



This Information Bulletin discusses one aspect of the new merger provisions -- the Advance Ruling Certificate -- in the Competition Act.

This Bulletin is intended to give interested persons an introductory guide to these provisions and the approach being taken by the Director of Investigation and Research to the issuance of Advance Ruling Certificates. The Bulletin sets out some of the considerations the Director may take into account in the review of applications for certificates, discusses various matters related to their issuance and describes some case examples.

Copies of the Bulletin can be obtained from the offices of the Bureau of Competition Policy. Their addresses are listed at the end of the Bulletin.

The Bureau of Competition Policy is part of the Department of Consumer and Corporate Affairs Canada and is headed by the Director of Investigation and Research. The Director has responsibility for administering and enforcing the Competition Act, legislation which is designed to maintain and encourage competition in the nation's marketplace.

General information on the Competition Act may be obtained from the Bureau of Competition Policy, Consumer and Corporate Affairs Canada, Ottawa, Ontario, K1A 0C9, telephone (819) 994-0798.

Calvin S. Goldman, Q.C.  
Director of Investigation  
and Research  
Bureau of Competition Policy

**ADVANCE RULING CERTIFICATES AND  
MERGER REVIEW UNDER THE COMPETITION  
ACT**

An Advance Ruling Certificate may be issued by the Director of Investigation and Research to a party or parties to a proposed merger transaction to assure them that the transaction will not give rise to proceedings under the merger provisions of the Competition Act if the merger proceeds as proposed.

Under the Act, a merger is defined as a direct or indirect acquisition or establishment, by one or more persons, of control over or significant interest in the whole or a part of the business of a competitor, supplier, customer or other person. The methods of achieving this control or significant interest include the purchase or lease of shares or assets, amalgamation or combination (section 63).

Under section 64 of the Competition Act, the Director may apply to the Competition Tribunal for an order in respect of a merger or proposed merger that prevents or lessens, or is likely to prevent or lessen, competition substantially. If the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, it may, in the case of a completed merger, issue an order to dissolve the merger, or to dispose of assets or shares; and, for a proposed merger, issue an order not to proceed with the merger or with a part of the merger. The Tribunal may also issue other orders, including those made on consent, designed to ensure that the merger is not likely to prevent or lessen competition substantially.

**Advance Ruling Certificates**

Subsection 74(1) of the Act states:

Where the Director is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 64, he may issue a certificate to the effect that he is so satisfied.

The advance ruling mechanism provides assurance that there will be no application by the Director under section 64 if the merger proceeds as proposed. An Advance Ruling Certificate cannot be issued for a transaction that has been completed.

Section 75 of the Act states:

Where the Director issues a certificate under section 74, he shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 64 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

However, should additional information that would have altered the basis for issuing a certificate subsequently come to the attention of the Director, he has the discretion to apply to the Tribunal for an order. This underlines

the importance of complete disclosure by the parties when the certificate is requested.

Should the transaction for which an Advance Ruling Certificate has been issued not be substantially completed within one year, the certificate expires, making it necessary to file a new application.

A transaction for which the Director has issued a certificate and for which the certificate is effective is exempt from Part VIII of the Act, which deals with notifiable transactions (paragraph 85(b)).

#### Advisory Opinions

While Advance Ruling Certificates for proposed mergers are expressly provided for in the Competition Act, Advisory Opinions on proposed mergers are available under the Director's Program of Compliance.

Through Advisory Opinions, the Director endeavours to assist business people who wish to avoid conflict with the provisions of the Competition Act. He will examine matters submitted to him and indicate whether or not implementation of the proposed plans or agreements would cause him to commence an inquiry. Business people are not bound by the opinion given by the Director and are free to adopt plans or agreements they are prepared to have tested before the Competition Tribunal or the courts. Similarly, the Director cannot bind himself or his successors by the opinion. Moreover, should the

details of the transaction as implemented differ from what was initially presented to the Director, or should a change of conditions arise which would alter the impact of the proposed plan on the market, the matter could be subject to further examination.

#### When to expect an Advance Ruling Certificate and when to expect an Advisory Opinion

An Advance Ruling Certificate may be issued by the Director when he is satisfied that he would not have sufficient grounds for applying to the Tribunal under section 64 of the Act in respect of a proposed merger. An Advance Ruling Certificate will only be issued where the competitive effect of the merger is sufficiently certain so as to satisfy the Director under section 74. The issuance of a certificate is a discretionary matter to be decided by the Director in accordance with the provisions of the Act. This discretion is carefully exercised since only the Director can make an application to the Tribunal on a merger matter and, once a certificate has been issued, the Director is prevented from applying to the Tribunal on the basis of the same or substantially the same information on which the certificate was issued.

An Advance Ruling Certificate may be issued without terms or undertakings, after terms or undertakings, for example, divestiture, have been fulfilled, or contingent on the fulfillment of particular terms or undertakings prior to closing the

proposed transaction. This is consistent with the Director's policy of encouraging voluntary compliance with the Act. Failure to comply with such terms or undertakings may provide the Director with sufficient grounds to exercise his discretion to bring an application to the Tribunal.

In some cases the Director may decide to allow the merger to proceed and monitor the effect of the merger as proposed rather than issue a certificate. This could occur where:

- o undertakings would only be implemented after the transaction is closed,
- o the potential anticompetitive effect of the merger is not sufficiently certain, or
- o the parties involved requested that the Director not make marketplace inquiries to assess the competitive impact of the proposal.

In many such instances an Advisory Opinion could be given. By providing an Advisory Opinion, the Director can give some degree of comfort to parties where the issuance of an Advance Ruling Certificate would be inappropriate. Such an opinion would outline the Director's position and concerns regarding the proposed transaction, and would indicate whether the Director intended to monitor the merger, or certain aspects thereof, during the three-year limitation period.

**Matters the Director takes into consideration in issuing a certificate**

Any examination of competition issues involves a determination of the relevant market, since an issue will only arise when competition in a particular market is adversely affected within the meaning of section 64 of the Act. The notion of market includes both a product and a geographic dimension.

A merger may raise issues in more than one market. A merger between competitors may require an assessment in the market in which they compete and in the markets of their suppliers and their customers. Similarly, the acquisition of a supplier or a customer may require assessment of the competitive impact in the acquiring firm's market(s) and in the market(s) of the firm being acquired. Accordingly, the examination must identify and evaluate the competitiveness of the suppliers and customers as well as the competitors.

The matters to be considered in assessing whether a proposed transaction qualifies for a certificate include those factors listed in section 65 of the Competition Act. These include: the effectiveness of foreign competition; whether one of the parties is a failing business; the availability of acceptable substitutes; the level of barriers to entry; the extent of effective competition

remaining after the merger; whether the merger involves the removal of a vigorous and effective competitor; the extent of change and innovation in the market and any other factor relevant to competition that would be affected by the merger. These factors are not exhaustive and the Director will consider them together with any other factors that are relevant to a proper assessment of the competitive implications of the transaction.

Concentration or market share is also an important consideration. However, subsection 64(2) makes it clear that it must not be the sole basis for concluding that competition is prevented or lessened substantially by a particular transaction. Similarly, low market shares or concentration levels will not necessarily be the sole basis for the issuance of an Advance Ruling Certificate.

#### **The advantages of applying for a certificate**

An application for an Advance Ruling Certificate offers several advantages:

- o It allows a party to a proposed transaction to substantially reduce or eliminate uncertainty over whether the merger would be subject to an application before the Competition Tribunal.
- o If a certificate is issued, the transaction is exempt from the notifiable transactions provisions of Part VIII of the Competition Act (paragraph 85(b)).

- o Given sufficient lead time the Director can identify and elaborate any competition concerns he may have. The parties involved then have the opportunity to provide additional information to allay the Director's concerns. Such discussions are advantageous prior to the period when the timing of the transaction becomes critical.
- o An application may be particularly useful for parties who must obtain clearance for the transaction from more than one government agency or who are otherwise concerned with meeting other future constraints or contingencies relating to the merger.

#### **The consequences of failing to apply**

There is no statutory obligation on a party or parties to a proposed transaction to apply for an Advance Ruling Certificate. A certificate when issued simply confirms that the Director is satisfied that he would not have sufficient grounds to apply to the Tribunal under section 64 with respect to the proposed transaction.

Where the proposed transaction would not cause competition concerns within the meaning of section 64, failure to apply would not have any consequences. Alternatively, if the proposed transaction did raise competition questions, the application for a certificate could identify problem areas earlier than would otherwise be the case and would

provide a greater opportunity to address the Director's concerns.

Should there be competition problems, failure to request an Advance Ruling Certificate or to notify the Director of a proposed merger by some other means (if the transaction is not otherwise notifiable under Part VIII) may leave the transaction open to immediate challenge by the Director. The Director could seek an interim injunction prohibiting a proposed merger from being completed under section 72 prior to commencement of formal proceedings under section 64.

**The type of information the Director requires from an applicant**

The decision to issue a certificate will be based largely, but not necessarily only, on information received from the applicant. Thus, the applicant should be willing to supply the Director or his authorized representatives with information relevant to the proposed merger and its effect on competition.

Unlike the notifiable transaction provisions in Part VIII of the Act, the Act does not list the information required by the Director on an application for an Advance Ruling Certificate. However, to expedite the review, the application should focus on a description of the market in question, the matters listed in section 65 that are considered to be relevant, and on any efficiency gains likely to result from the transaction. The submission of relevant market share information

and any related industry studies will also assist in the Director's review of the application. Any other factors that may be relevant to the Director's assessment should be highlighted. The prompt provision of complete and verifiable information will make it easier to obtain a decision from the Director. Accuracy is also important in view of the limits of the scope of protection provided by section 75 of the Act when a certificate is issued.

**Confidentiality of the information provided to the Director by the applicant**

Paragraph 27(1)(d) of the Competition Act prohibits the Director or his authorized representatives from communicating to another person the information obtained from an applicant for a certificate, except to a Canadian law enforcement agency or for the purposes of administering or enforcing the Act. This prohibition does not apply to information that has already been made public (subsection 27(2)). When a proposed merger is not yet public, the identity of an applicant for an Advance Ruling Certificate will not be made public by the Director. Once the matter becomes public, the Director may indicate that a party has sought and been granted an Advance Ruling Certificate.

In the context of an examination of an Advance Ruling Certificate application, the Director, in order to make his assessment, is permitted by the Act to make such limited disclosure as is necessary to substantiate the infor-

mation provided to him. Where parties request, with respect to non-public mergers, that the Director not make any marketplace inquiries as part of his merger assessment, the Director will respect such a request for confidentiality during the certificate review process. However, such a request may seriously restrict the ability of the Director to assess fully the competitive implications of the merger. This may mean that an Advance Ruling Certificate cannot be issued because the standard under section 74 of the Act cannot be evaluated. For public mergers the Director will normally seek the views of third parties in the market(s) involved.

While the Director will respect requests for confidentiality in the certificate review process, the information received may be disclosed for the purposes of the administration or enforcement of the Act. Where, for example, information provided in an Advance Ruling Certificate application contains evidence of criminal conduct or discloses grounds for an application to the Competition Tribunal, the information provided may be disclosed for enforcement purposes.

#### **Treatment of foreign-owned businesses**

Foreign-owned and Canadian-owned businesses are equally subject to the merger provisions of the Competition Act. There is no discrimination in the merger review process between foreign-owned and Canadian-owned businesses. A transaction allowed to proceed under the Investment Canada Act is not, as a

consequence, excluded from the application of the provisions of the Competition Act.

#### **Time taken to obtain an Advance Ruling Certificate**

The Director is obliged to respond to a request for an Advance Ruling Certificate as expeditiously as possible. It is the Director's policy to make every effort to meet reasonable commercial time periods for completion of the transaction. Therefore, any such constraints should be brought to the Director's attention at the time of the application.

As a practical matter, the time taken to assess a proposed merger will depend on the nature, quality and quantity of the information provided, the complexity and size of the transaction, the availability of market information and the speed and willingness of the party or parties to address any concerns of the Director. Ordinarily, in cases where no significant competition issue arises, the process can be completed within a relatively short time period.

#### **Examples of requests for Advance Ruling Certificates**

The following examples are included for illustrative purposes:

##### **o Upstream Sector of the Oil and Gas Industry**

The Director has issued a number of Advance Ruling Certificates in regard to acquisitions in the

exploration and development sector of the petroleum industry. Because of the nature of the industry, these transactions involve large sums of money and are invariably subject to notification under Part VIII of the Act. Whether the acquisition involves the purchase of shares or assets, the underlying value of the transaction generally reflects the value of the oil and gas reserves. Although the transaction value of oil and gas mergers is relatively high, in the overall context of the petroleum industry it is often small, frequently in the 1 percent to 2 percent range in terms of total industry reserves and production.

The Director has considered the following factors, among others, in granting these Advance Ruling Certificates:

- the effects of deregulation and falling energy prices, which have affected firms in the industry;
- the constraining influence of international market forces on Canadian oil prices and supplies;
- the countervailing power of crude oil refiners, pipeline companies and gas distributors who purchase crude oil and natural gas;
- the small post-merger market share in the context of the industry as a whole. There are over 100 oil and gas producers and the market share of each of the largest firms is in the order of 15 percent.

- the "failing firm" factor which has been present in some cases.

o Financial Markets

Transactions in this industry, while generally large in absolute terms, have been relatively small in the context of the industry as a whole. Since the relaxation of ownership and entry restrictions governing the securities sector, many transactions in this industry have been product extension mergers. Similarly, some mergers of smaller, sometimes failing, competitors have occurred in the liberalized environment. In view of the generally procompetitive nature of these transactions, a number of mergers involving financial markets have proceeded following the granting of an Advance Ruling Certificate. Among the factors considered were: the present lower barriers to entry into this industry; the competitive influence of foreign competition; the extensive availability of acceptable substitutes; the low market shares typically involved; the high degree of effective competition remaining; and, the nature and extent of change and innovation in this industry.

o Construction Products

Two firms engaged in the manufacture and supply of a particular category of construction products and services requested an Advance Ruling Certificate. The basis of their submission was that: there would remain a high degree of effective

remaining competition after the merger; entry barriers into the market were low; there was significant import competition; the combined post-merger market share would be approximately 30 percent to 35 percent, and, although they operated in the same general product market, their spheres of strength were different; i.e., one manufactured specialized products, the other off-the-shelf products. After examining these matters and determining that there were little or no implications for downstream and upstream industry participants, and others, the Director issued the Advance Ruling Certificate as he was satisfied competition would not be adversely affected within the meaning of section 64.

o Natural Resources Sector

Two large integrated natural resource companies, both of whom produced and supplied a number of intermediate products, requested an Advance Ruling Certificate. The only competition concern arose in one narrow product and geographic market. The Director's examination of that market revealed that: post-merger effective remaining competition would have been unclear; barriers to entry appeared to be high; geographic expansion by U.S. potential competitors remained uncertain; no satisfactory substitutes existed; and a duopoly would have been created, with the merged parties accounting for approximately 50 percent of production capacity in

the relevant market. For these reasons, the Director decided not to issue an Advance Ruling Certificate and indicated his intention to monitor the post-merger industry for the three-year period provided in the legislation.

o Food Processing

A firm in the food processing sector requested an Advance Ruling Certificate for its proposed purchase of one of its largest competitors. The market in question was characterized by a small number of oligopolists and the acquirer who had a small share of the market. Because the insignificant market share increase resulting from combination of the two firms would not have altered the relative position of the oligopolists in the market, and considering that there would be substantial effective remaining competition in this homogeneous product market, the Director granted this request.

o Energy Sector

The Director declined to grant an Advance Ruling Certificate involving an acquisition in the energy sector on the grounds that: the post-merger market share was extremely high; remaining competition was very limited; it was unclear whether one recent entrant could become an effective competitor; it was unclear whether potential competition from the U.S. would ever materialize; and, significant uncertainty existed

with respect to the extent to which regulation would affect the competitive environment. In view of these considerations, the Director provided an Advisory Opinion outlining his position that, while he was not at that time prepared to bring an application before the Tribunal pursuant to section 64 of the Act, he would not issue an Advance Ruling Certificate.

In another merger proposal, the Director's review of the limited information provided indicated that the transaction would result in high market shares and virtual monopolies in certain local markets. Given that the parties wished to maintain the confidentiality of their proposed merger, the Director took the position that he could not issue an Advance Ruling Certificate nor could he provide a favourable Advisory Opinion on the basis of the available information. He advised the parties that if interviews with potentially affected customers and other parties resulted in information that alleviated his initial concerns, he would be prepared to at least reconsider the request for a favourable Advisory Opinion. The parties declined to remove their confidentiality constraint and eventually abandoned the transaction.

#### **Experience with the Advance Ruling Certificate**

Since the passage of the Competition Act in June 1986 until the end of

October 1988, 88 requests for Advance Ruling Certificates have been received. During this period 82 of these assessments have been completed. Sixty-one Advance Ruling Certificates were issued and 12 Advisory Opinions were issued in lieu of certificates. For the remainder, either the proposed transaction was abandoned following application for an Advance Ruling Certificate or the parties were advised that the transaction would raise serious competition concerns and they decided not to pursue the matter.

The Advance Ruling Certificate process is being used extensively. During the same period in which 61 certificates were issued, 39 Advisory Opinions were provided.

#### **Applying for an Advance Ruling Certificate**

Since an Advance Ruling Certificate is available only for proposed transactions, the application should be made as soon as is reasonably practicable. This enables the parties to respond to the Director's concerns or questions so that he may have sufficient time to assess the application prior to the completion of the transaction. The application can be made either before, together with, or after any formal filing under Part VIII of the Act for mergers that are subject to notification. In this regard, the issuance of an Advance Ruling Certificate provides an exemption from the notifiable transactions provisions of Part VIII of the Competition Act. Advance Ruling Certificates are also available for

transactions that are below the Part VIII thresholds. The Director is under a legal obligation to consider requests as expeditiously as possible, and with the full assistance of the parties, he will be able to do so.

To apply for an Advance Ruling Certificate, write to the Director of Investigation and Research, Bureau of Competition Policy, Consumer and Corporate Affairs Canada, Ottawa, Ontario, K1A 0C9.

Parties can also telephone the Mergers Branch of the Bureau of Competition Policy at (819) 953-7092 to arrange a meeting to discuss their application. In either case, written material supporting the application should be provided as discussed in this Information Bulletin.