

FP EDITORIAL

The Competition Commissioner's backing of a bill to allow mergers only if efficiency benefits are passed along to consumers ignores economic reality

Leave mergers alone

R. JAY HOLSTEN

Throughout most of the 20th century, policymakers in developed countries struggled with the role that competition law should play in helping to shape their economies. Canadian policymakers, after years of debate and consultation, reached a workable and principled solution in the 1980s with the Competition Act. But this important legislation is threatened today by a bill that would undermine the principles on which it is based.

The authors of the Economic Council of Canada's 1969 Interim Report on Competition Policy concluded that Canadian competition policy should have a single, main objective — that of obtaining the most efficient possible performance from our economy. In their view, such a policy was likely to avoid economic waste and maximize productivity (and thereby, real income) for the benefit of all Canadians.

Bill C-249 would effectively repeal the efficiency defence in merger review

It was also likely to be applied more consistently and effectively than a policy focused on other objectives.

But it was not until 1986, after extensive federal government consultation with business and consumer groups, legal experts and other interested parties, that the Competition Act was enacted, providing Canadians with an effective and up-to-date competition law — something that, in the government's view, was long overdue. Among other important changes, the act clearly established the role of economic efficiency in Canadian competition policy.

For example, the merger provisions of the Competition Act included an efficiency defence: even where a merger was likely to result in a lessening of competition, the Competition Tribunal could not prohibit the transaction if it was likely to bring about gains in efficiency that would outweigh its anticompetitive effects.

Until the recent Superior Propane case, few commentators — particularly those familiar with the 1986 amendments — questioned the desirability of balancing the expected benefits of efficiency-enhancing mergers against the disadvantages of lessening competition. The only question that arose from time to time was the precise nature of the balancing test.

But initiatives currently underway in Ottawa would significantly undermine the economic principles reflected in the Competition Act. Bill C-249, a private member's bill currently before the Senate, would amend the act to provide that efficiencies would be relevant in Canadian merger review only where the efficiency benefits of a merger would be passed on to consumers in the form of lower prices. Unfortunately, these initiatives ignore the important economic considerations that led to enactment of the Competition Act in the first place.

Proponents of the bill — who include the Commissioner of Competition — cite the outcome of the Superior Propane case in support of the amendment. The commissioner also appears to have the view that Canadian merger law is out of date and does not reflect the economic realities of the 21st century. In recent comments to the standing committee on industry, science and technology, he noted that Canada's economy has changed significantly since 1986, as a result of globalization and free trade initiatives. He also suggested that while today we have a vastly different perspective on the importance of competition as a driving force behind development, the law has not changed and is leading to results inconsistent with this new reality.

But it is quite simply not the case that Canada's economy today is fundamentally different from the economy at the time the Competition Act was enacted. While much has changed since 1986, Canada remains a relatively small economy with a dependence on international trade. As Michel Côté, then minister of consumer and corporate affairs, put it in 1986, Canada is, first and foremost, a trading nation.

In 1986, the dollar value of Canadian exports as a percentage of our gross domestic product was approximately 27.5%, or roughly four times that of the United States. By 2000, the percentage had risen to approximately 46%. If anything, this suggests that Canada is even more a "trading nation" today than when the Competition Act was enacted.

It is also unlikely that we have a "vastly different" perspective on the importance of competition to development than we did in 1986. On the contrary, the importance of competition as "a driving force behind development" was itself a driving force behind the Competition Act.

As in 1969 and 1986, Canada's unique economic circumstances strongly suggest that it should have, and should continue to have, a unique competition policy. Particularly in the area of merger review, to simply adopt the competition policy of another jurisdiction such as the United States — with its focus on consumer protection — would be to ignore both the realities of the Canadian economy and the important differences between it and the economies of our major trading partners, to the detriment of all Canadians.

Yet this is precisely what Bill C-249

would do. If enacted, the bill would effectively repeal the efficiency defence in Canadian merger review. While this should be troubling to those familiar with the debate leading up to the enactment of the Competition Act, what is more troubling is that a single merger decision appears to be behind the proposed change.

Superior Propane is the only merger decision in more than 15 years that has turned on the efficiency defence. In the view of many who have studied the decisions, the case was lost not on the interpretation of the Competition Act by the Competition Tribunal and the Federal Court of Appeal, but on the insufficiency of the evidence put forward on behalf of the Commissioner of Competition in opposing the merger. Yet the commissioner insists the outcome of the case is unacceptable, and that the only workable solution is a legislative amendment. But that amendment, by refocusing the merger enquiry on vaguely defined consumer interests, will undermine both the important economic principles reflected in the

The tortured Superior Propane case should not be the basis for a major policy shift

Competition Act and the consensus that emerged within the Canadian business and legal communities in the debate leading up to its enactment.

Legislative changes that represent a major shift in competition policy should not be based on the outcome of a single merger decision, particularly one as tortured as Superior Propane. Rather, they should be preceded by a thorough policy debate. One can therefore only hope that Bill C-249 dies on the order paper, and that any future proposed changes to the Canadian merger review regime, including the efficiency defence, receive the thoughtful consideration they deserve — for the benefit of all Canadians.

R. Jay Holsten is the chairman of the Antitrust and Competition Law Group at Torys LLP. The views expressed in this article are the personal views of the author.