

Merger Settlements: Some More Transparency

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On September 29, 2016, the Competition Bureau (the “Bureau”) issued a template document for use as a form of Consent Agreement, to be filed with the Competition Tribunal to resolve concerns the Bureau may have with proposed mergers. The Bureau’s stated purpose is to provide formal guidance for the legal and business community “with better insight into the Bureau’s expectations when negotiating measures to address competitive issues likely to arise from a proposed merger.” This is part of the Bureau’s ongoing efforts to support transparency and predictability in how the Bureau enforces the Competition Act.

When it reviews a merger, the Bureau’s obligation under the *Competition Act* is to determine whether a transaction will be likely to result in a substantial lessening or prevention of competition. In arriving at that determination, the Bureau typically seeks to identify anti-competitive effects and, if any, to address them directly with the parties to a transaction. Consent Agreements are designed to address and remedy the aspects of a merger which give rise to that substantial prevention or lessening of competition in a market. Once the parties and the Bureau agree, and after the Agreement has been registered with the Competition Tribunal, a Consent Agreement has the force of a court order. The merging parties are then required to fulfill the obligations in the Consent Agreement, which may involve divestitures of assets (structural remedies), refraining from engaging in or mandating certain conduct (behavioural remedies), or licensing rights (quasi-structural remedies).

They key provisions which the template suggests that the Bureau will seek (in the appropriate case) in a Consent Agreement include:

- Obligations to Complete Divestitures within Prescribed Time Periods
- Divestiture Trustee Sale Process
- A requirement for Approval of Divestiture by the Commissioner of Competition
- Obligations to Hold Certain Assets Separate
- Behavioural Commitments and Transitional Support Obligations
- Rules regarding Relations with and Obligations to Employees
- Provision respecting Consequences for Failure of Divestiture
- The Appointment of a Monitor Re Compliance with Consent Agreement
- Ongoing Compliance Obligations
- The Preservation of Divestiture Assets

In the news release accompanying the form of template, the Bureau notes that it “will adjust the consent agreement template over time, based on its ongoing experience with negotiated merger consent agreements.” While there are many consent agreements registered with the Competition Tribunal (<http://www.ct-tc.gc.ca/Home.asp>) available for review by merging parties and their counsel, not all parties may be privy to the Bureau’s latest thinking. The Consent Agreement template provides all interested persons with a level playing field in terms of knowing the Bureau’s expectation.

There is always a danger that establishing a template may have the effect of narrowing room for negotiations where a term is proposed which is inconsistent with the template. Whether that may be more difficult now with the introduction of a template remains to be seen, but it would be an unwelcome development from the perspective of merging parties if that were to hinder devising appropriate remedies to the particular situation on specific industries or market structures. Time will determine how rigid the template proves, but it is to be hoped that alternate approaches will be considered when they are appropriate in the market context.