Competition Bureau Canada Bureau de la concurrence Canada

Information Bulletin on Merger Remedies in Canada

COMPETITION BUREAU

PREFACE

This document sets out the Competition Bureau's policy on merger remedies. It is intended to provide guidance on the objectives for remedial action and the general principles applied by the Competition Bureau when it seeks, designs and implements remedies. While a remedy must be tailored to the specific facts and circumstances of a case, such principles are essential elements that will be taken into account in all cases where remedial action is required.[1]

Part I: OBJECTIVES OF REMEDIAL ACTION

1. Remedies are required when a merger or proposed merger ("merger") is likely to prevent or lessen competition substantially in one or more relevant markets. In such cases, the Commissioner of Competition (hereinafter referred to as "the Bureau" or "the Commissioner") will take remedial action to prevent a merged entity, alone or in coordination with other firms, from having the ability to exercise market power.[2] When the Bureau has reason to believe that a merger is likely to prevent or lessen competition substantially, it can either apply to the Competition Tribunal ("Tribunal") to challenge it under section 92 of the Competition Act ("the Act") or negotiate remedies with the merging parties to resolve the competition concerns by consent.

2. The standard for achieving an acceptable remedy in either a contested or consent proceeding is set out by the Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc.* In this case, the Court concluded that "the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger."[3] This standard is referred to as "eliminating the substantial lessening or prevention of competition" or, for ease of reference throughout this document, "restoring or preserving competition" in the relevant markets.

3. When necessary, a remedy can restore the market to the level of competition that existed prior to the merger. The Supreme Court *in Southam* emphasized the importance of ensuring the remedy fully eliminates the substantial part of the lessening (or prevention) of competition. It stated: "If the choice is between a remedy that goes farther than is

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[1]To facilitate negotiated settlements between merging parties and the Bureau, a template consent agreement that applies these standard guiding principles is being developed and will be attached to the finalized version of this document.

[2]The analytical framework used to determine whether a merger is likely to prevent or lessen competition substantially is described in detail in the Bureau's 2004 Merger Enforcement Guidelines.

[3]*Canada (Director of Investigation & Research, Competition Act)* v. *Southam Inc.* [1997] 1 S.C.R. 748 at 85 ("*Southam*").

strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective."[4]

4. When a merger is likely to prevent or lessen competition substantially, the Bureau generally prefers to negotiate an agreement with the merging parties without proceeding to litigation. This approach enables a less costly and more expeditious resolution of the matter. In negotiating a resolution, the Bureau aims to address competition concerns in all markets where a likely substantial lessening or prevention of competition has been identified. In cases where it is not possible to address all such competition issues on consent, where appropriate the Bureau is prepared to consider limiting or narrowing the scope of litigation. This enables the uncontentious parts of a merger to proceed while the Bureau challenges those portions that are likely to result in a substantial lessening or prevention of competition before the Tribunal. Such settlements normally require the merging parties to agree, at a minimum, to hold separate the businesses and/or assets that could be the subject of an order. Hold-separate provisions are described more fully in Parts II and III below.

5. If a merger is challenged under section 92, the Bureau will identify proposed remedies in its application to the Tribunal.[5] As set out in section 92(1)(e) and 92(1)(f), the Act is very specific about the remedies the Tribunal can impose in contested cases. In the case of a completed merger, remedial action is limited to either dissolution of the merger or disposition of assets or shares. With a proposed merger, the Tribunal can only direct that the merger or part of the merger not proceed, or otherwise prohibit certain actions by the merging parties. With the consent of the merging parties and the Bureau in either a proposed or completed merger, the Act allows for a wider range of remedies to be considered.[6]

6. The choice of remedy is based on the unique circumstances of the case and the theory of competitive harm alleged by the Bureau or determined by the Tribunal.

7. Effective remedies are intended to promote competition, not competitors. In addition,

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[4] *Canada (Director of Investigation & Research, Competition Act)* v. *Southam Inc.* [1997] 1 S.C.R. 748 at 89.

[5] In contested cases, required remedies take the form of a "Tribunal order" or "divestiture order".

[6] Negotiated remedies between the Bureau and the merging parties take the form of a "consent agreement" that is registered with the Tribunal. As set out in section 105 of the Act, a registered consent agreement has the same force and effect as a Tribunal order.

remedies must be enforceable and capable of timely implementation. While a remedy package must be tailored to the particular set of facts, certain criteria have to be met in order for a remedy to be effective and enforceable. To be effective, a remedy must eliminate the substantial lessening or prevention of competition resulting from the merger. This could include addressing the impediments to competition that would otherwise limit the ability of remaining or potential competitors to constrain market power following the merger. A remedy should not only allow for competition to be preserved or restored as quickly as possible, but, in the case of divestitures, also provide an acceptable buyer of divested assets ("buyer") with the appropriate incentives to preserve or restore competition in the relevant market(s). Accordingly, careful consideration must be given to identifying the assets required for a buyer to compete effectively over the long-term.

Part II: DESIGNING REMEDIES

8. When designing remedies, terms must be clear and measures must be sufficiently well defined to ensure timely implementation, with minimal or no future monitoring or enforcement by the Bureau or the Tribunal. This also helps ensure that remedies can be enforced by way of contempt proceedings should a party not comply with them.[7] The range of remedies considered by the Bureau are described below.

STRUCTURAL REMEDIES

9. The anti-competitive effects that are likely to arise from a merger result from a structural change to the market. Unless structural changes that have harmful effects on competition are challenged, they are often long-lasting and can adversely affect innovation, economic performance and consumer welfare. Accordingly, structural remedies are usually necessary to eliminate the substantial lessening or prevention of competition arising from a merger.

10. Competition authorities and the courts generally prefer structural remedies because terms are clearer and more certain, less costly to administer and readily enforceable.[8] Structural

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[7]As stated by the Tribunal in *Canada (Director of Investigation & Research, Competition Act)* v. *Imperial Oil Limited* (1989) 89/03 at 86 - 88, "Orders which are sought from the Tribunal should be precise and enforceable without the need to return to the Tribunal for a variation or interpretation of those orders before they can be enforced. The Tribunal is not a regulatory agency. It does not see its role as one of continually monitoring an industry participant by reference to general standards. It has neither the staff nor the expertise to do so." It also noted that "terms have to be sufficiently precise and unambiguous so that they can be enforced by way of contempt proceedings should a party not comply with them."

[8]In its remedy decision, the Tribunal in Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. (October 3, 2001), CT-2000/002, stated at 110, "once there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power

remedies avoid many of the disadvantages associated with behavioural remedies, including:

- direct costs of monitoring the activities of the merged entity, and its adherence to the terms of the remedy;
- indirect costs associated with efforts by the merged entity to circumvent the spirit of the remedy; and
- costs to other market participants who must rely on arbitration proceedings arising from self-governing mechanisms.

In addition, behavioural remedies are typically less effective than structural remedies because attempting to regulate conduct may prevent the merged entity from efficiently responding to changing market conditions and they may restrain potentially pro-competitive behaviour by the merged entity or other market participants. Determining the appropriate duration of a behavioural remedy may also be difficult, especially because it often depends on how long it will take for new entry or expansion to be established.

11. Most structural remedies involve a divestiture of assets[9] rather than an outright prohibition or dissolution of the merger. However, prohibition or dissolution will be required when less intrusive remedies that would eliminate the substantial lessening or prevention of competition are unavailable. The remainder of this section describes the essential components of designing remedies that require the divestiture of assets.

Divestitures

12. The following criteria must be met for a divestiture to provide effective relief to an anti-competitive merger:

    - the asset(s) chosen for divestiture must be viable and be sufficient to eliminate the substantial lessening or prevention of competition;
    - the divestiture must occur in a timely manner; and
    - the buyer must be independent and must have the ability, incentives and

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should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance. This is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective. However, the Tribunal notes that enforcing the remedy proposed by the respondents would have the potential of being cumbersome and time-consuming and that monitoring such order would involve the Commissioner in commercial conduct more than would the administration of the divestiture order." See also 111where the Tribunal notes that divestitures are described by the U.S. Supreme Court as "simple, relatively easy to administer, and sure."

[9] The severing of structural links through divestiture of a minority shareholdings or the elimination of interlocking directorates may be an effective alternative to the divestiture of assets.

intention to be an effective competitor in the relevant market(s).

(i) Viability of the Assets Chosen for Divestiture

Full versus Partial Divestitures

13. Divestitures can be full or partial and must include all assets necessary for the buyer to be an effective, long-term competitor who will restore or preserve competition in the relevant market(s). While divestitures of assets or businesses within the relevant market are usually sufficient to address competition concerns, in certain circumstances it may be necessary to include assets outside the relevant market. For example, this may be the case when economies of scale and/or scope are important or when the assets related to the relevant market do not comprise a stand-alone business.

14. A **full divestiture** encompasses the whole of one of the merging parties' overlapping businesses. This includes all necessary management, key personnel, infrastructure (such as distribution, administrative functions), supply arrangements, customer contracts, and other components of an autonomous business. A full divestiture is required, for example, when assets cannot be separated or when the creation of a viable and effective competitor depends on the divestiture of the whole business unit and its associated assets.

15. A **partial divestiture** comprises part of a business unit such as manufacturing facilities, retail locations, individual products or product lines, intellectual property (including patents, brands, etc.) or other discrete assets. Provided it eliminates the substantial lessening or prevention of competition arising from a merger, divestiture of less than a stand-alone business may be acceptable when some of the components for operating the ongoing business are otherwise available. For example, a potential buyer of certain discrete assets may not require the administrative functions (e.g. human resources, accounting) or distribution assets of an ongoing business unit to become a viable and effective competitor if it already owns these capabilities or can readily obtain them from sources outside of the merged entity.

16. Divesting a stand-alone functioning business increases certainty that the remedy will be effective since the entity has proven its ability to compete in the market and survive independently. The Bureau applies greater scrutiny to partial divestitures since there is limited or no proven track record that the components of the business will be able to operate effectively and competitively. The same applies to a situation in which a proposed divestiture package comprises a mixture of assets from both merging parties. When partial divestitures consist primarily of intellectual property or other limited categories of assets, the Bureau will typically need to be satisfied in advance of consenting to a remedy that willing buyers with the necessary capabilities are available to

purchase the assets. In such cases, the Bureau is also more likely to require crown jewel provisions which are discussed further below. The Bureau generally prefers a "clean sweep" of assets from one merging party, normally the target company being acquired in the merger to reduce uncertainty and asset integration issues. This also limits the detrimental effects that could arise from the acquiring party in the merger obtaining confidential information about the assets to be divested.

17. Prior to agreeing to an asset package, the Bureau may seek information from the marketplace to determine whether a proposed remedy would be saleable, viable and ultimately effective in eliminating the substantial lessening or prevention of competition arising from a merger. This market testing, which is subject to confidentiality constraints, may include seeking information from industry participants such as competitors, customers and suppliers as well as from industry experts.

18. In addition to considering whether full or partial divestitures are required, the following provisions are helpful in ensuring the viability of assets to be divested and are therefore given careful consideration when designing remedies.

Hold-separate Provisions

19. Once the Bureau determines that a merger is likely to lessen or prevent competition substantially and identifies the scope of remedies necessary to address the competition concerns, it will normally require the merging parties to "hold separate" assets or businesses that could be the subject of a Tribunal order until the divestiture is completed. **Hold-separate provisions** preserve the Bureau's ability to achieve an effective remedy *pending its implementation.*[10] They reduce the likelihood that assets will depreciate during the divestiture process. Moreover, they ensure the merging parties do not combine their operations or share confidential information before divestitures occur thereby avoiding the problem of "unscrambling the eggs" if the merger has to be restructured at a later date. Hold separate provisions also preserve, if necessary, the Tribunal's flexibility to order an alternate remedy should the original divestiture(s) not be effected.

20. The Bureau may require that hold-separate provisions apply to assets or businesses beyond those that are to be divested pursuant to a consent agreement. In limited cases, such as those involving the divestiture of a stand-alone business, the Bureau may require the hold-separate provisions to cover only the portions of the merger that are likely to

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[10]This is the primary objective of hold-separate provisions. In contrast, the Bureau will not normally agree to hold-separate provisions *pending completion of a merger investigation* as section 100 of the Act is available for such purposes. Moreover, if the Bureau has identified competition issues that require remedial action but has not reached agreement with the merging parties regarding appropriate remedies, the Bureau will not normally agree to hold-separate provisions *pending completion of negotiations* as sections 92 and 104 of the Act are available to it should the merging parties attempt to close the merger.

result in anti-competitive effects. Hold-separate provisions are further discussed under Part III: Implementing Remedies.

Alternatives to Hold-Separate Provisions

21. In very limited circumstances, it may be sufficient to direct the acquiring party which must divest the assets ("the vendor") to maintain the competitive viability of the assets/businesses without having to hold them separate from its other operations. Maintenance provisions rather than hold-separate provisions may be sufficient when:

- the assets/businesses to be divested cannot operate on a stand-alone basis but are discretely identifiable such that it would not be difficult to "unscramble the eggs"; and
- it can be demonstrated that there is *de minimus* risk of disclosing confidential or competitively sensitive information (if, for example, pricing and cost information is transparent in the industry or if specific provisions in the consent agreement are likely to prevent disclosure of such information).

22. In such cases, the vendor must provide sales, managerial, administrative, operational and financial support as necessary in the ordinary course of business to promote the continued effective operation of the asset(s). It may also be required to honour all contracts (sales, employment, etc.) and agree to other provisions to ensure the ongoing viability of the assets, including those relating to maintaining employment. While the assets may not need to be held separate, information about customers and sales for each of the merging parties' businesses should be kept segregated in order to facilitate due diligence for the buyer during the divestiture period.

Representations and Warranties

23. To increase the attractiveness and viability of the divestiture package, the vendor should provide reasonable and ordinary commercial representations and warranties to the buyer. While each industry may have unique requirements, the vendor should include such commercially customary assurances as:

- the assets to be divested are in operating condition and are in a good state of repair;
- appropriate insurance is maintained on the assets;
- full disclosure has been made of all employees and their salaries, all pension plans, and all subsidiaries; and
- full disclosure has been made of all environmental liabilities that are associated with the assets in the remedy package.

Such representations and warranties must remain in effect at least until a final divestiture

is achieved. In addition, when necessary, the vendor must indemnify the buyer to offset liabilities that cannot be separated from the assets.

(ii) Ensuring Timeliness and Success of the Divestiture

24. A remedy is most effective when it is achieved in a timely manner. Timeliness reduces uncertainty for all affected parties by ensuring that competition is preserved or restored as quickly as possible, by minimizing the competitive harm, and by mitigating potential asset devaluation.

Fix-it-First

25. To eliminate the risks and uncertainty associated with implementing a remedy post-closing, merging parties are strongly encouraged to remedy competition issues arising from a merger by resolving them before completing the merger. A "fix-it-first" solution occurs when:

(i) the vendor is able to divest the relevant assets to an approved buyer prior to the closing of the merger; or
(ii) there is a purchase and sale agreement in place which identifies an approved buyer for a specific set of assets and the divestiture is executed simultaneously with the merger.

26. The Bureau strongly prefers fix-it-first solutions. This type of remedy often provides an optimal resolution because it resolves competition issues up front while giving certainty for merging parties.

27. Acceptable fix-it-first solutions are typically structural in nature. A fix-it-first solution alleviates concerns about whether the remedy package will be marketable, ensures that the assets in question are not devalued to any material extent, and preserves or restores competition in the relevant market(s) as expeditiously as possible. While still subject to Bureau approval, the registration of a consent agreement is typically not required with a fix-it-first solution. However, if the Bureau has reason to believe that the divestiture may be delayed until after the merger closes or may not occur at all, it will likely require a consent agreement as the divestiture will no longer be effected on a fix-it-first basis. The consent agreement will not have to be registered if the divestiture is actually completed before or at the same time as the merger is closed.

28. When fix-it-first solutions are not available, the following provisions are important in ensuring a timely and successful divestiture after the merger closes.

Short Time Periods

29. Imposing timely deadlines to the divestiture process improves the effectiveness of a remedy. The shorter the divestiture period, the less likely that factors such as the deterioration or depletion of assets or the loss of customers and/or key personnel will cause the asset package to lose value. While certain safeguards such as hold-separate provisions may lessen the degree to which the asset package may lose value, such provisions are temporary and are primarily designed for maintaining the current state of the assets rather than creating a vigorous competitor.

30. The Bureau typically agrees to provide the vendor with an initial fixed period of time ("initial sale period") to sell the remedy package at the best price and terms that it can negotiate with potential buyers. As further explained in Part IV, if the vendor cannot sell the assets within the initial sale period, an appointed trustee ("trustee") will have a fixed period ("trustee period") in which to complete the sale without any limitations on price.

31. The vendor will have a 3-6 month period to divest the asset package.[11] This is considered sufficient time to identify and select suitable buyers and to complete due diligence. The Bureau may grant a short extension of this period in exceptional circumstances or where the vendor has signed a binding letter of intent with a prospective buyer and closing of the divestiture transaction is clearly imminent.

No Minimum Price

32. To increase the likelihood that the divestiture will occur, the Bureau will require that, during the trustee period, the remedy package be divested at no minimum price. The Bureau will not agree to provisions that refer in any way to a minimum or floor price, including but not limited to terms such as "fair market value", "going concern", "liquidation price", "going out of business" or "fire sale".

Crown Jewels

33. The Bureau's goal is to design a remedy package that will eliminate the substantial lessening or prevention of competition arising from a merger without going beyond what is necessary to resolve competition concerns. However, given the prospective nature of proposed divestitures, there is frequently some uncertainty as to whether the remedy will be viable, for e.g., whether the assets will sell. Risk of failure may exist, despite good faith efforts by the vendor, if assets are likely to deteriorate quickly or if partial divestitures of limited assets make it difficult to determine *a priori* whether there will be acceptable buyers who are interested and willing to purchase the assets. Thus, a more

[11] Within this range, the actual time period in a given case will be a reflection of business realities. Based on the Bureau's past experience in Canada and the experience of competition authorities in other jurisdictions, the Bureau has determined that 3-6 months is an appropriate initial sales period.

marketable package of assets that could be needed to attract a buyer and is likely to be highly valued by both potential buyers and the vendor (commonly referred to as “crown jewels”), may be required as part of the remedy.

34. Crown jewel provisions are triggered during the trustee process. They allow for specified assets to be added or substituted in the initial package of assets to increase the marketability of the divestiture. Crown jewel provisions are not intended to be punitive. They are intended to provide the vendor with an incentive for timely completion of the divestiture of the initial package and to provide the Bureau with confidence that if the initial package is not marketable there will still be a viable remedy. Crown jewels are not required in a fix-it-first solution.

(iii) Independence and Competitiveness of the Buyer

35. The suitability of a buyer is directly related to the viability and sufficiency of an asset package. An acceptable buyer must have both the means (i.e. the necessary assets) and the incentive to preserve or restore competition. The buyer must operate independently of the merged entity in all aspects of competition, even if supply arrangements and other technical assistance are part of the remedy package for a transitional period of time.

36. Divestitures seek to (i) create a new source of competition through the sale of assets or businesses to a new market participant[12], or (ii) strengthen an existing source of competition through the sale of assets or businesses to an existing market participant. While either type of market participant may be acceptable in most cases, ultimately the acceptability of buyers will depend on the particular facts of the case and will be guided by the theory of competitive harm. For example, divestiture to an existing competitor may not be appropriate when the competitive concerns are related to coordinated behaviour among few firms in the market.

37. The capabilities and resources of prospective buyers are especially critical with partial divestitures where the package of assets lacks an established infrastructure. In such cases, a successful outcome depends on finding an appropriate match between the asset package and the buyer. It may therefore be necessary for the vendor to identify the buyer before the Bureau agrees to the remedy package. This is known as an “upfront buyer provision”.

38. An upfront buyer provision is different from a fix-it-first solution in that the buyer of divested assets must be approved by the Bureau in advance of registering a consent agreement but the assets are divested after the merger closes. This approach helps ensure

[12] A new market participant is a company that is not presently competing in the relevant market but has the necessary capabilities (financial, managerial, and otherwise) to become an effective competitor. A newly formed entity with no significant experience in the market will not likely be an acceptable buyer.

the timeliness of the sale and the viability of the asset(s), and usually avoids the need for hold-separate provisions (though it does not obviate the need for "maintenance" provisions). Because there is no open bidding process or public offering, the Bureau must exercise increased vigilance to ensure the buyer and vendor are independent of one another.

QUASI-STRUCTURAL REMEDIES

39. In limited circumstances, the Bureau may require the merging parties to take some action (other than divestiture) to remedy competition concerns. While allowing the merged entity to retain ownership of the assets or businesses acquired in the merger, certain actions may have structural implications for the marketplace. This includes those that reduce barriers to entry, provide access to necessary infrastructure or key technology, or otherwise facilitate entry or expansion. Examples include:

    - licensing intellectual property;
    - removing anti-competitive contract terms such as non-competition clauses and restrictive covenants;
    - granting non-discriminatory access rights to networks, especially when horizontal overlap is coupled with vertical integration and a risk of foreclosure to inputs; or
    - supporting the removal or reduction of quotas, tariffs, or other impediments imposed by regulatory bodies or industry groups that may be achieved with the help of efforts by the merged entity.

40. While such measures may help preserve or restore a competitive environment, it is necessary to fully examine their effects in the context of the industry as a whole. The Bureau will only accept these types of remedies if they adequately address the competitive harm arising from the merger, no other anti-competitive effects remain, and no other significant entry barrier(s) exist. It would not be sufficient to eliminate one barrier to entry if multiple barriers remain.

41. Remedial action involving intangible assets such as intellectual property is often accomplished through licensing rather than through an outright sale. While licencing agreements allow the merged entity to retain ownership rights to patents, trademarks or other intellectual property, they may be quasi-structural when they reduce or eliminate an important barrier to entry by enabling one or more third parties (who otherwise possess the necessary capabilities) to participate in markets that, in the absence of the licence, would be foreclosed from doing so. Licencing can also be efficiency-enhancing since it is less likely to discourage future research and development.

42. Before accepting a licensing agreement as a remedy, the Bureau will determine whether the scope of the licence must be:

(i) exclusive to the licensee;
(ii) co-exclusive such that the merged firm can retain certain rights to use these assets including the right to operate under the licenced intellectual property, or
(iii) non-exclusive such that multiple firms can have access to the intellectual property through sub-licensing provisions.

43. The scope of the licencing agreement depends on the nature of the competitive harm and the particular facts of the case. For example, a licence will likely be exclusive only to the licensee when the intellectual property is product-specific and the merged entity can rely on its other intellectual property to compete effectively with the licensee in the relevant market. In contrast, the merged entity can retain certain usage rights when the intellectual property being licensed is primarily used for other products that are not part of the relevant market, and the merged entity requires such intellectual property for such other products. Sublicensing may be appropriate when the owner of the intellectual property pre-merger previously licenced to multiple licensees and would likely engage in sublicensing to other firms in the future.

COMBINATION REMEDIES

44. A combination remedy refers to a structural divestiture combined with other relief that is behavioural in nature. Certain behavioural terms may help ensure an effective remedy is ultimately carried out when they supplement or complement the core structural remedy, especially if used during a transition or bridging period until a competitive market structure develops. Including behavioural components to a remedy may be useful if they provide a buyer and/or other industry participants with the ability or incentive to operate effectively as quickly as possible, thereby benefiting customers.

45. Examples of behavioural remedies that can support structural remedies include:

- short-term supply arrangements for the buyer of the assets to be divested at a price defined to approximate direct costs, especially if the buyer requires an immediate supply of inputs but needs a short period of time to establish its own supply management capabilities;
- provision of technical assistance to help a buyer or licensee train employees in complex technologies, especially those related to intellectual property;
- a waiver by the merged entity of restrictive contract terms that lock-in customers for long periods of time, especially when switching costs deter customers from moving their business to the buyer of divested assets; or
- codes of conduct which can be easily monitored and expeditiously enforced by a third party, e.g. through binding arbitration procedures

Such behavioural remedies may be important to the success of the buyer but would not be

an effective alternative to a successful structural divestiture.

STAND-ALONE BEHAVIOURAL REMEDIES

46. Stand-alone behavioural remedies are rarely accepted by the Bureau. It is difficult to design a behavioural remedy that will adequately replicate the outcomes of a competitive market. Even if such a remedy can be designed in clear and workable terms, it is likely to be less effective and more difficult to enforce than a structural remedy. Moreover, any attempt to provide for a stand-alone behavioural remedy usually imposes on ongoing burden on the Bureau and market participants, including the merged entity, rather than providing a permanent solution to a competition problem.

47. A stand-alone behavioural remedy may be acceptable when it is sufficient to eliminate the substantial lessening or prevention of competition arising from a merger, when there is no viable structural remedy, and when it will require minimal or no ongoing monitoring and enforcement required by the Bureau or the Tribunal.

Part III: IMPLEMENTING REMEDIES

Hold-Separate Provisions

48. Hold-separate provisions, previously discussed in Part II, are required in most consent agreements pending completion of the agreed upon remedy.[13] These provisions ensure that confidential information is not communicated to the vendor during the implementation phase of the remedy. They also ensure that the designated assets (including human resources) are preserved, are economically viable, and are operated at arm's length from the merged entity throughout the sale period. Hold-separate provisions are also necessary if significant investment in the assets must continue during the implementation phase of the remedy. In this instance, the vendor will be required to pay for ongoing investments, such as capital improvements and product development costs, as it will be the owner of the assets until the divestiture is completed.

49. Normally, it is necessary to immediately appoint an independent manager ("hold-separate manager") to operate the asset(s) until the sale is complete. The Bureau requires a hold-separate manager to have extensive experience in the market(s) in question and operate independently, i.e. at arm's length, from the vendor. In addition, the vendor must transfer to the hold-separate manager all rights, powers and authorities necessary to perform his or her duties and responsibilities under the consent agreement, and must not exercise any direction or control over the management of the assets. The hold-separate manager will

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[13]In contested proceedings, hold-separate provisions are necessary to preserve the potential remedy pending resolution of the litigation and usually take the form of a Tribunal order.

be responsible for the day-to-day management of the assets and, if necessary, will report directly to an independent monitor.

50. The Bureau will normally require the appointment of an independent third party to monitor compliance with the consent agreement ("monitor").[14] A monitor must have industry knowledge of the market(s) in question and have no ties, financial or otherwise, with the merging parties. The monitor must have complete access to all personnel, books, records, documents and facilities or to any other relevant information as he or she requests. The monitor will ensure that the vendor uses its best efforts to fulfill its obligations under the consent agreement. The monitor reports in writing to the Bureau as set out in the consent agreement.

Responsibilities of the Vendor (General)

51. To keep the Bureau informed throughout the sale process, the vendor must report to the Bureau in writing on a regular basis with respect to the progress of its efforts to accomplish the sale. This allows the Bureau to monitor whether the vendor is making best efforts to complete the divestiture.

52. The report should include a description of the sales process, including negotiations and the identity of all third parties contacted and prospective buyers who have come forward. In addition, the Bureau may also request other information such as correspondence between the vendor and prospective buyers and a description of the state of the assets at the time of reporting. A description of any material changes in the value of the assets which could affect their market value must also be reported. The Bureau will have the right to request additional information at any time regarding the progress of the proposed sale.

53. The vendor of the designated asset package will be responsible for payment of services of the hold-separate manager, the monitor, and, if the assets are not sold during the initial sale period, the trustee.

Obtaining Bureau Approval

54. In addition to approving the remedy package, the Bureau must approve the buyer of divested assets to ensure they are not sold to a less than vigorous competitor or to a firm who may increase the likelihood of coordinated behaviour. Requiring this approval increases the likelihood that the buyer will provide a competitive constraint.

[14] A monitor is required when either hold-separate provisions or maintenance provisions are part of the remedy.

55. The Bureau's approval of a buyer is based on the following criteria:

(i) sale of the asset(s) to the proposed buyer must not itself adversely affect competition;
(ii) the buyer must be independent (i.e. at arm's length) from the vendor;
(iii) the buyer must have the managerial, operational and financial capability to compete effectively in the relevant market(s); and
(iv) the assets being divested must be used by the buyer to compete in the relevant market(s) post-divestiture. This means that the assets must be sold to a firm that will effectively compete in the market and has the intention to keep the assets in the relevant market(s) after they are divested. This determination will be based in part on business plans that explain how the proposed buyer plans to compete in the future.

56. When a remedy package includes assets in several geographic areas to address competition concerns in multiple local or regional markets, it may be necessary to approve more than one buyer. However, the Bureau's willingness to accept multiple buyers depends on the nature of the adverse effects that must be addressed with a remedy. For example, a single buyer is more likely to be required when economies of scale and/or scope are important to ensuring the elimination of the substantial lessening or prevention of competition.

Part IV: TRUSTEE PROVISIONS

57. When the sale of the asset(s) to be divested is not completed in the initial sale period and in the manner contemplated by the consent agreement (or the divestiture order in contested cases), the Bureau will require that a divestiture trustee be appointed to divest the assets. As mentioned in Part II, the inclusion of trustee provisions provides some assurance that the asset(s) will be divested in a timely and effective manner. The trustee period will normally be 3-6 months, depending on the circumstances.

58. Prior to the start of the trustee period, the trustee must be given sufficient time and information to get familiar with the terms of the consent agreement and the assets to be divested. This ensures the sale process can proceed without delay at the initiation of the trustee period.

59. During the trustee period, the trustee will have the exclusive power and authority to complete the divestiture. The trustee will sell the assets on terms and conditions that are favourable to the vendor at no minimum price. The sale is subject to the Bureau's approval and must be made to a firm who meets the criteria stipulated in the consent agreement (or divestiture order). This includes the buyer having the capabilities and resources to operate the asset(s) and the other conditions identified above in Part III.

60. To complete the divestiture, the trustee must have full and complete access to personnel,

books, records and facilities related to the asset(s) in question, or any other information deemed relevant by the trustee to effect the sale.

61. The trustee will be required to report in writing on a regular basis to the Bureau concerning all efforts to accomplish the sale. This report will include details on the steps being taken by the trustee to effect the sale, the identity of prospective buyers and the status of negotiations with such prospective buyers.

62. If at the end of the trustee period the trustee has submitted a divestiture plan or believes that the divestiture can be accomplished within a short period of time, this period may be extended at the Bureau's sole discretion.

Part V: CONFIDENTIAL SCHEDULES

63. The Bureau aims to be as transparent as possible with the terms of consent agreements. However, at the request of the vendor, the Bureau may agree to let certain provisions of a negotiated settlement requiring divestitures remain confidential during the initial sales period. In particular, the time period within which the vendor must sell, the fact that there is no minimum price and the specific assets that form part of the crown jewel package, as opposed to the fact that crown jewels exist at all, may be considered by the Bureau for inclusion in confidential schedules to a consent agreement.

64. When such confidential schedules exist, bona fide prospective buyers who sign confidentiality agreements will have access to information about the initial asset package itself but not to provisions relating to time periods and crown jewels.

65. Once the trustee period begins, most terms will be made public, including the time period in which the sale must occur, all crown jewel provisions, and the fact that the asset package must be sold at no minimum price.

66. Full disclosure of the terms of a consent agreement will occur in the following circumstances:

- in multi-jurisdictional cases where remedies are coordinated with other agencies, to the extent that terms are made public in the other jurisdictions; and
- upon completion of the divestiture(s) in a negotiated settlement.

67. In contested cases where the Bureau proposes a divestiture order to the Tribunal, all terms of the proposed order will be made public at the time the section 92 application is made.

Part VI: COMPLIANCE AND ENFORCEMENT OF MERGER REMEDIES

68. The Bureau will commit the necessary time and resources to ensuring the merged entity complies with the required remedies. During the implementation phase of the remedy, the Bureau will have the ability to interview officers, directors, employees and agents of the merging parties as necessary, to ensure compliance with the divestiture order.

69. Crafting clear terms that are readily enforceable and require little or no oversight is a key objective when designing remedies and can effectively serve as a deterrent for non-compliance. In the Bureau's experience, merged entities generally comply with the terms of negotiated settlements (or divestiture orders in contested cases). However, when non-compliance requires further enforcement action, the Bureau will take the necessary steps to ensure that the terms of the remedy are fully implemented.

70. The nature of the non-compliance will determine the type of action that will likely be taken. When substantive issues relating to competition arise, it may be sufficient in some cases to discuss them with the merged entity to determine whether non-compliance has been inadvertent. Where there is a disagreement on the interpretation of the terms of the remedy, it may be necessary to apply to the Tribunal for an order that interprets or clarifies the agreement. Where a merged entity clearly and/or willfully acts in contempt of a Tribunal order or a registered consent agreement, the Bureau will take appropriate action to enforce the terms of the settlement and other such as action that may be necessary.[15]

71. Moreover, in the event that a remedy package is not divested in the agreed upon time periods, the Bureau retains the right to challenge the merger before the Tribunal under section 92 and section 97.[16]

Part VII: INTERNATIONAL COORDINATION AND COOPERATION

72. The increasing number of global mergers has enhanced the need for communication, coordination and cooperation among competition authorities. The Bureau uses a number of cooperation arrangements or agreements with its foreign counterparts to help facilitate information exchange, investigations and ultimately coordination of remedies.[17] Such

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[15] For example, the Bureau may seek action under section 66 of the Act.

[16] Section 97 of the Act provides for a three year period following substantial completion of a merger during which the Bureau can challenge a transaction.

[17] Canada currently has agreements or arrangements that facilitate cooperation with counterparts in the U.S., E.U., Mexico, Australia, New Zealand, United Kingdom, Chile and Costa Rica. Canada is currently negotiating a similar cooperation agreement with Japan.

cooperation is subject to the confidentiality provisions of section 29 of the Act and, when requested by foreign competition authorities, is facilitated by the provision of waivers from merging parties and/or affected third parties.[18]

73. The Bureau will coordinate with other competition authorities on remedies when a worldwide or multi-jurisdictional merger is likely to have anti-competitive effects in Canada that are similar or related to those that are likely to result in other jurisdictions. Coordination can involve communicating as developments occur within jurisdictions, participating in joint discussions with the merging parties, and fashioning parallel remedies in Canada that mirror those in other jurisdictions.

74. The greater the extent that competition issues identified in Canada are similar to those in other jurisdictions, the greater the likelihood that coordinated remedies will be effective. Because Canadian assets are involved in many global mergers, coordination of remedies is of particular importance for the Bureau since it increases the likelihood that remedies will be consistently applied across jurisdictions. Consistent and coordinated remedies help avoid potential frictions stemming from situations where a remedy in one jurisdiction may not be acceptable in another. They can also lead to a more effective resolution than would be attained through independent enforcement action. Furthermore, such remedies reduce uncertainty for businesses.

75. To resolve competition concerns within Canada, the Bureau may either take specific action or it may determine that action beyond what will be taken by foreign jurisdictions is not required. While enforcement decisions are made on a case-by-case basis, the Bureau is more likely to formalize negotiated remedies within Canada when the matter raises Canada-specific issues, when the assets to be divested reside in Canada or when it is critical to the enforcement of the terms of the settlement. In contrast, the Bureau may rely on the remedies in the formal proceedings initiated by the foreign jurisdictions when assets that are subject to divestiture and/or conduct that must be carried out as part of a behavioural remedy are primarily located outside of Canada.[19] However, it will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada.

76. When coordinating cross-border remedies, a primary objective is to prevent conflicts that may arise when remedies are intended to address competition concerns in different jurisdictions. For example, due to potential differences in concentration levels in relevant

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[18] A waiver allows the exchange of confidential information between the Bureau and foreign competition authorities that would otherwise be prohibited by law in the foreign jurisdictions.

[19] Notably, the Act provides for a three year period during which the Bureau can challenge a transaction. Therefore, in the event that parties do not carry through with remedies that apply to Canada but are enforceable only in foreign jurisdictions within that time frame, the Bureau may challenge the acquisition at the Tribunal.

markets in Canada and the United States and/or other countries, a potential conflict may arise when a single buyer must be approved for a North American or worldwide divestiture. Furthermore, cross-border remedies often require that the Bureau coordinate with its foreign counterparts to ensure that a single trustee or monitor is appointed to oversee the divestiture of the worldwide assets. Having a common trustee or monitor who understands the objectives of the remedies for each jurisdiction can reduce the potential for conflicts to arise when determining acceptable buyers for the divested assets.

77. While consistent and coordinated remedies are desirable, each jurisdiction must retain the authority and ability to ensure remedies are sufficient within its own borders. Importantly, the jurisdiction of the Bureau and ultimately of the Tribunal requires that the competition test as set out in section 92 of the Act is met. Therefore, within the framework of its own laws and to the extent compatible with its own interests, the Bureau would generally take another jurisdiction's interests and policies into account to the extent that such interests and policies do not limit or prevent the remedy of Canadian competition concerns.