Competition Bureau Canada
Bureau de la concurrence Canada

Bulletin

Competition Bureau Merger Remedies Study

Canada

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1. INTRODUCTION

The Competition Bureau ("Bureau") has completed an internal study of the effectiveness of remedies obtained under the merger provisions of the *Competition Act* ("Act") during the period 1995-2005. The detailed internal results of the study will be used to update the Bureau's *Information Bulletin on Merger Remedies in Canada* ("*Remedies Bulletin*")[1], including the consent agreement outline template contained in an appendix to the *Remedies Bulletin*. While these internal results incorporate information provided by third parties that is protected as confidential under section 29 of the Act, this document provides a public summary of the key observations arising from the study.

2. STUDY METHODOLOGY AND HISTORICAL CONTEXT

In conducting its study, the Bureau examined all cases between 1995 and 2005[2] in which the Bureau obtained remedies, with the exception of those cases where no part of the remedy was implemented.[3] Cases post-2005 were excluded to ensure that sufficient time had elapsed to properly evaluate the effectiveness of a remedy. In addition, under the then current law, the Commissioner of Competition ("Commissioner") had the ability to challenge mergers within three years following closing.[4] Certain cases within the 1995-2005 period were also excluded because, as explained below, the Bureau was not able to obtain sufficient information from market participants respecting the effectiveness of the remedy in those cases.

A total of 23 cases, which are listed in Appendix I, were ultimately included in the study. Many of these cases included several remedial measures and, in some instances, it was not possible to collect sufficient information related to a particular remedy to include it in the study. For example, in instances where remedies were obtained in numerous geographic markets, the Bureau was not necessarily able to interview participants in each of the relevant geographic markets and, as a result, those markets were not included in the study.

1 Competition Bureau Canada, "Information Bulletin on Merger Remedies in Canada" (September 22, 2006), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.

2 While the Bureau also considered remedies obtained from 1986 to 1995 (the merger provisions of the Act were enacted in 1986), it did not attempt to contact market participants for this earlier period given the difficulty in locating interviewees with sufficient knowledge of the remedies obtained during this time frame.

3 The main reasons why a remedy was never implemented were: (1) the parties abandoned their transaction; or (2) the consent agreement was rescinded prior to implementation.

4 Section 97 of the Act was amended on March 12, 2009 (S.C. 2009, c. 2, s. 430), as a result of which the Commissioner is no longer able to challenge a merger more than one year after it has been substantially completed.

In order to conduct the study, staff developed questionnaires for three sets of constituents: (1) the merged entity; (2) customers; and (3) purchasers of divested assets or other market participants impacted by the remedy (e.g., licensees of intellectual property in pharmaceutical cases or industry participants whose rights were protected under a code of conduct). Where possible, staff also interviewed representatives of third party market participants (e.g., suppliers and industry associations). A total of 135 interviews were conducted, as summarized in the table below:

Table I: Number of Interviews Conducted By Constituent

	Merged Entities	Purchasers / Beneficiaries	Customers	Third Parties	Total
Number of Interviews	20	28	60	27	135

The willingness of parties to participate in the study was an important factor in the Bureau's decision to include a case in the study. Although the Bureau encouraged participation in the study by all key parties, the process was voluntary, and a number of parties declined to participate. The number of interviewees required to include a case in the study was determined on a case-by-case basis, owing to the fact that this depended on both the quality, and consistency, of the information obtained from participants.

To encourage participation in the study, the Bureau provided certain confidentiality assurances to participants. Consistent with the Bureau's obligations under the Act, confidential information provided by interview participants is protected under section 29 of the Act and under section 24 of the Access to *Information Act*.[5] In addition, the Bureau agreed that information provided by participants as part of the study would only be used for the purposes of the study (i.e., to assess the effectiveness of past merger remedies so as to advance the Bureau's practices with respect to the design and implementation of future merger remedies).

The Bureau did *not* conduct an independent analysis of market conditions following the implementation of a remedy. Rather, it compiled its observations respecting the effectiveness of a remedy, or problems with a remedy, based on the information provided in interviews. Following interviews, Bureau staff met to reach a consensus view on: (1) the effectiveness of the remedies in each case based on the input received; and (2) any key observations from the case that might inform the Bureau's approach to remedies in future cases.

Given the interview-based nature of the study, the information obtained through the study is qualitative and should only be regarded as directional.[6] Nonetheless, the study has been

5 R.S.C. 1985, c. A-1.

6 In a number of cases there were unforeseen changes in market conditions following implementation of a remedy (e.g., regulatory change, introduction of alternative products, etc.). In such cases it was more difficult for interviewees to isolate the impact of a remedy from coincidental changes to other factors affecting competition.

informative in terms of validating and refining certain aspects of the Bureau's practice. This practice also evolved significantly during the time period covered by the study owing to changes to the law and practice. In particular, while there have been a handful of contested (litigated) merger cases, the vast majority of remedies obtained by the Bureau have been negotiated with, and agreed to, by both the Bureau and the merging parties. Such negotiated remedies are known as consensual remedies. Prior to 2002, the mechanism for implementing consensual remedies was the consent order process. Under this process, the Commissioner and the merging parties applied to the Competition Tribunal ("Tribunal") to seek a consent order. The Tribunal actively reviewed the application and the evidence, and retained jurisdiction to refuse to issue an order if it determined that a remedy would not be effective in eliminating a substantial lessening or prevention of competition arising from a merger. In one case, a consent order was rejected[7] and, in another, only certain provisions of an order were approved by the Tribunal.[8] Six of the cases included in the Bureau's remedies study involved this consent order process before the Tribunal. The uncertainty and time associated with the consent order process led the Bureau and merging parties to rely on less formal tools (e.g., negotiated undertakings), to implement consensual remedies. Five of the cases included in the study involved undertakings. In addition, three cases included in the study involved an undertaking backed by a consent order.

Amendments to the Act in 2002 allowed the Bureau and merging parties to negotiate the terms of a remedy in a consent agreement and to register their agreement with the Tribunal. Once registered, a consent agreement has the same force and effect as an order of the Tribunal. A consent agreement must contain terms that the Tribunal could include in an order; otherwise, the Tribunal could refuse registration.[9] The consent agreement process is more certain and streamlined than the previous consent order process, and today consent agreements are the principal instrument used to implement consensual remedies. Six of the cases included in the study involved consent agreements entered into by the Commissioner and the merging parties, which were subsequently registered with the Tribunal.

In addition to undertakings, consent orders and consent agreements, parties have also addressed competition concerns through "fix-it-first" remedies, where assets are divested voluntarily prior to, or concurrently with, the closing of a proposed transaction to an approved purchaser. Six of the cases included in the study involved fix-it-first remedies. A number of these fix-it-first remedies were supplemented with a further remedy that was the subject of an undertaking, consent order or consent agreement.

The publication of the 2006 *Remedies Bulletin* was significant in that the Bulletin, for the first time, set out a comprehensive statement of the Bureau's policy on merger remedies. The Bureau will use the information obtained from the remedies study (and subsequent experience) to update the *Remedies Bulletin* and to revise the consent agreement outline template contained in an appendix to the Remedies Bulletin.

7 *Director of Investigation and Research v. Palm Dairies Limited*, CT 1986-001 (Comp. Trib.)

8 *Director of Investigation and Research v. Imperial Oil*, CT 98-3 (Comp. Trib.)

9 *Supra* note 5 at s.105.

3. KEY INFORMATION AND OBSERVATIONS PROVIDED BY STUDY PARTICIPANTS

Given the number of separate interviews conducted and individual views expressed, the Bureau has not attempted to draw conclusions about the overall effectiveness of merger remedies. It is clear that remedies have been very effective in restoring competition in certain cases, and less effective in other cases. The major contribution of the study has been to assist the Bureau in identifying factors that tend to improve the effectiveness of remedies, as well as those factors that tend to detract from their effectiveness.

The Bureau classifies remedies into four main categories: structural remedies, quasi-structural remedies, combination remedies and stand-alone behavioural remedies. These categories are discussed in more detail in Appendix II. The cases included in the study involved all four categories of remedies. Structural remedies, whether alone or in combination with a quasi-structural or behavioural remedy, were the most common type of remedy studied, which is consistent with the Bureau's preference for structural divestitures over other types of remedies.[10] Very few cases (included in the study or otherwise) involved stand-alone behavioural remedies. Quasi-structural and combination remedies have arisen in a larger number of cases; however, the lines between these categories were sometimes blurred. For this reason, the Bureau has grouped its observations respecting behavioural and quasi-structural remedies, whether stand-alone or part of a combination remedy, together for the purposes of this public version of the study.

The following is a list of key observations based on the study interviews:

Structural remedies

- 20 of the studied cases included at least one divestiture remedy;
- Divestitures were completed in all but two cases. In the majority of cases, the divestiture(s) were viewed by interviewees as having been effective in achieving their objective of eliminating the substantial lessening or prevention of competition arising from the merger;
- Divestitures were not completed in two cases. While no single factor explains the failure to divest in these cases, the following factors were raised by participants in the study as having contributed to this failure:
    - the assets slated for divestiture were not perceived by interviewees as being highly attractive to buyers in the prevailing industry and owing to economic conditions;
    - the divestiture orders included minimum pricing provisions (a requirement to sell at market value or above liquidation value), which further detracted from their attractiveness to buyers; and

10 *Remedies Bulletin*, p. 5: "Structural remedies are typically more effective than behavioural remedies."

    - there was a limited pool of potential buyers given foreign ownership restrictions in the relevant industries.
- In another two cases, the divested business was no longer operating at the time the study was conducted. In one of these two cases, it appeared that broader macro-economic factors explained the cessation of operations; in the other, the factors were more complex, and included the inability of the purchaser of the divested assets to find a partner able to invest sufficient funds to keep the assets competitive.
- The Bureau considered whether the effectiveness of a divestiture turned on whether it involved the sale of a stand-alone operating business, as opposed to components of a business. Responses in this area seemed to depend on the identity of the purchaser of the divested assets. Where assets were purchased by an "in-market" purchaser with existing infrastructure and expertise in the relevant product line (e.g., the purchase of a chemical or pharmaceutical product by an existing supplier of such products), the divestiture of the components of a business was perceived to be capable of restoring competition.
- Concerns were raised in certain cases that the assets slated for divestiture were of a poor quality, or that the divestiture package did not contain sufficient assets to be viable or saleable. These comments point to the need for the Bureau to fully "market test" the viability/saleability of a divestiture package during negotiations. Such market testing necessarily includes a focus on the identity and types of purchasers who are likely to bid on the assets; as noted above, an in-industry purchaser may have different needs in terms of the scope of a divestiture package than does a new entrant. (e.g., a prospective purchaser who has pre-existing plans or commitments to enter a market absent a proposed merger[11] may be a more suitable purchaser of divested assets than a purchaser without a demonstrated ability or intention to be an effective long-term competitor in a relevant market).
- Concerns were raised in certain cases where the assets to be divested included contracts that could be terminated upon a change of control or where a third party could withhold consent to the assignment of the contract. Failure to obtain prior consent, in certain instances where the contract was critical to remedying the likely substantial lessening or prevention of competition, delayed the implementation of remedies.

11 Recognizing that such *de novo* entry may not be likely, timely or sufficient to obviate the need for a remedy in the first place.

- The length of the initial sale period (during which the vendors would sell the divested assets) and the trustee sale period (triggered if there was no sale during the initial sale period), was highly variable from case-to-case. Initial sale periods ranged from 3 months to 24 months and trustee sale periods varied from 3 to 12 months, except in one case in which it was unlimited. Certain cases, particularly those where undertakings were used rather than a consent agreement or consent order, did not provide for the appointment of a trustee sale. All such cases pre-dated the *Remedies Bulletin* in which the Bureau provides guidance on the length of sale periods and on the use of trustees. A longer sale period was associated with degradation of the asset(s) or market changes that affected the saleability of the asset(s) in some cases.
- A crown jewel provision allows for additional specific asset(s) to be added or substituted into the initial divestiture package to increase the viability of a remedy. Typically, a crown jewel is triggered if a divestiture is not completed within the specified initial sale period, and thus the presence of a crown jewel is intended, in part, to provide an incentive for timely completion of a divestiture. Five of the cases included in the study involved crown jewels. The crown jewel was not triggered in any of these cases.
- Factors that contributed to the success of a divestiture included the quality of the purchaser. In particular, where a purchaser was financially stable and had prior industry experience, a divestiture was more likely to be viewed by interviewees as having been successful.
- In a small number of cases, merged entities indicated that they would have preferred additional information from the Bureau regarding the criteria it uses in determining whether to approve a purchaser.[12]
- Concerns were raised about the interim arrangements and maintenance of the assets pending their divestiture in certain cases. In particular, the following problems were identified:
    - Degradation of the assets pending sale;
    - Failure by the purchaser to keep the business to be divested at arm's length;
    - Lack of investment in the assets during the interim period (particularly in industries where continuous capital investment is necessary to keep machinery/technology competitive);
    - Loss of key/qualified personnel during the interim period;
    - Sharing of confidential information between the business to be divested and the purchaser;
    - Failure to maintain supplier/customer relations during the interim period; and

12 These cases preceded the *Remedies Bulletin*, which outlines the criteria the Bureau takes into consideration in determining whether to approve a purchaser at para.s 39-41 and 57-59.

- Problems with the duration of the initial sale period and/or the trustee sale period (in cases where this period was lengthy, there was greater scope for degradation of the assets and the loss of key/quality personnel, as well as technological or industry changes that detracted from the value and currency of the assets).

- The approach to maintenance of assets during the interim period pending their divestiture was inconsistent across cases. While certain cases required the merging parties to hold the business to be divested separate, others imposed only a maintenance obligation (which tended to be older cases). Similarly, certain cases required the appointment of a hold-separate manager or monitor, while others did not; even where such appointments were contemplated, there were instances where no manager or monitor was in fact appointed or it was in the merged entity's discretion to appoint the manager. The absence of monitoring/oversight during the interim period was linked to the degradation of assets in some (but not all) cases.

Quasi-structural and behavioural remedies (whether stand-alone or as part of a combination remedy)

Given that quasi-structural, behavioural and combination remedies vary widely from case-to-case, and are typically tailored to the business and industry at issue, it is very difficult to draw general conclusions regarding the effectiveness of these remedies. Furthermore, the Bureau has less experience with these types of remedies; necessarily, any conclusions are drawn from a smaller sample. Additionally, the confidentiality commitments made to the parties interviewed as part of the remedies study preclude the Bureau from identifying concerns raised in specific cases; however, we can draw several general observations, in particular:

- Not surprisingly, where structural divestitures contemplated in a remedy are not implemented, this may detract from or negate the effectiveness of quasi-structural measures aimed at limiting expansion of the merged firm and encouraging new entry post-merger.
- In a case where a merged firm agreed to a series of behavioural commitments, some parties identified the failure to provide for the appointment of a monitor as a factor that detracted from the effectiveness of the remedy.
- In several cases it was determined that a particular purchaser was unlikely to be successful without access to certain downstream services. Agreements between the merged entity and the purchaser providing for relatively long-term access to such downstream services at fixed rates (e.g. supply agreements) were determined to be successful in enabling the purchaser to become an effective competitor in the relevant market.
- Where formal arbitration methods were put in place, some parties identified these methods as difficult to access, owing to the necessity of third parties to maintain ongoing business relationships with the merged entity in a necessarily concentrated industry.

- In a case where the Bureau has imperfect information about the likelihood of future entry, the term of a standalone behavioural remedy is critical. Moreover, certain market participants observed that, unless underlying structural change occurs in a market prior to the expiry of the remedy, there are no constraints on the merged firm to exercise market power thereafter.
- Certain market participants noted that stand-alone behavioural remedies tend to be less effective, as they do not address the underlying issue of the merged firm's ability to exercise market power. While such remedies are aimed at constraining the conduct of the merged firm, it is often difficult to anticipate future conditions at the time that the remedy is crafted.
- A failure to ensure that customers were notified of the terms of a code of conduct governing the merged firm's conduct was identified as a factor that limited the effectiveness of the code.
- In a case where a business was to be operated independently/held separate on an interim basis, certain parties expressed concerns that there had been information-sharing between the merged firm and the business that was held separate. Stronger firewall provisions were identified as a factor that could contribute to the effectiveness of such a remedy.

4. NEXT STEPS

The remedies study has been of significant value in confirming that many of the Bureau's existing policies and procedures relating to the design and implementation of merger remedies are effective, and in identifying areas where such policies and procedures could be more effective. The Bureau intends to use the knowledge gained from the study in an update to the *Remedies Bulletin*, including the consent agreement template appended thereto.

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6. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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APPENDIX I

Cases included in the Competition Bureau Remedies Study

Consent Orders and Consent Agreements

1. *The Director of Investigation and Research v. Air Canada, Air Canada Services Inc., PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Airlines Ltd., 154793 Canada Ltd., 153333 Canada Limited Partnership, and The Gemini Group Automated Distribution Systems Inc. 1988* (CT-1988-001)
2. *The Commissioner of Competition v. Astral Media Inc., Télémédia Radio Inc., Radiomédia Inc.* (CT-2001-010)
3. *The Commissioner of Competition v. Bayer AG,* 2002 Comp. Trib. 29 (CT-2002-003)
4. *The Commissioner of Competition v. Canfor Corporation* (CT-2004-002)
5. *The Commissioner of Competition v. British Columbia Railway Company and Canadian National Railway Company* (CT-2004-008)
6. *The Commissioner of Competition v. Canadian Waste Services Holdings* 2001, Comp. Trib. 35 (CT-2000-002)
7. *The Director of Investigation and Research v. Canadian Waste Services Inc. 1997* (CT-1997-001)
8. *Commissioner of Competition v. Trilogy Retail Enterprises L.P.,* 2001 Comp. Trib. 021
9. *The Commissioner of Competition v. Lafarge S.A., 2001 Comp. Trib. 33* (CT-2001-004)
10. *The Commissioner of Competition v. Pfizer Inc. and Pharmacia Corporation* (CT-2003-002)
11. *The Commissioner of Competition v. Quebecor Inc.,* 2001 Comp. Trib. 1 (CT-2000-005)
12. *The Commissioner of Competition v. West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.* (CT-2004-013)

Undertakings and Fix-it-First Remedies

13. *Air Canada/Canadian* – The acquisition by Air Canada and 853350 Alberta Ltd. of Canadian Airlines Corporation (1999)
14. *Canada Bread/Multi-Marques* – The acquisition by Canada Bread Company, Limited of Multi-Marques Inc. (2001)
15. *Cendant/Budget* – The acquisition by Cendant Corporation of Budget Group, Inc.'s car and truck rental assets in the Americas, the Caribbean and the Asia Pacific Region (2002)
16. *The Director of Investigation and Research v. Canadian Waste Services and Capital Environmental Resource Inc.* 1998 (CT-1998-001)

17. *Diageo/Seagram* – The acquisition by Diageo plc-Pernod Ricard SA of the spirits and wine businesses of Seagrams from Vivendi Universal SA (2001)
18. *Empire/Oshawa* – The acquisition by Empire Company Limited and Sobeys Canada Inc. of the Oshawa Group Limited (1999)
19. *Lafarge/Warren Paving* – The acquisition by Lafarge Canada Inc. of the Warren Paving & Materials Group Limited (2000)
20. *Loblaw/Provigo* – The acquisition by Loblaw Companies Limited of Provigo Inc. (1999)
21. *Pearson/Viacom* – The acquisition by Pearson plc. of Viacom International Inc. (1999)
22. *Sysco/Serca* – The acquisition by Sysco Corporation of Serca Foodservices Inc. (2002)
23. *TD/Canada Trust* – The acquisition by Toronto-Dominion Bank of CT Financial Services Inc. (2000)

APPENDIX II

Categories of Remedies Considered by the Competition Bureau

The *Remedies Bulletin* provides that the Bureau will consider four main types of remedies. These same categories of remedies were considered in the remedies study. The following is a description of each category:

- A **structural remedy**, which typically involves a divestiture of assets or shares, addresses the anti-competitive effects arising from a merger by directly intervening in the competitive structure of the market.
- A **quasi-structural remedy** similarly involves a change to the structure of the marketplace; however, it is accomplished through means other than a divestiture. Examples include granting access rights to networks, removing anti-competitive contract terms, and licensing intellectual property, which allows the merged entity to retain ownership of the asset(s) acquired in the merger, while also impacting the competitive structure of the market, for example, through the reduction of barriers to entry, provision of access to necessary infrastructure or key technology, or facilitation of entry or expansion.
- A **combination remedy** is one where other remedial measures[13] complement a structural divestiture. The complementary measures are intended to increase the likelihood that a purchaser of the divested assets will succeed in the relevant market and thus help ensure the effectiveness of the core remedy. Examples of behavioural remedies that may be used to support structural remedies include short term supply arrangements for the buyer of the asset(s) to be divested, the provision of technical assistance to help a buyer or licensee train employees, a waiver by the merged entity of restrictive contract terms that lock in customers for long periods of time, and codes of conduct that may be enforced by third parties (e.g., through binding arbitration).
- A **stand-alone behavioural remedy** is intended to address the anti-competitive harm arising from a merger by modifying or constraining the behaviour of the merged firm. Examples include codes of conduct incorporating price and service controls or requiring the merged firm to implement firewalls to prevent information-sharing among business units. The *Remedies Bulletin* provides that standalone behavioural remedies are acceptable to the Bureau only in very limited circumstances; (e.g., where there is no appropriate structural remedy and where the behavioural remedy requires no or very limited future monitoring by the Bureau).

13 Although structural remedies are at the core of the vast majority of combination remedies, a quasi-structural remedy combined with another remedial measure would be considered a combination remedy.