverse competitive effects are substantial. Competition authorities are also likely to take the position that efficiencies almost never justify a merger to monopoly or near-monopoly. The challenge is to balance the cost of taking merger efficiencies into account against the cost of preventing mergers that are socially beneficial because of the efficiencies they generate. A key issue is whether competition authorities should rely on presumptions or proxies (*i.e.*, low market shares) or whether they should examine merger-specific efficiency claims on a case-by-case basis.

The authors posit that, although there is a need for competition authorities to work toward adopting consistent approaches to merger efficiency claims in an increasingly global economy, there is no one-size-fits-all solution and, depending on the state of development of a jurisdiction’s economy, a greater acceptance of and reliance on efficiencies may be warranted. This requires that competition authorities have the option to examine and consider claims of credible productive, dynamic and other less-accepted types of efficiencies, as well as a clear direction on how to treat the redistributive effects that might be associated with such mergers.

---

4 *See* Joseph F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" (1987) 62 N.Y.U. L. Rev. 1020 ("**Brodley**"), noting, among other things, the efficiency benefits of competition and the importance of innovation efficiencies.

I. INTRODUCTION

1. A June 1994 OECD *Interim Report on Convergence of Competition Policies*[5] states that: "There is general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies. While countries differ somewhat in defining efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice." The Report notes further that, although the competition laws of some countries encompass other objectives as well, it is clear that the efficiency goal is central to competition enforcement in virtually all Member countries.

2. Mergers, joint ventures, and strategic alliances, unlike naked price-fixing arrangements, involve the integration of resources; hence, they have the ability to generate real efficiencies. However, there are differing views on the role that efficiencies should play in the competitive analysis of merger transactions. Importantly, the focus of competition policy on the treatment of efficiency claims in some jurisdictions and the fundamental rejection of possible efficiency claims in other jurisdictions has not always been clearly understood or delineated. Many competition authorities have taken a structuralist approach that focuses on the increase of market power. In some jurisdictions, market shares are used as a proxy to assess market power. Indeed, in some cases, courts and enforcement authorities viewed efficiencies as a negative factor to be counted *against* a merger, as they could add to the market dominance of the merging parties.

3. In addition to the issues facing competition authorities, there is also a difficult burden facing the parties to a merger who seek to argue the pro-competitive efficiency-enhancing elements of a transaction. The parties must define and demonstrate the size and nature of anticipated efficiencies, often at a very preliminary stage in their due diligence and business planning, and certainly before they have the opportunity to fully assess the reality of the integration challenges they may face. While in most jurisdictions there is now a highly-developed paradigm for the analysis of anti-

---

5 OECD/GD (94) 64, at Annex, Areas of Convergence in Competition Policy and Law at ¶ 4.

competitive effects (*i.e.*, assessing the relevant markets, market shares and barriers to entry), the paradigm for considering specific merger efficiencies is rejected or relatively undeveloped in many countries. Accordingly, competition authorities may seek to discount the magnitude of predicted efficiencies.

4. In this context, it is not surprising that there are very few merger cases where a merger enforcement decision has turned explicitly on the efficiency-enhancing attributes of the transaction.

5. Clearly, some jurisdictions, such as the U.S., Canada, the EU, the U.K. and Australia, have developed policies on the treatment of efficiencies and continue to refine their policies today.[6] Many jurisdictions today have issued legislation, statements or guidelines that appear more receptive to incorporating efficiencies into the analysis and viewing the achievement of efficiencies as a potentially positive outcome of a transaction. In practice, however, there appears to remain a degree of hesitancy in finding that efficiencies will offset concentration presumptions in most cases. At the core of all of these issues — and influencing the attitude of competition authorities and the courts — is the underlying normative perspective toward welfare redistribution policies.

6. A transaction that provides a firm with market power[7] generally results in a reduction in allocative efficiency (increased dead-weight loss). However, efficiencies generated by the transaction may have the effect of increasing consumer and/or producer welfare due to the ability of the merged firm to offer the relevant product or service at a lower price (or better quality) and/or lower cost. Some commentators and scholars suggest that a transaction would be net beneficial and should not be blocked so long as it increases the sum of consumer and producer surplus. Such an approach is indifferent as to whether the transaction benefits producers at the expense of consumers, so long as resources saved (the "efficiencies") exceed the resulting dead-weight loss due to increased market power. In contrast, in a consumer-focussed approach, a transaction may be prohibited if, on balance, consumers are harmed.

---

6 For a detailed discussion of the treatment of efficiencies in the U.S., EU and Canada*, see* Ilene Knable Gotts and Calvin S. Goldman "The Role of Efficiencies in M&A Global Antitrust Review: Still in Flux?" (2002) Fordham Corp. L. Inst. (B. Hawk, ed. 2003) at 201-300 ("**Gotts & Goldman**").

7 In this context, market power can be described as the ability to profitably maintain prices above competitive levels for a specified period of time. A merger leads to an increase in market power if it leads to higher prices (or other disadvantages) to consumers. The relevant benchmark in this respect is the market situation which would apply in the

Indeed, in many jurisdictions, it appears necessary that efficiency gains must be passed on, at least in part, to the customers of the merged parties. Thus, such an approach can limit significantly the types of efficiencies that will be given any weight in a merger review. For example, while variable cost savings translate into reduced marginal costs and are likely to be passed on to consumers through reduced prices, fixed cost savings are not (at least in the short term); they are independent of prices to customers even though they may represent real resource savings to the economy. Other commentators and scholars suggest that a direct welfare-based evaluation of mergers should not be conducted at all.

7. Moreover, in transactions involving high concentration levels, merger parties often find themselves faced with a presumption of illegality that is very difficult to overcome.

8. The treatment of efficiencies varies among industrialised nations. Competition authorities and most courts have considered efficiencies to different degrees, including hostility[8], disregard, healthy scepticism or cautious hesitancy, as a defence or as a factor contributing to market dominance. This divergence in merger efficiency policies among enforcement regimes can have an adverse effect on the ability of firms to merge or undertake acquisitions (or, for that matter, compete) on an international basis.[9] Increasingly, markets are operating on a global scale — or at least with the same multinational firms trading or operating in many jurisdictions. As the marketplace continues to evolve globally, convergence and/or harmonisation among the major enforcement authorities on fundamental competition issues such as the role of merger efficiencies will provide firms with a greater degree of certainty.

9. In all jurisdictions, there exist several difficult and determinative policy questions surrounding the implementation of appropriate rules to take efficiencies into account, including: (1) whether and how efficiencies should be factored into the merger analysis; (2) what type of efficiencies should be given any weight; (3) what welfare standard should be applied; (4) what standard of proof should be imposed;

---

absence of the merger.

8 Examples of early hostility in the U.S. can be found in the cases of *Brown Shoe Co. v. United States*, 370 U.S. 294, at 344 (1962), *United States v. Philadelphia National Bank et al.*, 374 U.S. 321 (1963), *FTC v. Proctor and Gamble Co.*, 386 U.S. 568 at 580 (1967) and *FTC v. Foremost Dairies*, 60 F.T.C. 944 (1962).

9 Gotts & Goldman at 203.

(5) whether efficiencies can save otherwise anti-competitive mergers with potentially large post-merger market shares; and (6) what the paramount goal of the merger regime is.

II. HOW ARE EFFICIENCIES TREATED IN MERGER REVIEW?

10. An important policy question is how efficiencies should be incorporated into the review of a merger by a competition authority. For example, they may be simply ignored (as in many jurisdictions, including the early years of the U.S. Clayton Act), they may be factored into the overall competition assessment of the merger, or they may be used as a defence to rebut a finding of an anti-competitive merger. The discussion below presents some of the methods used by the jurisdictions reviewed.

(a) Efficiencies as part of an SLC or dominance test

11. The consideration of efficiencies may be incorporated into the analysis of a substantial lessening of competition (**SLC**). On this basis, a merger that reduces or prevents competition, but generates significant efficiencies, might be permitted where efficiencies have rendered the lessening of competition insubstantial or where they are large enough to cause a price decrease despite the lessening of competition. This is generally the position adopted in the United States.[10]

12. The new merger guidelines of the UK Office of Fair Trading under the *Enterprise Act 2002* (**UK OFT Merger Guidelines**)[11] allow the OFT to take efficiency gains into account at two separate points in the analytical framework. First, efficiencies may be taken into account where they increase rivalry in the market so that no SLC would result from a merger.[12] Second, efficiencies might also be taken into account where they do not avert a SLC, but will nonetheless be passed on after the merger in the

---

10 Whether efficiency considerations are part of an SLC test depends on what that test means, and there are important differences in how the test is applied in different jurisdictions. For instance, in the UK, the SLC test is understood to refer to the competitive process. In the U.S., the test is understood to refer to the outcome of that process, so the SLC test is the only possible way of incorporating efficiencies. While the outcome matters in the UK, it is in a quite distinct part of the analysis. Further, some jurisdictions have two separate welfare analyses with different welfare measures, applied at different stages of merger review or by different enforcement agencies. Moreover, efficiencies may always be considered a "defence" in the sense that the merging parties will always have some burden of persuasion (but never in the sense that their presence will make anti-competitive effects irrelevant).

11 "Mergers: **Substantive assessment guidance" (May 2003)** , *available at:* http://www.oft.gov.uk/NR/rdonlyres/283E1C2D-78A6-4ECC-8CF5-D37F4E4D7B22/0/oft516.pdf.

12 For example, this could happen where two of the smaller firms in a market gain such efficiencies through merger that they can exert greater competitive pressure on larger competitors. UK OFT Merger Guidelines at ¶4.30.

form of customer benefits.[13]

13. The new merger guidelines of the UK Competition Commission (**UK CC Merger Guidelines**)[14] also focus on whether efficiencies will enhance rivalry among the remaining firms in the market and therefore prevent an SLC from occurring. Thus, where efficiency gains are claimed to have a positive effect on rivalry, it can be said that their impact is assessed as part of the SLC analysis.[15]

14. The New Zealand Commerce Commission (**NZCC**) has published a Practice Note[16] (**NZ Practice Note**) that identifies a number of issues, including efficiencies, that the NZCC may consider in determining whether a proposed acquisition would result in an SLC. While efficiencies are generally considered under the New Zealand authorisation procedure, they may also be relevant in clearance applications where, as a result of these efficiencies, an acquisition could be seen to have an overall "pro-competitive" effect. It is not clear from the NZ Practice Note whether efficiencies are considered as part of the total assessment of the effect on competition under an SLC analysis, or whether they might operate as a defence to a merger that is otherwise anti-competitive. Mergers that would or would be likely to result in an SLC in a market may nevertheless be authorised if the NZCC is satisfied that the public benefits outweigh the detriment arising from any SLC. The NZ Practice Note states that "[w]here the applicant can make a sound and credible case that such efficiencies will be realised, that they cannot be realised without the acquisition, and that they will enhance competition in the relevant market, the [NZCC] will include them in the broader analysis of all of the competitive effects of the acquisition in assessing whether or not competition is likely to be substantially lessened".[17]

---

13 For example, if a merger would reduce rivalry in a market but proven efficiencies would be likely to result in lower prices to customers, the OFT would not take this into account in reaching a conclusion on the SLC test, but it might be a consideration under the customer benefits exception to the duty to refer to the UK CC. *Id. a*t ¶4.3.

14 Merger References: Competition Commission Guidelines (March 2003) at ¶3.26, ***available at*** http://www.competition-commission.org.uk/our_role/consultations/past/pdf/ebmerg.pdf.

15 Examples where efficiencies may enhance rivalry among the remaining players in the market include the case where two smaller firms merge to provide more effective competition to a larger rival, or where the merger stimulates the combined firm to invest more in R&D and thereby increase rivalry through innovation.

16 "The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in Section 47 – A Test of Substantially Lessening Competition", ***available at:*** http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=303&Filename=pnote428may01.pdf.

17 The NZ Practice Note also suggests that efficiencies may only be used to defend a claim that a proposal will substantially lessen competition: "[t]he Commission envisages that efficiency claims of the required magnitude and credibility will only rarely overturn a finding that competition would otherwise be substantially lessened."

15. The Australian Merger Guidelines[18] recognise that mergers are one means by which domestic firms exposed to global markets can achieve efficiency. The Guidelines note that the Australian *Trade Practices Act 1974* (**TPA**) is concerned with the lessening of competition in a market, not with the competitiveness of individual firms. It states, however, that an acquisition that increases the competitiveness of the merged firm may also increase competition in the market. In the context of an informal clearance, efficiencies are relevant to the extent that they impact the level of competition in the market. The Australian Competition and Consumer Commission (**ACCC**) states that, rather than being considered as a "trade off" with competition effects, as might be done in an authorisation context, the concern in a merger analysis is the effect or likely effect on the combined firm's abilities and incentives to compete in the relevant market, including any effect flowing from efficiencies.

16. Efficiencies are also considered as part of an overall SLC or dominance test in Finland[19] and Japan[20]

17. Article 2(3) of the European Community Merger Regulation (**ECMR**)[21] provides that a "concentration which would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." As efficiencies may make the merged entity more competitive, efficiency considerations can be part of the overall competition assessment under Article 2 of the ECMR.

18. In particular, Article 2(1)(b) of the ECMR contains a detailed list of the factors that

---

18 Merger Guidelines (June 1999), *available at* http://www.apeccp.org.tw/doc/Australia/Decision/merguide.html

19 Juhani Jokinen notes that, "(a)n increase in efficiency may, however, be attached which supports the approval of the concentration. Increased efficiency may, *e.g.*, consist of the achieving of synergy or economies-of-scale benefits; specialisation; or the development of new products, for which the concentration provides the necessary prerequisites. This is not enough by itself, however; it is part of the appraisal to examine to what extent companies could achieve efficiency benefits with less stringent measures than a concentration and to what extent the companies transfer these efficiency benefits to their customers. Juhani Jokinen, "Control of Concentrations - the New Weapon of Competition Policy" (1998), *available at* http://www.kilpailuvirasto.fi/cgi-bin/sivu.pl?s=juhanijokinen.

20 In Japan, efficiencies are examined in their impact on competition. When improvement of efficiency is deemed likely to stimulate competition, these positive impacts are considered. *See* Guidelines for Interpretation on the Stipulation that "The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade" Concerning M&As (Fair Trade Commission, 21 Dec. 1998), *available at* http://www.apeccp.org.tw/doc/Japan/Decision/jpdec3.htm. Accordingly, efficiency increase is just one of the factors to be considered when determining whether a certain merger would be pro- or anti-competitive, and does not by itself render the merger more acceptable from the point of view of the Japanese merger legislation. OECD, "Competition Policy and Efficiencies Claims in Horizontal Agreements", Doc. OCDE/GD (96) 65 (Paris, 1996).

21 **Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.**

the European Commission (**EC**) must consider in its analysis of horizontal mergers, which include "the development of technical and economic progress, provided that it is to consumers' advantage and does not form an obstacle to competition". The requirement of "no obstacle to competition" is an integral part of the general competition test articulated in Articles 2(2) and (3) of the ECMR and, in effect, acts as a safeguard by providing a limit above which a merger cannot be considered as beneficial for consumers. Arguably, this requirement may make it unlikely that a dominant firm will be able to assert efficiencies as a defence, since any improvement in efficiency may enhance its position of dominance. In such cases, efficiencies may even be treated as an offence in the sense that they add to the factors that contribute to the creation or strengthening of a dominant position.[22] This view is illustrated by the EC's actions in *Du Pont/ICI*[23] and *Shell/Montecatini*[24], two transactions in which the EC required undertakings that sought to provide comparable or shared efficiency benefits for competitors before allowing the transactions to proceed. In addition, in the GE/Honeywell merger[25], the EC took the position that the merger would provide incentives for the merged entity to discount prices to customers through mixed bundling, thereby restricting the ability of rivals to compete, leading to increased marginalisation and eventually elimination of the competitors. In turn, competitor exit from the marketplace would lead ultimately to higher prices and lower quality products. The EC held that price cuts resulting from mixed bundling were not the type of real efficiency that should be taken into account in a merger analysis, but, instead, constituted a form of "strategic pricing" by the merged firm.

(b) Efficiencies as a defence

19. A merger efficiencies defence appears to be more prevalent in small open-trading economies where domestic markets may not permit a large number of firms to achieve economies of scale. Where greater concentration is needed to do so, more permissive merger efficiency regimes are observed.

20. In Canada, for example, the current law provides that a transaction that has been

22 For example, in both Germany and Finland, economic advantages from economies of scale and scope, rationalisation and synergies have been identified as factors that can create market entry barriers and further strengthen the market position of the merged entity.

23 *Du Pont/ICI* O.J. L7/13 (1993) (Comm'n).

24 *Shell/Montecatini* O.J. L332/48 (1994) (Comm'n).

25 *General Electric/Honeywell*, Case No. COMP/M. 2220 (2001) (Comm'n).

found to prevent or lessen competition substantially can be defended by showing that the efficiencies created outweigh the anti-competitive effects of the transaction. The Canadian statutory efficiency defence[26] permits an anti-competitive merger so long as the efficiency gains that would be lost by blocking the merger are greater than and offset the anti-competitive effects of permitting the merger.[27] In practice, merging parties may raise the defence, both in the initial assessment phase before the Canadian Competition Bureau and again, if necessary, when the merger is challenged by the Canadian Commissioner before the Competition Tribunal. While the Canadian efficiency defence has been part of Canada's merger law for over 15 years, it has only been tested on one occasion: the merger of national propane companies Superior Propane Inc. and ICG Propane Inc. The lengthy litigation in the *Superior Propane* case[28] has, at least for now, confirmed that merger efficiencies are not an "intractable subject for litigation"[29] and can be measured, proved and weighed against anti-competitive effects in a real case. In that case, it was the opinion of the Tribunal that the real resource savings or efficiencies from the merger made the merger socially beneficial to the Canadian economy, despite the fact that the merger created an entity with significant market power in the propane distribution business in Canada.

21. In the UK, an "evaluative" analysis akin to an efficiency defence is undertaken where it is argued that the OFT need not refer the merger to the UK CC because efficiencies are claimed to constitute "customer benefits" that will outweigh any SLC. However, the UK OFT Merger Guidelines state that only on "rare occasions" does the OFT expect that it will be sufficiently confident of customer benefits to clear mergers that it believes are likely to result in an SLC.[30] Further, it is not sufficient to demonstrate that there are merely some theoretical benefits to customers; the merging parties

---

26 §96, Canadian *Competition Act*.

27 It is important to note that the Canadian efficiency defence was enacted at the same time as Canada entered into a Free Trade Agreement with the U.S. and that Canadian businesses were perceived to be likely to have difficulty developing efficient size from scale economies to compete with large U.S. companies within Canada and abroad.

28 *Commissioner of Competition v. Superior Propane Inc., et. al* (2000), 7C.P.R. (4th) 385 (Comp. Trib); rev'd in part, *(Canada) Commissioner of Competition v. Superior Propane* (2001), 199 D.L.R. (4th) 130 (Fed. C.A.); *The Commissioner of Competition v. Superior Propane Inc. et al* (2002), 18 C.P.R. (4th) 417, (Comp. Trib.); conf'd *Commissioner of Competition v. Superior Propane Inc. et. al* (2003), 223 D.L.R. (4th) 55 (F.C.A.), *available at* http://www.ct-tc.gc.ca/english/cases/propane/propane.html.

29 Richard Posner, *Antitrust Law: An Economic Perspective* (2d. ed., 2001) at 111-112, noting that "[t]he measurement of efficiency ... [is] an intractable subject for litigation".

30 *See* UK OFT Merger Guidelines at ¶¶ 7.7 - 7.10.

must also show that the parties will have the incentive to pass benefits on to customers and that these benefits will be sufficient to outweigh the competition detriments caused by the merger.[31]

22. The UK CC may have regard to relevant customer benefits (*i.e.,* lower prices, higher quality, greater choice or greater innovation) when determining appropriate remedies to an SLC. In principle, with sufficient customer benefits, the UK CC could decide that an SLC would occur, but that no remedy whatsoever is appropriate. However, the UK CC Merger Guidelines note that, "It would not normally be expected that a merger resulting in an SLC would lead to benefits to customers". Such benefits must accrue immediately or "within a reasonable period" as a result of the merger and must be "unlikely to accrue without the creation of that situation or a similar lessening of competition". The burden of proof is on the merging parties.[32]

23. Romanian competition law[33] permits transactions: (a) that increase economic efficiency, enhance production, distribution or technical progress or increasing export competitiveness; (b) so long as the positive effects of the concentration compensate for the negative effects; and (c) to a reasonable extent, consumers benefit from the resulting gains, especially through lower real prices. Therefore, efficiency gains must offset any anti-competitive effects of the merger. However, no standard of proof concerning the claimed efficiencies has been specified.

24. It would also appear that the Irish Competition Authority considers efficiencies as a defence (at least in name) rather than as part of the total assessment of the competitive effects of a merger. However, it is clear from the Irish Guidelines that "consumer welfare" is paramount, and a finding of no SLC would occur only where consumer welfare has not been reduced.

25. While Brazil in practice has adopted an efficiency defence, many of the mergers permitted based on the alleged efficiencies have been subject to performance commitments by the merging parties.

(c) Public interest (or public benefits) test

---

31 Benefits that are "sufficient to outweigh the competition detriments" may result in the elimination of SLC, which would suggested that the efficiency analysis is really part of the SLC determination.

32 UK CC Merger Guidelines at ¶¶ 4.34 - 4.45.

33 Chapter III of Law No 21/1996 on Competition.

26. Under a public interest test, various aspects of the public interest are considered regarding the social suitability of a merger. "Public interest" may be defined quite broadly and can include such elements as employment effects and regional distributions of income. When the public interest test is dominated by efficiency considerations, it can resemble an efficiency defence. In other cases, efficiencies may be thrown into the "public interest soup" and it may be difficult to determine their relative significance.[34]

27. A public benefit test is used in Australia where an acquirer may decide, or may be encouraged by the ACCC, to apply for authorisation in circumstances where a transaction that may breach section 50 of the TPA is likely to deliver public benefits, which include efficiency gains.[35]

28. In Germany, it is conceivable that efficiencies may be considered as part of a public benefits test under section 42 of the *Act Against Restraints of Competition*, which permits the German Federal Minister of Economics and Labour to, in exceptional cases, authorise a merger that had been previously prohibited by the German Federal Cartel Office because of its anti-competitive effects. In these cases, the "macro-economic" advantages (*i.e.*, economy-wide) of the merger must outweigh its competitive restraints or, alternatively, the merger must be justified by a paramount interest of the public, including advantages of rationalisation.[36] However, given the few Ministerial authorisations that have been granted, it is difficult to derive any general conclusion as to whether and how efficiencies may be factored into this macro-economic analysis.

III. MERGER-SPECIFICITY

29. Firms often undertake acquisitions when their management believes it is the most profitable means of enhancing capacity or capacity utilisation, new knowledge or

---

34 Ann-Britt Everett and Thomas W. Ross, "The Treatment of Efficiencies in Merger Review: An International Comparison", University of British Columbia and Delta Economics Group Inc. (22 November 2002) ("**Everett & Ross**"), *available at* http://strategis.ic.gc.ca/pics/ct/ct02516e.pdf.

35 The New Zealand regime also contains provision for the authorisation of otherwise anti-competitive mergers on public benefit grounds. However, this aspect is not covered in the NZ Practice Note.

36 The Minister has held that the advantages arising from rationalisation and synergies due to the merger must be of a significant macro-economic importance. Only such cost savings will be taken into account that exceed ordinary potentials for rationalisation. This can be the case, if the merger generates significant R&D capacities or allows the use of certain production processes that could not exist without the merger. Mestmäcker/Veelken in Immenga/Mestmäcker, 2001 at § 42, ann. 31.

skills, or entering new product or geographic arenas.[37] The decision to undertake a major acquisition typically is part of a broader plan to achieve long-term company growth and reorganisation objectives. Efficiencies may be realised in many types of business arrangements, such as mergers, joint ventures, licensing and distribution arrangements, and strategic alliances. Some of these arrangements impose greater restrictions on competition than do others. Mergers generally represent the most limiting of these arrangements as they effectively remove one competitor from the marketplace entirely. As a result, most of the jurisdictions examined (including the U.S., Canada, the EU, the UK (both the OFT and the UK CC) and Australia) have incorporated a requirement that efficiencies claims be "merger-specific".

30. In the U.S., the merger-specific requirement is significant because, instead of requiring proof that claimed efficiencies could not be achieved through some hypothetical alternatives (such as unilateral expansion or competitor collaborations), the U.S. antitrust authorities have committed to evaluate claimed efficiencies against other practical alternatives.[38] The U.S. courts have, at the urging of the enforcement agencies, been very literal in their treatment of merger-specificity and have focussed on whether a firm would likely achieve the efficiencies absent the transaction, and on blocking those transactions in which the court found that such efficiencies would occur.[39]

31. But what alternative means of achieving efficiencies should be considered? The Canadian *Merger Enforcement Guidelines* (**Canadian Merger Guidelines**) provide that only if the alternative means is a common "industry practice" will it be considered. Examples of alternatives include internal growth, enhancing capacity or capacity utilisation, a merger with an identified third party, a joint venture, a specialisation agreement, or a licensing, lease or other contractual arrangement.[40]

32. Similarly, the horizontal merger guidelines of the European Union (**EU Merger Guidelines**) state that the merging parties must provide all information necessary to

---

37 Paul A. Pautler, "Evidence on Mergers and Acquisitions" (25 September 2001) (unpublished) at 1-2.

38 Robert Pitofsky, "Efficiencies in Defense of Mergers: 18 Months After" George Mason Law Review Antitrust Symposium, The Changing Face of Efficiency (Washington, 1998) at 2, available at: http://www.ftc.gov/speeches/pitofsky/pitofeff.htm.

39 Gotts & Goldman at 276.

40 Canadian Merger Guidelines at §5.2.

demonstrate that there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (*e.g.*, a licensing agreement, or a cooperative joint venture) or of a concentrative nature (*e.g.*, a concentrative joint venture, or a differently structured merger) than the proposed merger under which the efficiencies are claimed.[41] The EC will then consider only those alternatives that are reasonably practical in the business situation faced by the merging parties, having regard to established business practices in the industry concerned. The U.S. *Horizontal Merger Guidelines* (**US Merger Guidelines**) of the Federal Trade Commission (**FTC**) and Department of Justice impose as the test whether the efficiencies are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or other means having comparable anti-competitive effects".[42]

33. However, there may be a number of reasons why firms do not pursue efficiencies internally. For example, a firm may not want to expand its infrastructure to take advantage of new technological efficiencies because the industry already has excess capacity or the associated costs would be prohibitive. That firm, however, could benefit from substantial efficiencies by merging with a competitor and consolidating its operations in the competitor's operations. Further, adding new capacity in a stable or declining demand environment may place downward pressure on price, thereby making such expansion unprofitable. In addition, adding new capacity may result in social waste to the extent that duplicate resources at the acquired firm subsequently may be scrapped.[43] More importantly, most merger efficiencies cannot reasonably be achieved by the merging firms on their own; there may be good reasons why, absent the merger, the merging firms would not co-operate in ways to achieve the efficiency.

IV. TYPES OF EFFICIENCIES CONSIDERED

34. Not all types of efficiencies are treated equally under the law (or, for that matter, by economists). Currently, there appears to be a trend towards accepting only those

41 *Commission Notice on the Appraisal of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings* (28 January 2004) at ¶ 85.

42 See US Merger Guidelines at §4, available at: http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

43 William J. Kolasky, "The Role of Efficiencies in Merger Review" (2001) 16 *Antitrust* 82-87.

variable production cost savings that can be achieved in a relatively short time frame, whereas other fixed cost savings or riskier or longer term efficiencies will be ignored or discounted. Pecuniary efficiencies (*i.e.*, efficiencies that result in a mere redistribution of income from one person to another) are also not generally accepted. Under the US Merger Guidelines, some types of efficiencies are recognised as more likely than others to meet the relevant criteria.

35. Further, certain types of cost savings may be accorded greater weight than others owing to issues of the difficulty of evidentiary proof or establishing merger-specificity. For example, the US Merger Guidelines place "procurement, management and capital cost savings" in the category of efficiencies that "are less likely to be merger-specific or substantial, or may not be cognisable for other reasons". In other words, these types of efficiencies are given little weight due to the reasons stated above.

(a) Fixed cost savings

36. Generally speaking, cost efficiencies that lead to reductions in variable or marginal costs are more cognisable to competition authorities than reductions in fixed costs because they are more likely to result in lower consumer prices and to be achieved in the short term. In other words, efficiencies are thought to be more cognisable where they impact upon variable costs (and thus marginal cost), since such cost savings tend to stimulate competition and are more likely to be passed directly on to consumers in the form of lower prices (because of their importance in short-run price setting behaviour).[44]

37. However, David Painter, formerly of the U.S. FTC, believes that, contrary to most common perceptions, reductions in fixed costs *can* lead to lower prices to consumers, as well as other significant non-price benefits. In his presentation on merger efficiencies before the FTC[45], he cited two separate studies[46] in support of his

44 UK OFT Merger Guidelines at 27.

45 David T. Painter and Gabriel H. Dagen, "Panel 4 - How and in What Context Do Cost Savings of Various Kinds Affect Business Decision Making? What Have Been the FTC and DOJ's Experience with Efficiency Claims?" Federal Trade Commission, A Roundtable Sponsored by the Bureau of Economics Understanding Mergers: Strategy & Planning, Implementation and Outcomes (9-10 December 2002, Washington, D.C.) ("**Painter & Dagen**"), *available at* http://www.ftc.gov/be/rt/xscriptpanel4.pdf.

46 V. Govindarajan and R. N. Anthony. "How firms use cost data in pricing decisions" Management Accounting (July 1983) ("**Govindarajan & Anthony**"); E. Shim and E. F. Sudit, "How Manufacturers Price Products" Management Accounting (February 1995).

primary argument that, in reality, fixed costs are taken into account far more often than not in setting prices.[47] In support of his argument, Painter sets out several examples of both price and non-price benefits that can arise from fixed cost savings.

38. Further, determination of what costs might be "variable" in any given instance is highly problematic and can be a matter of the analysis timeframe adopted: reductions in fixed costs can eventually become variable in the long run and therefore can play an important role in longer term price formation.[48]

39. Finally, as Donald McFetridge points out, if savings in fixed costs are to be ignored or discounted, then several real savings, including economies of density, economies derived from rationalisation (such as the elimination of set-up or change-over costs) and efficiencies in R&D, marketing and capacity expansion, could be ruled out.[49]

(b) Pecuniary or redistributive efficiencies

40. In general, pecuniary efficiencies (*i.e.*, efficiencies that result in a mere redistribution of income from one person to another) will not be considered in a merger/efficiency analysis.[50] For instance, under Canadian law, efficiency gains that are brought about "by reason only of a redistribution of income between two or more persons" will not be considered in the trade-off analysis between efficiencies and anti-competitive effects.[51] The reasoning behind this principle is that all gains realized pursuant to a merger do not necessarily represent a saving in resources. For example, gains resulting from increased bargaining leverage that enable the merged entity to extract wage concessions or discounts from suppliers that are not cost-justified represent a mere redistribution of income to the merged entity from employees or the supplier; such gains are not necessarily brought about by a saving in resources.[52]

41. Miguel de la Mano of the EC suggests that a general way to predict whether

---

47 Govindarajan & Anthony, cited in Painter & Dagen at 237. For example, the two studies showed that approximately 40% percent of large manufacturing companies set prices by marking up some version of full costs, *i.e.*, a combination of fixed and variable costs.

48 Firms naturally consider the merger process as a long-run phenomenon in which all costs would be considered variable. Competition authorities, on the other hand, treat mergers as a short-run phenomenon creating obvious conflicting conclusions regarding the ultimate effects of a merger on the industry and the economy.

49 Donald G. McFetridge, "Efficiencies Standards: Take Your Pick" (2002) 21:1 Can. Comp. Rec. 45 ("**McFetridge**") at 54, *available at* http://www.carleton.ca/~dmcfet/courses/efficiencies.PDF.

50 However, it should be noted that the US Merger Guidelines do not expressly discount pecuniary efficiencies.

51 *Competition Act*, §96(3).

52 Canadian Merger Guidelines at §5.3.

efficiency claims relating to purchasing operations are real efficiencies is to evaluate the degree of competition in both sides of the input market. In a competitive input market, with many suppliers and buyers, verifiable economies of scale and scope in procurement are likely to correspond to real cost savings.[53]

42. Some may view the hostility towards procurement savings as unfortunate, as procurement savings consistently generate the bulk of near-term savings in mergers - increased volume typically results in lower unit costs and the combination of best practices in sourcing approaches.[54] Yet most jurisdictions do not acknowledge them as the types of efficiency gains that should be considered.[55]

(c) Productive efficiencies

43. Productive efficiencies are perhaps the least controversial category of efficiencies - they are readily quantifiable, often associated with variable costs, and, for the most part, broadly accepted by economists and competition authorities alike. Productive efficiency is optimised when goods are produced at minimum possible cost, and includes: (1) economies of scale (*i.e.*, when the combined unit volume allows a firm to operate at a lower unit cost); (2) economies of scope (*i.e.*, when the joint use of an asset results in a lower overall cost than firms had when they operated independently); and (3) synergies.

44. Production efficiencies leading to economies of scale can arise at the product-level, plant-level and multi-plant-level and can be related to both operating and fixed costs, as well as savings associated with integrating new activities within the combined firms.

45. Examples of plant-level economies of scale include:[56]

---

53 Miguel de la Mano, "For the customer's sake: The competitive effects of efficiencies in Europe Merger Control", Enterprise Papers No. 11 (2002) ("**de la Mano**") at 65, *available at* http://europa.eu.int/comm/enterprise/library/enterprise-papers/pdf/enterprise_paper_11_2002.pdf.

54 "Procurement savings are particularly persuasive where the reduction in the number of buyers or the streamlining of the buying process will reduce the costs of the suppliers and these reduced costs will be passed on to consumers in the short term." David Balto, "The Efficiency Defense in Merger Review: Progress or Stagnation?" (Fall 2001) *Antitrust* at 77.

55 Both Canada and Ireland expressly exclude procurement savings unless they represent real cost savings. However, in Australia, pecuniary benefits such as lower input prices due to enhanced bargaining power may be relevant in a §50 context.

56 Gotts & Goldman at 278-279.

- specialisation, *i.e.*, the cost savings that may be realised from shifting output from one plant with a high marginal cost of production to another lower-cost plant, without changing the firms' production possibilities frontier[57];
- elimination of duplication;
- reduced downtime;
- smaller inventory requirements;
- the avoidance of capital expenditures that would otherwise be required.
- consolidation of production at an individual facility; and
- mechanisation of specific production functions previously carried out manually.

46. Multi-plant-level economies of scale can arise from:[58]

- plant specialisation;
- rationalization of administrative and management functions (*e.g.*, sales, marketing, accounting, purchasing, finance, production) and the rationalization of R&D activities; and
- the transfer of superior production techniques and know-how from one of the merging parties to the other.

47. Economies of scope occur when the cost of producing or distributing products separately at a given level of output is reduced by producing or distributing them together. Sources of economics of scope include:[59]

- common raw inputs;
- complementary technical knowledge; and
- the reduction or elimination of distribution channels and sales forces.

48. Synergies are the marginal cost savings or quality improvements arising from any source other than the realisation of economies of scale. Examples include:[60]

- the close integration of hard-to-trade assets;
- improved interoperability between complementary products;

---

57 de la Mano at 62.

58 Gotts & Goldman at 278.

59 *Id*. at 280.

60 For a comprehensive review of the role of synergies in merger review, *see* Joseph Farrell and Carl Shapiro, "Scale Economies and Synergies in Horizontal Merger Analysis" (2001) 68 Antitr. L.J. at 685-710.

- the sharing of complementary skills; and
- the acquisition of intangible assets, such as brand names, customer relationships, hard-to-duplicate human capital, functional capabilities (marketing, technological and operational) and "best practices."

49. As the summary table to this chapter illustrates, most of the jurisdictions examined will consider, in varying degrees, many of these categories of productive efficiencies.

(d) Distribution and promotional efficiencies

50. The Canadian Merger Guidelines expressly acknowledge the acceptance of efficiencies relating to distribution and advertising activities and the EU Merger Guidelines recognise cost savings in distribution functions. In the U.S., a 1995 FTC Global Staff Report viewed promotional efficiencies as "less likely to be substantial and often likely to be difficult to assess".[61] FTC Chairman Muris, however, has stated that "in the cost structure of consumer goods, promotion plays an important role, particularly since the larger market share may be needed to achieve minimum efficient scale".[62]

(e) Dynamic or innovative efficiencies

51. While productive efficiencies are achieved from producing goods at lower cost or of enhanced quality using existing technology, innovative efficiencies are benefits from new products, or product enhancement gains achieved from the innovation, development or diffusion of new technology. However, while R&D efficiencies offer great potential because they tend to focus on future products, there may be formidable problems of proof.[63] Innovation efficiencies may also make a significant contribution to competitive dynamics, the national R&D effort and consumer (and overall) welfare.

52. As a general proposition, society benefits from conduct that encourages innovation to lower costs and develops new and improved products. The EU, the UK (OFT and CC), Ireland, Canada, Brazil and Japan all appear to recognise these types of

---

61 In 1995, the FTC held Global Competitive Hearings on, *inter alia*, the role of efficiencies in M&A antitrust review. The resulting report endorsed integrating further efficiencies into the competitive effects analysis. "**FTC Roundtable**" at 33).

62 J. Howard Beales and Timothy J. Muris, *State and Federal Regulation of National Advertising* (AEI Press, Washington, D.C., 1993) at 7-10.

63 Gotts & Goldman at 282.

efficiencies. While R&D efficiencies may be considered in the U.S., they are "generally less susceptible to verification and may be the result of anti-competitive output reductions."[64]

(f) Transactional efficiencies

53. An acquisition can foster transactional efficiency by eliminating the "middle man" and reducing transaction costs associated with matters such as contracting for inputs, distribution and services.[65] In general, market participants design their business practices, contracts and internal organisation to minimise transaction costs and reduce exposure to opportunistic behaviour (*e.g.*, hold-ups). Joint ventures and common ownership can help align firms' incentives and discourage shirking, free riding and opportunistic behaviour that can be very costly and difficult to police using arm's-length transactions.[66] Therefore, some commentators think that transactional efficiencies should be recognised as real benefits from a merger.

54. Among the jurisdictions reviewed, the UK CC[67], Canada, Brazil and Ireland appear to recognise the benefit of transactional efficiencies.[68]

(g) Demand-side network effects

55. Network effects occur when the customer's value of a product increases with the number of people using that same product or a complementary product. For instance in communications networks, such as telephones or the Internet, the value of the product increases with the number of people that the user can communicate with.[69]

56. Each of the UK (OFT and CC), Ireland and Brazil expressly acknowledge demand-side network effects.

(h) Managerial cost savings

---

64 US Merger Guidelines, § 4.

65 However, not all transactional costs involve third parties. For example, transactional could include internal management time and the cost of "opportunistic hold-up", which are unlikely to involve significant third-party costs. Further, internal transaction costs are very different from the "management cost savings" discussed later.

66 Gotts & Goldman at 284.

67 UK CC Merger Guidelines at ¶4.44, with respect to vertical integration.

68 In this respect, it should be emphasised that the EU Merger Guidelines address horizontal mergers and not non-horizontal (vertical/conglomerate) mergers. It is in the latter context that transactional cost savings are more likely to play a role. Also, the US Merger Guidelines are primarily concerned with horizontal mergers.

69 de la Mano at 69.

57. In general, competition authorities will discount managerial efficiencies because they are not merger-specific and they represent fixed cost reductions less likely to be passed on to consumers in the short term. Managerial efficiencies arise from the substitution of less able managers with more successful ones. However, managerial skill and imagination often may be difficult to measure, abundantly available through contract, or even unpersuasive as a factor that positively affects competitive dynamics. In practice, managerial efficiencies are disfavoured by competition authorities because of the difficulties in establishing that the acquired firm cannot improve its efficiency in ways that are less harmful to competition.[70]

58. The financial literature recognises the disciplining effect of the "market for corporate control" (*i.e.*, M&A) as a means of weeding out bad management and moving assets to their highest-valued uses.[71] In large public corporations particularly, a failure of management to maximise the profits of the corporation may be a result of internal inefficiency (sometimes referred to as "x-inefficiency"). It is the recoupment of some of these inefficiencies that motivates some transactions, particularly hostile ones. If managerial efficiencies are ignored and certain take-overs are made more difficult, competition policy may reduce the disciplining role of the take-over threat and the transfer of unique, or at the very least, scarce know-how brought to the merger by new management.

59. In a November 2002 speech to the American Bar Association, FTC Commissioner Leary recognised that "innovation or managerial efficiencies . . . are probably the most significant variable in determining whether companies succeed or fail . . . Yet, we do not overtly take them into account when deciding merger cases . . . We tend to ignore the less tangible economies in the formal decision process because we simply do not know how to weigh them."[72] Indeed, there are no reported instances in which any of the competition authorities studied expressly recognised managerial efficiencies in the merger review and permitted the transaction to proceed on that basis.

---

70 *Id*. at 68.

71 Gotts & Goldman at 286.

72 Thomas B. Leary, "Efficiencies and Antitrust: A Story of Ongoing Evolution" ABA Section of Antitrust Law 2002 Fall Forum, Washington, D.C. (8 November 2002) ("**Leary**"), *available at* http://www.ftc.gov/speeches/leary/efficienciesandantitrust.htm.

60. Nor is the EU entirely receptive to this category of savings. In *Aerospatiale-Alenia/de Havilland*, for instance, the management cost savings identified by the parties were rejected as not being merger-specific: "These cost savings would not arise as a consequence of the concentration *per se*, but are cost savings which could be achieved by de Havilland's existing owner or by any other potential acquirer."[73]

61. In a different light, perhaps the authorities are doing the right thing in ignoring/discounting managerial efficiencies. Indeed, there clearly is merit in having a merger enforcement policy where the competition authority can be held accountable for its actions. Otherwise, it would become a matter of total discretion.

(i) Capital cost savings

62. While capital-raising efficiencies are one of the most persistent advantages of corporate size, savings in capital costs are unlikely, on their own, to be of such significance to offset the price increases induced by increased market power.[74] Moreover, as capital markets are in the Chicago school of thought generally assumed as efficient, there is in an SLC framework no persuasive reason to recognise capital-raising savings as efficiencies, absent a strong showing that the merger would address identifiable capital market imperfections. On the other hand, superior access to the capital markets is in many jurisdictions regarded as one important factor which gives rise to market power.

63. The decision of the EC in the GE/Honeywell case provides an example of how capital cost savings were treated as a factor which gave rise to a dominant market position.[75]

64. As with productive scale economies, some may argue that these savings should also

---

73 *Aerospatiale-Alenia/de Havilland*, O.J.L 334/42 (1991) (Comm'n) at ¶ 65.

74 de la Mano at 66.

75 In assessing the potential competitive harm of the merger arising from the proposed bundling, the EC identified what was referred to as GE's "market dominance tool kit", which included GE's financing arm, GE Capital. In the EC's view, GE Capital provided GE with significant financial advantages which would allow GE to take more risk in product development than its competitors and (at least initially) to heavily discount the sale of its engines. Its competitors, on the other hand, did not have access to internal financing and would have to rely on external sources. The EC was also concerned that GE would be able to pass on its access to lower-cost financing (from its AAA bond rating) to Honeywell. Arguably, the combination of these two financial tools would provide the merged entity with a unique advantage that could not be otherwise duplicated by Honeywell's competitors. The EC believed that these advantages would provide incentives for GE/Honeywell to discount prices through mixed bundling, causing a restriction in competition, increased competitor marginalisation and, eventually, competitor exit. This, in turn, would lead to higher prices and lower quality products. See Gotz and Drauz, "European Union Law: Unbundling GE/Honeywell: The Assessment of Conglomerate Merger Under EC Competition Law" (2002) 25 Fordham Int'l L.J. 885 at 897-903.

be recognised because they can dramatically improve a firm's cost position, and ultimately, its competitiveness in the marketplace - to the extent that these cost savings are likely to be passed on to consumers only over the long-term (and a consumer welfare standard is deployed), the value of these savings can be discounted appropriately.[76]

V. STANDARDS FOR WEIGHING EFFICIENCIES AGAINST ANTI-COMPETITIVE EFFECTS

65. The debate continues regarding the legitimate goals of antitrust. Even in the U.S. and Canada, with over one hundred years of "modern" antitrust legislation, it is not possible to definitively state the goals of the law. In the area of merger efficiencies, a key issue is what standard should be applied in determining which beneficial effects and which anti-competitive effects are to be considered. For example, should a merged firm's efficiencies be necessarily "passed on" to consumers in the form of price reductions or other benefits (as required in a "consumer welfare" model), or should the benefits to society as a whole arising from the efficiencies be the determining factor (as promoted in "total welfare" models)? This question is ultimately informed by the goal of the relevant antitrust law. In any event, it is useful to understand the merits and limitations of the full range of standards – regardless of the goal of a particular jurisdiction's antitrust law. The standards reviewed, in order of decreasing strictness, are as follows:

(a) price standard;

(b) consumer surplus standard;

(c) Hillsdown consumer surplus standard;

(d) balancing weights approach; and

(e) total surplus standard.

(a) Price standard

66. Under the price standard, proven efficiencies must prevent price increases in order to reverse any potential harm to consumers. Efficiencies are considered as a positive factor in merger review, but only to the extent that at least some of the cost-savings are passed on to consumers in the form of lower (or not higher) prices. The

76 Gotts & Goldman at 289.

emphasis here is on the immediate price-related benefits to the consumer.

67. While the price standard has been attributed by some to the U.S. antitrust authorities, the more appropriate view (which is supported by the U.S. DOJ and FTC) is that there is no basis in the US Merger Guidelines for suggesting that U.S. agencies ignore benefits to consumers that are not in the form of price reductions.

(b) Consumer surplus standard

68. The "consumer surplus standard", which assesses the effects of a merger on consumer welfare, appears to have at least two different interpretations. One interpretation (which has been taken by the U.S. and the EU) views the consumer surplus standard as a refined version of the price standard under which a merger will be permitted to proceed if there is no net reduction in consumer surplus. While it is a given that consumer surplus will increase if efficiencies cause prices to fall *ceteris paribus*, consumer surplus can still increase if prices rise, so long as consumers benefit in other ways, as from the introduction of new products, better quality or better service. These other consumer benefits translate into a shifting outward of the demand curve, in which case, consumers will remain better off due to, say, the product improvements made possible by the merger, even though prices may rise.[77]

69. Many of the jurisdictions examined (including the U.S.[78], the EU, Finland, the UK[79] and Ireland) appear to have adopted this interpretation of consumer surplus standard.

70. The price standard and a consumer surplus standard that requires benefits to be passed on to consumers raise difficulties where the principal "consumers" are in fact large corporations that purchase, for example, significant quantities of commodity

77 In the reverse scenario, a merger may result in the reduction in the number of brands produced. In this case, the merger might still pass a price test (because prices do not rise) but fail the consumer surplus standard (because the reduced quality lowers total consumer welfare). *See* Everett & Ross at 21.

78 While most commentators have interpreted the US Merger Guidelines as adopting the price standard or consumer surplus standard, Bill Kolasky and Andrew Dick point out that the Guidelines do not fully embrace a form of consumer surplus standard but, rather, provide that consideration will be given to the effects of cognisable efficiencies with no-short term, direct effect on prices. They characterise the U.S. approach as a "hybrid consumer welfare/total welfare model", under which efficiencies that benefit consumers immediately will receive the most weight, while other efficiencies, to the extent that they can be proved and shown to ultimately benefit consumers, will also be considered. William J. Kolasky and Andrew R. Dick, "The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers" (2003) 71 Antitr. L.J. 207 at 230, *available at* http://www.usdoj.gov/atr/hmerger/11254.pdf.

79 Under the UK OFT Merger Guidelines, the claimed customer benefits must accrue to customers of the merging parties (or to customers in a chain beginning with those customers), but need not necessarily arise in the market(s) where the SLC concerns have arisen. It is therefore conceivable that sufficient customer benefits might accrue in one market as a result of the merger that would outweigh a finding of SLC in another market(s). To show that benefits in one market outweigh an expected SLC in another will require clear and compelling evidence. UK OFT Merger Guidelines at ¶7.9.

goods such as oil, potash or propane. In this regard, the beneficiaries of the efficiencies will be the shareholders of the large corporations, who may be in a no less favourable position than the shareholders of the merged entity. This problem is exacerbated when the "consumers" are primarily foreign-owned firms, in which case the benefits of the efficiencies arising from a purely domestic merger would be "exported" to the foreign shareholders.

(c) Hillsdown Consumer Surplus Standard

71. The second interpretation of the consumer surplus standard (which is also referred to as the Hillsdown standard[80] and appears to be the interpretation given in Canada) permits a loss in consumer surplus, provided that the efficiency gains resulting from the merger exceed this loss. Under this standard, the post-merger efficiencies must exceed the sum of the dead-weight loss plus the loss to consumer surplus (which is transferred to producers). The transfer of wealth from consumers to producers is considered only as an adverse effect in the balancing equation; no corresponding gain to producer surplus is acknowledged.

72. Some observers believe that the Hillsdown standard is not consistent with any known economic welfare theory: by ignoring the transfer of wealth to producers, the standard in effect disregards the maximisation of social welfare and does not distinguish between the "transfer of wealth and the destruction of wealth"[81], *i.e.*, that gains to producers (and their shareholders) can be socially positive.

73. The Hillsdown standard assigns the same weight to all consumers, therefore protecting *all* consumers, even when some consumers may be better off than sellers and their shareholders. The reality is, since many firms are in fact owned by consumers (either directly or through shareholdings by pension plans, for example), profit increases can accrue to the ultimate benefit of consumers. This issue then becomes whether all consumers count or just those covered by the relevant antitrust market definition.

74. The Hillsdown standard was eventually argued by the Canadian Commissioner in *Superior Propane* in the rehearing before the Canadian Competition Tribunal as the

80 The Hillsdown standard is derived from the *obiter dictum* in the Canadian *Hillsdown* decision: *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.).

81 McFetridge at 55.

correct standard, but ultimately rejected by the Tribunal as being inconsistent with the policy goal of promoting efficiency.

(d) Total surplus standard

75. Total surplus is the sum of consumer and producer surplus. If the result of a merger is to raise the price of the relevant product without improving quality, consumer surplus decreases; if the merger is profitable, producer surplus increases through excess profits. Some of the increase in producer surplus arises from the decrease in consumer surplus. This is the so-called "transfer" of wealth or welfare. Under the total surplus standard, the anti-competitive effect of the merger is measured solely by the dead-weight loss to society (that is, the loss of producer and consumer surplus resulting from the price increase). This means that efficiencies merely need exceed the dead-weight loss to permit an otherwise anti-competitive merger to proceed.

76. Unlike the Hillsdown standard, which assigns a zero value to the wealth transferred from consumers to producers, the total surplus standard assigns an equal weight to both the loss in consumer surplus and the corresponding gain to producer surplus. In other words, the transfer of wealth is viewed as "neutral"[82] The rationale for a total surplus standard is grounded in the oft-criticised belief that the wealth transfer effects of mergers are neutral due to the difficulty of assigning weights to certain effects *a priori* based on who is more deserving of a dollar.[83]

77. In New Zealand, the NZCC recently reiterated that the proper test in that country is the total surplus standard. In its July 2003 paper setting out the analytical framework for a pending investigation into allegations of monopolistic price-gouging

---

82 Professor Townley is critical of the neutrality assumption in the total surplus standard. He argues that, if it is not possible to conclude that the parties affected by a merger value “dollars” differently, then it is not possible to conclude that they value them equally. Therefore, there is no basis for concluding that the transfer of wealth is neutral or is not neutral. “Efficiency Standards: They also serve who only sit and weigh(t)” (2003) 21(2) Can. Comp. Rec. 115 (“**Townley**”) at 119.

See also Professors Ross and Winter, who argue that the fact that all individuals in the economy consume, and therefore can be labelled consumers, does not in itself mean that a transfer from one group of individuals to another can be treated as neutral. Rather, a transfer is "welfare-improving" if it transfers wealth from more wealthy to less wealthy individuals. *A priori*, it cannot be said that consumers in a particular market are of the same wealth as shareholders. (For example, in some markets – ski resorts, airline, private jets, spa services, luxury goods in general – consumers are relatively wealthy; whereas in other markets, consumers may be less wealthy than shareholders.) Moreover, to the extent that a large fraction of companies are owned by, say, union and teacher pension plans, it is quite possible that price increases divert wealth from relatively more wealthy consumers to relatively poorer consumers. Thomas W. Ross and Ralph A. Winter, "The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments", presented at the Competition Law Roundtable, University of Toronto (13 December 2002) ("**Ross & Winter**") at 37.

83 Canadian Merger Guidelines, § 5.5.

by the owners of New Zealand's natural gas pipeline networks, the NZCC considered that, under the *Commerce Act 1986*, any decision to regulate pipeline prices would have to be justified by reference to "a net public benefit test, as distinct from a net acquirers' benefit test":

> "In summary, a net public benefit analysis considers net total welfare effects. Under this analysis, any deadweight efficiency loss due to allocatively inefficient prices would count as a net public detriment, but any transfer of wealth from consumers to suppliers (or vice versa) would not." [84]

78. Some have suggested that the relevant standard for authorisations in Australia is the total surplus standard.[85] Professor Corones concludes that, "as long as the claimed public benefit involves a reduction in social costs, it does not matter that the cost saving is not passed on to consumers in form of lower prices; however, it would be necessary to have regard to how widely the cost saving is shared among the group of beneficiaries."[86] In *Queensland Co-operative Mining Association Ltd,*[87] the Australian Tribunal indicated that private benefits (*e.g.,* to the shareholders of merging firms) could be considered as public benefits. Further, in the *7-Eleven Stores* case, the Tribunal stated that "the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources."[88] In 2002, the ACCC denied an application for authorisation of the proposed merger of Australian Pharmaceutical Industries Ltd. with Sigma Company Ltd.[89] Whilst the ACCC accepted that the merger would achieve efficiency gains, it found that any efficiency gains would be likely to be retained by the merger entity for its benefit and the benefit of its shareholders.

79. However, Professor Hazeldine of the University of Auckland suggests that the Australian public benefits test differs from the New Zealand test in that greater consideration will be given to efficiencies that are passed on to consumers.[90] This

---

84 NZCC, Gas Control Inquiry: Draft Framework Paper (16 July 2003) at 14, ¶1.

85 Everett & Ross at 40.

86 Stephen G. Corones, *Competition Law in Australia*, 2nd ed. (LBC Information Services, 1999).

87 *Re Queensland Co-operative Mining Assn Ltd* (1976) ATPR 40-012.

88 *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

89 Application for Authorisation: A30215, "Australian Pharmaceutical Industries Ltd. In respect of proposed merger with Sigma Company Ltd" (11 September 2003) (ACCC).

90 Tim Hazledine, "Pie in the Sky? The Proposed Cartel between Qantas and Air New Zealand", Prepared for presentation to the 14th Annual Workshop Competition Law & Policy Institute of NZ (Auckland, 23-24 August 2003).

can be seen in the ACCC's recent Final Determination in relation to the proposed acquisition of Air New Zealand by Qantas Airways and further cooperative arrangements among Qantas, Air New Zealand and Air Pacific.[91] In reviewing the public benefits claimed by Qantas and Air New Zealand, the ACCC stated at paragraph 13.65 (p.146):

> "Finally, it should again be noted that the cost saving benefits accrue to the Applicants and their shareholders. While the Commission is of the view that benefits to a particular group or segment of the community may be regarded as benefits to the public, consideration needs to be given as to whether the community has an interest in that group being benefited and whether that benefit is at the expense of others – for example, consumers through higher prices. The level of competition in a market will affect both the durability of the benefit and the likelihood and extent of that benefit being passed through to consumers. Where benefits are not passed on to consumers this may be symptomatic of a lack of competitive pressure that would otherwise cause such benefits to endure and be passed through. Such benefits are likely to be accorded a lower weight by the Commission."[92]

80. Prior to the Canadian *Superior Propane* case, the total surplus standard had been the proper test in Canada since the early 1990s and had been written into the Canadian Merger Guidelines. In *Superior Propane*, the Canadian Commissioner ignored the fact that the total surplus standard had been endorsed in his very own Canadian Merger Guidelines and took the initial (and contrary) view that the standard was too easy a test to meet and should therefore be abandoned. However, some Canadian critics suggest that, had the total surplus standard been properly argued by the Commissioner by taking into account pre-merger market power[93] and the loss of

---

91 Applications for Authorisation: A30220, A30221, A30222, A90862 and A90863, "Acquisition by Qantas Airways Limited of ordinary shares in Air New Zealand Limited and cooperative arrangements between Qantas, Air New Zealand and Air Pacific Limited" (9 September 2003) (ACCC).

92 In an appendix to the Final Determination, the ACCC addressed the anti-competitive detriment analysis of the airlines' economic consultants, Network Economic Consulting Group (NECG) at page C-17:

> "Finally, NECG's analysis did not fully address the issue of the distribution of the estimated benefits and detriments of the alliance between various parties, other than making some adjustments for international wealth transfers. The Commission analysed the burden of anti-competitive detriments and possible detriments to examine the distributional effects implicit within the NECG Model. This analysis shows that in aggregate, while deadweight losses reduce both consumers and producers surplus, Qantas and Air NZ benefit through significant welfare transfers from Australian, New Zealand and foreign consumers. The net effect on the Applicants is strongly positive, but for consumers is unambiguously negative. In gross terms, the transfer payments from consumers to producers are far in excess of the deadweight loss estimates provided by NECG. Furthermore, the NECG modelling fails to quantify the extent to which the benefits to Qantas accrue to foreign shareholders, rather than to Australia."

93 Margaret Sanderson states as follows: "Mergers in markets with pre-existing market power can still give rise to a substantial lessening of competition. Further, the greater the amount of pre-existing market power, the greater the efficiencies must be in order to offset the resulting welfare loss. As a consequence, the more closely a merger approaches a merger to monopoly, the less likely it is that any efficiency accompanying the merger will offset the

producer surplus[94], the merger in *Superior Propane* may not have been permitted under this standard.[95]

81. While favoured by many economists, it would appear, however, that from a political viewpoint most competition authorities are reluctant to adopt the total surplus standard.[96]

82. Putting aside welfare arguments for the time being, perhaps the strongest argument for the adoption of the total surplus standard arises in the need to stimulate and make efficient emerging economies or the new economies of developing nations. In this regard, factors to consider include the nature of the particular economy in question, the degree to which it is integrated with the economies of other trading nations, its historical economic experience with competition and competition law, the extent of regulation and deregulation, and its relative size. Indeed, the focus for developing countries seeking to participate in the global marketplace will be on creating an internationally competitive and efficient economy. In these circumstances, the relevant competition authorities may want to consider a more flexible if not responsive approach to efficiencies.[97]

(e) Balancing weights approach

83. The balancing weights approach attempts to find a balance between the redistributive effects or transfer of wealth from consumers to producers/shareholders by assessing the relative adverse effects on those "more deserving or less well-off" consumers. In

---

resulting welfare loss. The total surplus standard does not need to be abandoned to achieve this result. It only needs to be properly applied as articulated in the Merger Enforcement Guidelines." Margaret Sanderson, "Competition Tribunal's Redetermination Decision in *Superior Propane*: Continued Lessons of the Value of the Total Surplus Standard" (2002) 21:1 Can. Comp. Rec. 1-5.

94 In a market in which market power is already being exercised pre-merger, there will be a loss of both producer and consumer surplus from a price increase. This is highly likely in most cases where efficiencies will matter (that is in highly concentrated markets). This has two implications. The first is that the post-merger firm may have no incentive to raise price further as it will lose a portion of the producer surplus. Second, and more relevant to efficiencies, one must count both the producer surplus loss and the consumer surplus loss against the efficiency gains. The producer surplus loss is a real loss to the economy and could be significant. In the *Superior Propane* case, the Canadian Competition Tribunal was not presented with evidence of producer surplus and therefore considered only the consumer surplus loss, which was small in relation to the expected cost savings.

95 *See* Frank Mathewson and Ralph Winter, "The Analysis of Efficiencies in Superior Propane: Correct Criterion Incorrectly Applied" (2000) 20 Can. Comp. Rec. 2, *available at:* http://www.chass.utoronto.ca/~rwinter/papers/efficienc.pdf.

96 For example, FTC Commissioner Leary does "not believe this is a fruitful policy debate, for the simple reason that no endorsement of an overall welfare standard is politically viable in [the U.S.]; The assumption that sellers are already much richer than buyers is just too deeply entrenched, even though it obviously is not always true." *See* Leary.

97 See generally, Michal Gal, "Competition Policy in Small Economies", OECD Global Forum on Competition (7 February 2003), *available at:* http://www.olis.oecd.org/olis/2003doc.nsf/0/aba73de0eefbb274c1256cc60041ea19/$FILE/JT00138914.PDF.

other words, the redistributive effects will be considered if those who "lose" from the merger are less well-off than those who gain from the merger. When comparing the adverse effects to the magnitude of the efficiency gains, it must be determined whether the adverse effects are so egregious that a premium should be attributed to those adversely-affected consumers relative to the producers/shareholders.[98]

84. The balancing weights approach was first introduced in Canada in the *Superior Propane* case by the Canadian Commissioner's expert witness, Professor Peter Townley[99], endorsed by the Canadian Federal Court of Appeal, later abandoned by the Commissioner in favour of the Hillsdown standard, and subsequently applied (at least in principle) by the Canadian Competition Tribunal. It remains the current law in Canada. Brazil also, to a certain degree, employs a form of balancing weights approach. The difficulty in this approach, of course, is determining the relative degree of harm to those consumers to be protected when compared to the producer/shareholder gains from the efficiencies.

85. The above assessment requires a socio-economic value judgement that depends on case-specific evidence and the deciding body's perception of the marginal social utilities of income (or wealth) of the consumers and producers/shareholders affected by the merger.

86. While the balancing weights approach may be considered as a reasonable compromise between the consumer surplus standard and the total surplus standard, it is considered by some as largely unworkable because of this value judgement.[100] Whereas, the burden to show the nature and extent of the anti-competitive effects of a merger is typically placed on the government, which is uniquely placed to obtain and quantify this type of information, it may be beyond the competence and ability of

---

98 Townley at 118. It should be noted that the above description of the balancing weights approach attirbutes to the decision-makers a degree of precision and knowledge that may be overstated. In practical terms, the balancing weights approach is simply a pragmatic method to guide the decision-makers. If the merger passes the total surplus standard, the natural result is that the resource savings from efficiencies are greater than the dead-weight loss. Therefore, the former divided by the latter must be greater than one. (In *Superior Propane*, it was approximately 1.6.) The competition authority must then decide whether other considerations - such as distributional or equity factors - should be factored into the particular situation. If such a need exists, then the authority must decide whether these factors, in their totality, command such a premium that it is worth giving up the net efficiency gains.

99 Peter G. C. Townley, "Report, Exhibit A", Expert affidavit submitted in *Commissioner of Competition* v. *Superior Propane Inc. and ICG Propane Inc.* (August 1999), *available at* http://www.ct-tc.gc.ca/english/cases/propane/115.pdf.

100 However, Townley observes that all other standards also require value judgements. For example, he states that, "total surplus accords equal distributional weights and the price standard gives winners zero (or losers infinite) relative weight, both regardless of the actual circumstances of a particular merger. Consumer surplus lies between these extremes…". Townley at 126.

merging parties (and the reviewing agency) to obtain and assess the socio-economic evidence of the affected customers. Accordingly, without clear guidelines, merger review may become a lengthy and uncertain process under the balancing weights approach. Perhaps over time, a paradigm for this approach could be developed and proxies could be used to make these decisions; however, because of the high level of uncertainty involved, merging parties would not have a clear rule to guide them in merger planning for years to come.

VI. STANDARD AND BURDEN OF PROOF TO SUBSTANTIATE EFFICIENCIES

87. The expected value of an efficiency is a function of both the magnitude and the likelihood of the efficiency. Part of the suspicion and scepticism surrounding efficiencies arises from the difficulties in gauging future events with precision.[101]

88. The credibility of efficiencies claims depends on verification of the claims and the strength of the evidence overall. Efficiencies may be substantiated by the following types of evidence:[102]

- a company's internal plans and cost studies, as well as public statements;
- engineering and financial evaluations;
- industry studies from third-party consultants;
- economics and engineering literature;
- testimony from industry, accounting and economic experts;
- information regarding past merger experience in the industry; and
- information on firm performance from the stock market.

89. While it is true that forecasting synergies from a merger is an uncertain and difficult exercise, this may be no more speculative than forecasting the potential for SLC or the competitive response of rivals or poised entrants to possible price increases by the merged entity.[103] The more experience with efficiencies, the more likely that the

101 Gotts & Goldman at 261.

102 *Id.* at 263-265.

103 However, in cases with concentration levels similar to those found in the U.S. *Heinz* case, or in matters where unilateral effects are predicted, there is a well-established paradigm for predicting competitive effects. In such cases, there may well be less confidence and experience in judging what types of mergers are likely to fail to obtain expected efficiencies.

appropriate paradigm will emerge for incorporating them into the analysis.[104] However, efficiencies will always need a case by case assessment.

90. The problem of verification must also be considered in view of the empirical evidence that suggests that many mergers fail to deliver their projected efficiencies. Therefore, the following questions need to be answered when evaluating claimed efficiencies: (1) is the decision to merge based on projected efficiencies (or only motivated by market power)? and (2) are the efficiency estimates held by the firms reasonable (taking into account the history of failure)?[105]

VII. SHOULD EFFICIENCIES PERMIT MERGERS WITH LARGE MARKET SHARES?

91. Debate remains regarding to what extent efficiencies should be considered in mergers resulting in large market concentrations. One approach that has been used on occasion in the U.S. is to take into account the post-merger market concentrations. Under this approach, the lower the concentration levels, the more likely competition authorities will factor into the analysis the efficiencies' benefits of a transaction. For transactions raising higher concentration concerns, this approach "discounts" efficiency claims. Moreover, as indicated in the US Merger Guidelines and in recent U.S. court decisions, it is very unlikely that efficiencies will ever outweigh large anti-competitive effects.[106]

92. Similarly, the use of structural market share indicators appears to correspond to the current EU model, which uses a relatively high threshold for its structural presumptions. The EU Merger Guidelines also provide that it is unlikely that a market position approaching that of a monopoly can be declared compatible with the common market on efficiency grounds.[107]

---

104 It is to be noted that at one time U.S. practitioners retained economic experts to calculate HHI ratios.

105 Lars-Hendrick Röller, Johan Stenneck and Frank Verboven, "Efficiency Gains from Mergers" (2000) The Research Institute of Industrial Economics, Working Paper No. 543 at 60.

106 In the U.S. baby food case of *Heinz*, while the D.C. Circuit Court exhibited scepticism and hostility to efficiencies due to the concentration levels that would exist post-merger, it did leave open the possibility that, at least in some cases, an efficiencies defence could succeed. The Court held that the high market concentration levels present in *Heinz* required, in rebuttal, proof of "extraordinary" efficiencies. *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000); rev'd, 246 F.3d 708 (D.C. Cir. 2001).

107 EU Merger Guidelines at ¶ 84.

93. The Canadian efficiency defence provides no limits to the level of concentration that can be authorised thereunder. As a matter of law, the Canadian Competition Tribunal is not permitted to block a merger solely based on market share. Without such limits, the acceptance of a valid efficiency defence theoretically may permit the creation of a monopoly or near monopoly.[108]

94. While the Australian Merger Guidelines do not expressly state that gains in efficiency can justify or offset the elimination or near elimination of competition, it has been suggested that the ACCC may be open to the possibility.[109] In a recent speech, former Australian Commissioner Jones reported that:

> "... in granting authorisation the Commission is giving immunity from a significant economic principle. It is allowing firms to substantially lessen competition, and thereby gain substantial market power, even monopoly power."[110]

95. In Brazil, merger filings that would result in both possible anti-competitive effects and high market shares were allowed to proceed based on the alleged efficiencies. However, due to the lack of specific standards (and a more developed antitrust experience) for the analysis of efficiencies, Brazilian authorities have been generally discretionary in these cases.

96. It is argued that it may be better to discard the presumption based on concentration in favour of a case-by-case adjudication of other factors such as market conditions and net efficiencies.[111] This argument is based on the opinions of some scholars who view the presumption on concentration levels as weak (absent extraordinary circumstances of creation or enhancement of unilateral market power).[112] However, while the existing theories for attacking mergers on concentration and market share grounds alone may lack a firm empirical foundation, competition authorities appear to be reluctant (and perhaps justifiably so) to permit mergers that result in inordinately

---

108 However, monopoly, in practice, is at best an elusive concept. Instead, it is perhaps more appropriate to speak of "market power" or "high market shares". Accordingly, because of the offsetting resource savings to the Canadian economy resulting from the merger in *Superior Propane*, the practical effect of the Canadian Competition Tribunal's decision was to allow a merger that gave the merging parties the ability to raise prices and exercise market power.

109 Everett & Ross at 43.

110 Commissioner Ross Jones, "The Rationale for Merger Laws" Speech delivered at The Thirteenth Annual Workshop of The Competition Law and Policy Institute of New Zealand (2 August 2002) at 17. Ross Jones retired from the ACCC on 30 June 2003.

111 Gotts & Goldman at 268.

112 *Id*. at 269.

high market shares.[113]

VIII. SIGNS OF REFORM

97. In the UK, the treatment of efficiencies has been clarified in the recently promulgated *Enterprise Act*. Previously the "public interest" test could take account of efficiencies, but the CC inquiry teams were not bound as to what issues they considered to be relevant to their conclusions. The new sets of UK CC and OFT Guidelines make the assessment of efficiencies much more explicit.

98. In the U.S., adverse court decisions have led some antitrust lawyers to advise their clients not to make the effort necessary to put forward their best efficiencies case.[114] Recognising this problem, FTC Chairman Muris has stated that, "internally we take substantial well-documented efficiencies arguments seriously. And we recognise that mergers can lead to a variety of efficiencies beyond reductions in variable costs." Moreover, Chairman Muris indicated that efficiencies can be important in cases that result in consent decrees, and in the formulation of remedies that preserve competition while allowing the parties to achieve most, if not all, efficiencies. He has reassured antitrust counsel that well-presented credible efficiencies will be given due consideration by the FTC in merger review.

99. In Europe, critics have argued that a merger policy that does not take into account efficiency gains (including cost savings that are passed on to consumers in the form of lower prices) may be harmful to European competitiveness, especially in high-tech industries. Accordingly, the EC recently indicated that it is examining its views on efficiencies and may view efficiencies more favourably in the future. In July 2002, EC Commissioner Monti stated, "We are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition."[115] He (1) expressed support for an efficiencies

---

113 Some jurisdictions respond to this concern by making concentration or market share only one element of the analysis, which must be considered only in tandem with other factors such as barriers to entry. From a competition authority's point of view, this "reluctance" is perfectly justified, as it depends on what levels of market share and concentration may arise.

114 Timothy J. Muris, "Understanding Mergers: Strategy and Planning, Implementation, and Outcomes" FTC Roundtable at 2, *available at* http://www.ftc.gov/speeches/muris/mergers021209.htm.

115 Mario Monti, "The Future for Competition Policy in the European Union" Address at Merchant Taylor's Hall, (London, 9 July 2001), *available at:* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN

defence; (2) noted that reform will be accompanied by the issuance of interpretative market power guidelines to assist in providing market definition and how efficiency considerations should be taken into account; and (3) indicated that the EU will not stop mergers simply because they reduce cost and allow the combined firm to offer lower prices, thereby reducing or eliminating competition. Commissioner Monti concluded, however, that "it is appropriate to maintain a touch of 'healthy scepticism' with regard to efficiency claims, particularly in relation to transactions which appear to present competition problems."[116]

100. The recently issued EU Merger Guidelines similarly indicate that:

> "The Commission considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have."[117]

101. In Canada, the former Canadian Commissioner of Competition viewed the outcome of *Superior Propane* as an unacceptable result. At the time, however, he chose not to launch a further appeal, but rather, sought legislative reform by supporting draft amendments to the Canadian *Competition Act* put forth in a private member's bill (Bill C-249[118]). Bill C-249, which has gone through accelerated passage in Canadian Parliament with very little opportunity for public consultation, seeks to repeal the statutory efficiency defence in its entirety and, purportedly, to bring Canadian law in line with the treatment of efficiencies in other jurisdictions such as the U.S. and the EU. Under the draft legislation, a merger will no longer be assessed by looking at the "trade-off" between the post-merger efficiencies and the anti-competitive effects of

---

116 Mario Monti, "Review of the EC Merger Regulation – Roadmap for the Reform Project Conference on Reforms of European Merger Control" British Chamber of Commerce (Brussels, 4 June 2002) at ¶ 31, *available at*: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=SPEECH/02/252|0|AGED&lg=EN&type=PDF.

117 EU Merger Guidelines at ¶ 77. The Guidelines further require that "efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur". EU Merger Guidelines at ¶79.

118 *Bill C-249, An Act to amend the Competition Act*, 2nd Sess., 37th Parl., 2002, *available at* http://www.parl.gc.ca/PDF/37/2/parlbus/chambus/house/bills/private/c-249_3.pdf.

the merger. Rather, post-merger efficiencies will be considered (in some unspecified fashion) as part of the overall SLC assessment of the merger, with regard to whether such efficiencies will be "passed on" as benefits to consumers in the form of, for example, lower prices or improved product choices.

102. In its current form, the draft legislation raises several uncertainties, including as to (a) how exactly efficiencies will be assessed when compared to other factors considered in the government's competitive analysis of a merger; (b) whether this legislation adopts a price standard or a form of consumer surplus standard; (c) which consumers would be eligible to receive the benefits of the efficiency gains; (d) how merging parties would demonstrate that the passing-on of efficiencies to consumers would sufficiently mitigate any anti-competitive effects of the merger; and (e) how such a passing-on requirement would, in practice, be enforced. What can be expected, however, if Bill C-249 were to be enacted as drafted, efficiencies will have minimal significance in all but a limited number of cases, and efficiencies alone will almost never "trump" a merger to monopoly.[119]

103. At this time, the future of this Bill C-249 is unknown. While the bill has passed second reading in the Canadian Senate, it received a considerable “dressing down” by members of the Canadian competition bar and Professor Peter Townley when they appeared before the Senate Standing Committee on Trade, Banking and Commerce reviewing the bill in November 2003. Following this hearing, the Standing Committee issued a letter to the Minister of Industry, recommending that Bill C-249 should be subject to a wider public consultation process, similar to those used for other proposed amendments to the *Competition Act*. Further, with the recent departure of former Commissioner von Finckenstein and the appointment of a new Commissioner[120], it remains to be seen whether Bill C-249 will be resurrected in its current form.

104. In Australia, the Dawson Committee concluded in its report to the Australian

---

119 Many in the Canadian business and legal community believe that the balancing weights approach advocated in the *Superior Propane* case properly reflects the intention of the Canadian government in its objectives of promoting a more cost-effective and internationally-competitive economy for a small open trading economy like Canada: the fact that gains in efficiencies which are real and specific to a merger may override certain anti-competitive effects is consistent with this broader national objective.

120 On 12 January 2004, the Canadian Government appointed Sheridan Scott, Chief Regulatory Officer of Bell Canada, as its new Commissioner of Competition. Her experience includes nine years at the Canadian Radio-television and Telecommunications Commission where she was involved in major telecommunications and broadcasting hearings.

government[121] that the introduction of an efficiency test would produce a more complex clearance process, requiring more time and the exercise of greater discretion by the ACCC. The Committee therefore concluded that efficiencies should be considered, where necessary, as part of the total authorisation procedure. It further stated that the existing public benefits test for merger authorisations is broad enough to encompass any factors relevant to efficiency. The Government of Australia has accepted the Committee's recommendations in this area.

IX. CONCLUSION

105. If indeed there is a need for the adoption and evolution of a broader and more universally consistent treatment of merger efficiency claims, competition authorities will be required to increasingly develop an expertise in evaluating efficiencies and their effects, including: (1) determining what efficiencies should be included in a trade-off against post-merger anti-competitive effects, including a consideration of fixed costs and less certain long-term savings; (2) how such efficiencies should be quantified; and (3) once quantified, how they should be weighed against any losses to consumers or other anti-competitive effects.

106. The authors suggest that the next step in the process may be the consideration of first principles, including perhaps the following:

1 There should be the creation of a standard template to categorise the types of efficiencies to be adduced by merging parties – in this regard, the most permissive interpretations from the various jurisdictions noted above will be instructive.

2 Each jurisdiction would then be permitted to consider and accept or reject any part or all of the above categories put forward. Each jurisdiction would be required to identify which factors it will not consider in an open and transparent way.

3 No jurisdiction would apply efficiencies to count against a merger.

4 There would be no presumption of illegality based on post-merger market

121 "The Dawson Committee Report on the *Trade Practices Act*" (23 April 2003).

concentrations alone. Rather, the merger would be examined in light of all factors, including the efficiencies provided thereby and the barriers to entry.

5 The requirement for merger-specificity should not be based on speculative or theoretical possibilities for achieving the efficiencies absent the merger.

6 Competition authorities should provide guidance on how efficiencies will be identified and measured in a merger submission and how the evidentiary burden is to be discharged. This should be coupled with guidance on the weight that will be given to efficiencies if they are proven to the reasonable satisfaction of the competition authority in the overall assessment of the merger.

7 Competition authorities should attempt to develop an actual standard to be used in weighing efficiencies, as well as the degree, if any, to which the efficiencies may outweigh any anti-competitive effects of a merger. In such cases, there may be a need for an empirically-tested model.

107. It should be noted that it is difficult to formulate properly any kind of recommendation for best practices based on the entire foregoing “conceptual framework”, particularly in the absence of empirical support. However, we have articulated the above draft first principles more as “discussion points” rather than as a firm foundation for the development of "best practices" in the analysis of merger efficiencies.

Issue	United States	Canada	Brazil
Governing law	• Clayton Act • US Merger Guidelines • *Heinz* case	• *Competition Act* • Canadian Enforcement Guidelines • *Superior Propane* case	Administrative Council of Economic Defense - Administrative Rule n. 15/98
Treatment of efficiencies	Considered as part of total SLC assessment	Efficiency defence	Efficiency defence
Types of efficiencies claims considered*	• Rationalisation and multi-plant economies of scale are more cognisable • R&D – less cognisable • Procurement, management or capital cost – least cognisable	• Production (including economies of scale and scope and synergies) • Transactional • R&D • Dynamic • Distribution and advertising	• Economies of scale • Economies of scope • Transaction cost reduction • The introduction of more productive technology • Positive externalities or elimination of negative externalities • The generating of compensatory market power
Must efficiencies be merger-specific?	Yes	Yes	Yes
Standard for weighing efficiencies	Consumer surplus — However, the effects of cognisable efficiencies with no short-term, direct effect on prices will be also considered.	Balancing weights approach	Consumer surplus Balancing weights approach
Efficiencies must be passed on to consumers?	Yes - over time	No	Efficiencies must be passed to consumers, but there is no authority on the methodology to be used.
Standard of proof to claim efficiencies	• Efficiencies must be "cognisable", i.e., merger-specific, verifiable and cannot arise from anti-competitive reductions in output or service. • "Extraordinary" cognisable efficiencies required where potential adverse competitive effects are likely to be particularly large.	Parties must show, on the balance of probabilities, that a merger is likely to bring about gains in efficiencies that will be greater than and will offset the effects of SLC and that efficiencies would not be achieved if the order sought were made.	Efficiencies can not be vaguely established or speculative, and must be capable of being reasonably monitored.
Relationship between	Efficiency gains must show that transaction is not likely to be anti-	Efficiency gains must be "greater than and offset" the anti-competitive effects.	Efficiencies must be "greater than and offset" the anti-competitive effects.

* This list may not necessarily be exhaustive. Please refer to the applicable guidelines for further information.

Issue	United States	Canada	Brazil
efficiencies and anti-competitive effects	competitive.		
High market shares permitted?	Yes, but efficiencies almost never justify a merger to monopoly or near-monopoly.	Yes, efficiencies may trump a merger to monopoly or near-monopoly.	Yes
Suggested reform	Increased willingness to accept evidence of efficiencies.	Draft legislation may replace the efficiencies defence by a consideration of efficiencies that are likely to benefit consumers as part of the SLC test.	None at this time

Issue	EU	UK	Ireland
Governing Law	• ECMR • EU Merger Guidelines	• *Enterprise Act 2002* • UK OFT Merger Guidelines • UK CC Merger Guidelines	*Competition Act 2002*
Treatment of efficiencies	Efficiencies have to benefit consumers, be merger-specific and be verifiable. (EU Merger Guidelines, ¶78).	**UK OFT:** • Normally, efficiencies must avert an SLC by increasing rivalry within the market. • In its duty to refer mergers to the UK CC, the UK OFT will consider efficiencies that do not avert an SLC but will nonetheless be passed on after the merger in the form of customer benefits. **UK CC:** • Normally, efficiencies must avert an SLC by increasing rivalry within the market. • In deciding remedies for an SLC, may have regard to relevant customer benefits that are sufficient to remove the need for a remedy to the SLC.	Efficiencies defence

Issue	EU	UK	Ireland
Types of efficiencies permitted*	• Should benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. (EU Merger Guidelines, ¶79) • Cost savings in production or distribution (EU Merger Guidelines, ¶80) • New or improved products or services from R&D and innovation (EU Merger Guidelines, ¶81)	**UK OFT:** • Cost savings (fixed or variable) • More intensive use of existing capacity • Economies of scale or scope • Demand side efficiencies such as increased network size or product quality • Reductions in fixed costs are also given weight • Capturing of complementarities in R&D activity which might increase incentives to invest in product development in innovation markets • Can be in another market. **UK CC:** No explicit or exhaustive list for efficiencies to be taken account when assessing whether an SLC has occurred.	• Efficiencies that are likely to Increase price rivalry, including savings relating to more efficient purchasing processes, efficiencies arising from network effects in demand, efficiencies due to technology transfer and demand-side efficiencies **EXCLUDED:** • Savings due to the integration of administrative functions • Input price reductions related to buyer power • Efficiencies related to economies of scale that do not involve marginal cost reductions • Efficiencies that reduce prices in one market but do not compensate for increases in another
Merger specificity?	Yes	**UK OFT:** Yes **UK CC:** Yes	Yes
Standard for weighing efficiencies	Consumer surplus	**UK OFT:** Customer surplus for cases that are not referred to the UK CC. **UK CC:** Customer surplus for determining remedies.	Consumer surplus
Efficiencies passed onto consumers?	• Consumers cannot be worse of as a result of the merger (EU Merger Guidelines ¶79). • Efficiencies should be substantial and timely (EU Merger Guidelines ¶79).	**UK OFT:** For cases not referred to the UK CC, efficiencies must be passed on as benefits to customers. **UK CC:** In determining remedies, the only relevant customer benefits that will be considered by the UK CC are lower prices, higher quality, greater choice or greater innovation (¶4.37 of the UK CC Merger Guidelines).	Overall effect result in lower net prices for consumers

*** This list may not necessarily be exhaustive. Please refer to the applicable guidelines for further information.**

Issue	EU	UK	Ireland
Standard of proof to claim efficiencies	Efficiencies have to be verifiable such that the EC can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers. (EU Merger Guidelines ¶86)	**UK OFT:** Efficiencies that are claimed to enhance rivalry must be: • demonstrable; • merger-specific; and • likely to be passed on to customers. Rare for efficiencies to outweigh SLC. **UK CC:** • SLC - If efficiency gains are to argued as increasing rivalry among the remaining firms in the market, the UK CC will need to form an expectation that the claimed efficiencies: – will result within a short period of time; and – result as a direct consequence of the merger. • Remedies - Rare for a merger resulting in an SLC to lead to customer benefits. Burden of proof is on merging parties claiming relevant customer benefits in the context of remedies to an SLC.	• Parties must demonstrate that there is a sufficient likelihood that efficiencies will be realised. • Must show that efficiencies cannot be achieved in another way that is less restrictive to competition and will be achieved within a reasonable timeframe and with sufficient likelihood. • Must be clearly verifiable, quantifiable and timely.
Relationship between efficiencies and anti-competitive effects	Efficiency gains cannot form an obstacle to competition.	**UK OFT and UK CC:** • Normally, efficiencies will be permitted only where they increase rivalry in the market, *i.e.,* no SLC. • Efficiencies passed on as benefits to customers may mitigate anti-competitive effects in rare cases.	• Efficiencies must be sufficient to outweigh both any increase in price-cost margins and any uncertainties about their realisation. • No finding of SLC provided that consumer welfare is not reduced.
High market shares permitted?	Highly unlikely that a merger leading to a market position approaching that of a monopoly (or leading to a similar level of market power) can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects. (EU Merger	**UK OFT:** Unlikely – enough competition must remain to ensure pass on to consumers of a "reasonable share" of benefits. **UK CC:** UK CC Merger Guidelines do not discuss the point.	Not specified but unlikely.

Issue	EU	UK	Ireland
	Guidelines, ¶84).		
Suggested reform	New EU Merger Guidelines released in early 2004.	*Enterprise Act*, UK CC Merger Guidelines and OFT Guidelines came into force on June 20, 2003.	None

Issue	Germany	Finland	Romania
Governing law	*Act Against Restraints of Competition* (**ARC**) **NOTE:** While §42 of the ARC could theoretically encompass efficiencies as a benefit to be considered in the context of a Ministerial authorisation, the paucity of such authorisations does not allow any general conclusion or rules to be made. Therefore, reference to the consideration of efficiencies under §42 is more speculative than authoritative.	*The Act on Competition Restrictions* 480/1992 (Chapter 3a)	Chapter III of Law No 21/1996 on Competition
Treatment of efficiencies	• Public benefits test (§42 ARC)	As part of the "creation or strengthening of a dominant position" analysis	Efficiencies defence
Types of efficiencies permitted*	Not restricted to a particular market (§36 ARC), but no precedent established to date.	Not specified, but may include: • Synergy • Economies of scale benefits • Specialisation • Development of new products	Not specified
Merger specificity?	Possibly, in the context of §42 Ministerial authorisation.	Yes	Not specified
Standard for weighing efficiencies	No precedent established to date.	Consumer surplus	Not specified
Efficiencies passed onto	No precedent established to date.	Yes, customers or consumers	Not specified

*** This list may not necessarily be exhaustive. Please refer to the applicable guidelines for further information.**

Issue	Germany	Finland	Romania
consumers?			
Standard of proof to claim efficiencies	• Public benefits must be "concretely verifiable" (§42 ARC).	Not specified	Not specified
Relationship between efficiencies and anti-competitive effects	• Efficiencies may form part of the benefit to the public interest: the total benefit must outweigh the competition restraints (§42 ARC)	Efficiencies must offset any anti-competitive effects of the merger.	Efficiencies must offset any anti-competitive effects of the merger.
High market shares permitted?	• Under §42 ARC, high market shares may be justified if they are offset by substantial public benefits.	Unlikely	Not specified
Suggested reform	None	None	None

Issue	Australia	New Zealand	Japan
Governing law	• *Trade Practices Act 1974* (TPA) • Australian Merger Guidelines	• *Commerce Act 1986* • NZ Practice Note	*Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade*
Treatment of efficiencies	• Public benefits test for authorisations • SLC review in informal clearances under §50	Unclear - public benefits or perhaps efficiency defence	Efficiencies are examined in their impact on competition
Types of efficiencies permitted*	• Economies of scale • Efficiencies that allow the merged entity to become a new competitive constraint on the unilateral conduct of other firms in the market. • Pecuniary benefits such as lower input prices due to enhanced bargaining power may also be relevant in a §50 context.	The NZ Practice Note refers only to decreased unit cost of production as a permissible efficiency.	• Economies of scale • Integration of production facilities • Specialisation of factories • Reduction in transportation costs • Efficiency in R&D • Other improvements of efficiency caused by the M&A
Merger	Yes	Yes	Not specified

*** This list may not necessarily be exhaustive. Please refer to the applicable guidelines for further information.**

Issue	Australia	New Zealand	Japan
specificity?			
Standard for weighing efficiencies	• Consumer surplus for informal clearance and breach of §50 of the TPA • Unclear for authorisations	Total surplus	Not specified
Efficiencies passed on to consumers?	• Yes, for informal clearance • No, for authorisations	No	Not specified
Standard of proof to claim efficiencies	• Efficiencies must be substantiated to ascertain their magnitude and must be probable. • "Strong and credible" evidence.	• Efficiencies must be of "the required magnitude and credibility". • Parties must make a "sound and credible case" that the efficiencies will be realised, that they cannot be realised without the acquisition, and that they will enhance competition in the relevant market.	Unclear, somewhere between beyond a reasonable doubt and the preponderance of evidence.
Relationship between efficiencies and anti-competitive effects	Efficiencies must enhance competition in the market.	Efficiencies must enhance competition in the market.	Efficiencies are only considered when improvement is deemed likely to stimulate competition.
High market shares permitted?	Possibly	Not specified	Not specified
Suggested reform	Recommendations of the Dawson Committee to consider efficiencies as part of the authorisation process.	None	None

Postscript to ICN Chapter on Efficiencies

Australian Developments

Since the writing of the efficiencies chapter, there have been two significant developments in Australia concerning the consideration of efficiencies in merger matters.

The first significant development is that, on 11 November 2003, the ACCC announced that, for the first time, it would publish reasons for its consideration of mergers. This will no doubt lead to greater transparency in the ACCC's decision-making process. Three decisions have so far been published on the ACCC's web site.[122]

The publishing of such decisions should give some insight in the future into the ACCC's reasoning in its application s 50 of the TPA. One decision already published, the ACCC's assessment of Coca-Cola Amatil Limited's proposed acquisition of Berri Limited, does suggest that the ACCC considers efficiency issues to be important in assessing conduct which may contravene s 50 of the TPA. In this decision, the ACCC determined that it would oppose the proposed merger on the basis that it would have the effect, or would be likely to have the effect of substantially lessening competition in contravention of s 50. Among other concerns, the ACCC noted that, while efficiencies could be increased and costs reduced on the part of the merged firm, this would lead to a rise in rivals' costs and the efficiency gains would be unlikely to be passed on to consumers. This suggests that, contrary to the indications of Professor Corones (see paragraph 77 of the efficiencies chapter), the ACCC considers that the relevant standard in assessing efficiency in merger decisions is not the total surplus standard, as the retention of efficiency gains by the merged entity and/or its shareholders would not be a sufficient 'public interest'.

The second significant development has been the decision of the Federal Court of Australia in *Australian Gas Light Company Ltd v Australian Competition and Consumer Commission (No 3)* [2003] FCA 1525 (Unreported, French J, 19 December 2003), where a declaration was sought that a proposed merger would not contravene s 50 of the TPA. Such declaration was granted by the Court, subject to certain undertakings being given by the merged entity. This case is the first where such a declaration as to s 50 of the TPA has been sought from the Court. While the decision does not consider efficiency as a sole and determinative factor, it was still alluded to in the competition analysis conducted by French J. Given the speed at which the Court reached its decision subsequent to a trial heard in December 2003, this decision may encourage more parties contemplating mergers to seek similar declarations from the Court if the ACCC indicates that it will oppose a merger. This may lead to more detailed judicial consideration of the assessment of efficiencies in merger transactions in Australia in the future.

---

[122] **As at 31 March 2004, the ACCC has made available the reasons for its decisions relating to mergers concerning (i) MiTek Australia Ltd and Austrim Nylex Limited; (ii) Coca-Cola Amatil Ltd and Berri Ltd; and (iii) (in relation to undertakings, rather than the merger itself) Perkins Shipping Pty Ltd and Gulf Freight Services Pty Ltd. The decisions can currently be found on the ACCC's web site at http://www.accc.gov.au/content/index.phtml/itemId/486967.**

-

Bob Baxt, Melissa Randall and Andrew North, 5 April 2004