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Information Bulletin on Merger Remedies in Canada

COMPETITION BUREAU

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Canada

PREFACE

This Bulletin sets out the Competition Bureau's ("**the Bureau**") current policy on merger remedies.[1] It is intended to provide guidance on the objectives for remedial action and the general principles applied by the Bureau when it seeks, designs, and implements remedies. While such principles are essential elements, which will be taken into account in all cases where remedial action is required, it is important to realize that all remedies will be tailored to the specific facts and circumstances of each case. Remedies will also be tailored according the Bureau's ongoing experience regarding the efficacy of previously implemented remedies. In other words, the Bureau will apply a principled yet flexible and evolving approach to designing and implementing merger remedies.

To facilitate negotiated settlements between merging parties and the Bureau, an outline of a consent agreement, which generally follows the principles articulated in this Bulletin, will be included as an appendix hereto.[2] This outline consent agreement is necessarily generic and provided as an example only, as the terms and conditions of each consent agreement will be tailored to the specific facts and circumstances of each case. During merger remedy negotiations, it is the practice of the Bureau to prepare the first draft of any consent agreement and to retain carriage over the draft document throughout any negotiations that follow.

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 ("**the Bureau**" or "**the Commissioner**")[3] will take remedial action to prevent a merged entity, alone or in coordination with other firms, from having the ability to exercise market power, as a result of the merger.[4] When the Bureau believes that a merger is likely to prevent or lessen competition substantially, it can either apply to the

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[1] This Bulletin is intended solely to provide information and is not intended to be a substitute for the advice of counsel. The Bulletin is not a binding statement of how discretion will be exercised in a particular situation. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal. The Bulletin replaces and supercedes any other publications of the Bureau in this area.

[2] The outine consent agreement will be published shortly.

[3] For the purposes of this Bulletin, the terms "Commissioner" and "Bureau" are used interchangeably, as appropriate to the topic discussed.

[4] 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*.

Competition Tribunal ("**Tribunal**") to challenge it under section 92 of the *Competition Act*[5] ("**the Act**"), or negotiate remedies with the merging parties in order to resolve the competition concerns by consent.[6]

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*.[7] 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."[8] Throughout this Bulletin, this standard is referred to as either "eliminating the substantial lessening or prevention of competition" or, for ease of reference, as "preserving competition"[9] in the relevant markets.

3. Eliminating the substantial lessening or prevention of competition sometimes means that the remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level. To this end, the Supreme Court, in *Southam*, emphasized the importance of ensuring that the remedy *fully* eliminates the substantial lessening (or prevention) of competition: "If the choice is between a remedy that goes farther than is 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."[10]

4. When a merger is likely to prevent or lessen competition substantially, the Bureau generally attempts 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, the Bureau is prepared, where appropriate, to consider limiting or narrowing the scope of litigation. This enables the

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[5] RS, 1985, c. C-34

[6] See section 105 of the *Competition Act*.

[7] *Canada (Director of Investigation & Research, Competition Act) v. Southam Inc.* [1997] 1 S.C.R. 748. [Hereinafter referred to as "*Southam*"].

[8] *Southam* at 85.

[9] "Preserving competition" is strictly for ease of reference. The Bureau will seek to obtain all remedies according to the standard set out in *Southam*.

[10] *Southam* at 89.

uncontentious parts of a merger to proceed while the Bureau challenges only 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 asset(s) and/or business(es)[11] that could be the subject of an order. Hold-separate provisions are described more fully in sections II and III of this Bulletin.

5. If a merger does proceed to litigation (*i.e.*, being challenged under section 92 of the Act), the Bureau will identify proposed remedies in its application to the Tribunal.[12] 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 merger that has closed, 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.

6. With the consent of the merging parties and the Bureau, in the cases of either a proposed merger or a merger that has closed, the Act allows for a wider range of remedies to be considered.[13] To be effective, a remedy must eliminate the substantial lessening or prevention of competition resulting from the merger. Ultimately, an effective remedy is based on the unique circumstances of the case and theory of competitive harm, as alleged by the Bureau or determined by the Tribunal. Accordingly, an effective remedy could include addressing any impediments to competition that would otherwise allow remaining or potential competitors to constrain market power following the merger.[14]

7. In addition to being effective, remedies must also be enforceable and capable of timely implementation so that the substantial lessening or prevention of competition can be eliminated as quickly as possible. Accordingly, in the case of divestitures, an acceptable buyer of divested asset(s) ("**buyer**") must be provided with those asset(s) necessary to achieve the goal of

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[11] Although businesses are generally comprised of more than just assets, for ease of reference, the terms "asset(s)" and "business(es)," in the context of divestitures, are used interchangeably throughout this Bulletin. Furthermore, such terms are to be interpreted broadly: for example, depending on the circumstances, a divestiture of "asset(s)" may also entail the divestiture of shareholdings.

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

[13] Negotiated remedies between the Bureau and the merging parties take the form of a "consent agreement", which 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.

[14] Effective remedies are ultimately intended to preserve competition, rather than promote certain competitors.

eliminating the substantial lessening or prevention of competition, as quickly as possible. Careful consideration is given to identifying the asset(s) required for a buyer to compete effectively over the long term.

II. DESIGNING REMEDIES

8. When designing remedies, terms must be clear and measures must be sufficiently well defined. This is to ensure timely implementation of the remedy and either no or minimal future monitoring by the Bureau. Additionally, clear terms and defined measures ensure that such remedies can be enforced by the Bureau or the Tribunal, which includes being enforced by way of contempt proceedings should a party not comply with them.[15] The range of remedies considered by the Bureau is described below.

A. Structural Remedies[16]

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. Structural remedies are typically more effective than behavioural remedies. For example, behavioural remedies may prevent the merged entity from efficiently responding to changing market conditions and may restrain potentially pro-competitive behaviour by the merged entity

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[15] 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."

[16] In general, a structural remedy addresses the anti-competitive effects arising from a merger by directly intervening in the competitive structure of the market. Divestitures are the most common form of structural remedy. In some cases, a divestiture (or licensing) of intellectual property, so long as no ongoing monitoring and enforcement is required, may also be considered a structural remedy. A behavioural remedy, on the other hand, addresses the anti-competitive harms stemming from a merger by modifying or constraining the behaviour of the merging firms. Behavioural remedies are normally ongoing and require a substantial amount of monitoring and enforcement.

and/or other market participants. Furthermore, it is difficult to determine the appropriate duration of a behavioural remedy, since it is often difficult to gauge how long it will take for new entry or expansion to be established in the relevant market(s). Competition authorities and courts generally prefer structural remedies over behavioural remedies because the terms of such remedies are more clear and certain, less costly to administer, and readily enforceable.[17] Disadvantages with respect to the costs associated with behavioural remedies include:

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

11. Most structural remedies involve a divestiture of asset(s) rather than an outright prohibition or dissolution of the merger.[18] However, prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable. The remainder of this section describes the essential components of designing remedies that require a divestiture of asset(s).

i. Divestitures

12. Divestitures seek to:

(i) preserve competition through the sale of asset(s) to a new market participant;[19] or

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[17] 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 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." Also see paragraph 111 where the Tribunal notes that divestitures are described by the U.S. Supreme Court as "simple, relatively easy to administer, and sure."

[18] In some cases, the severing of structural links through the elimination of interlocking directorates may be an effective alternative to the divestiture of assets.

[19] A new market participant is a company that is not presently competing in the relevant market, but has the necessary capabilities (*e.g.* financial, managerial, or otherwise) to become an

(ii) strengthen an existing source of competition through the sale of asset(s) to an existing market participant.

13. 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 both viable and 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 have both the ability and intention to be an effective competitor in the relevant market(s).

(a) Viability of the Asset(s) Chosen for Divestiture

14. Divestitures can include one (or more) standalone operating business(es) and/or one or more components of a standalone operating business(es). Importantly, divestitures must include all assets necessary for the buyer to be an effective long-term competitor who will preserve competition in the relevant market(s). While divestitures of asset(s) or business(es) within the relevant market are usually sufficient to address competition concerns, in certain circumstances it may be necessary to include asset(s) outside the relevant market. For example, this may be the case when economies of scale and/or scope are important or when the asset(s) related to the relevant market do not comprise a standalone operating business.

15. A divestiture of a standalone operating business(es) means that the whole of one of the merging parties' overlapping businesses is to be divested. This includes all necessary management, personnel, manufacturing and distribution facilities, retail locations, individual products or product lines, intellectual property (*e.g.* including patents or brands), administrative functions, supply arrangements, customer contracts, government and regulatory approvals, leases, and other components of an operating business. Such a divestiture is required, for example, when something less than a standalone operating business 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 asset(s).

16. A divestiture of one or more components of a standalone operating business means that less than the whole of one of the merging parties' overlapping businesses is to be divested. Provided it eliminates the substantial lessening or prevention of competition arising from a merger, a divestiture of less than a standalone operating business may be acceptable when some of the components needed to run the business are otherwise available. For example, a potential buyer of certain discrete asset(s) may not require certain administrative functions (*e.g.* human resources, or accounting) or distribution asset(s) of an ongoing business unit to become a viable

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effective competitor. A newly formed entity with no significant experience in the market will not normally be an acceptable buyer.

and effective competitor if it already owns these capabilities or can readily obtain them from sources outside of the merged entity.

17. Divesting a standalone operating business increases the level of certainty that the remedy will be effective, since the business has proven its ability to compete in the market and survive independently. Accordingly, the Bureau applies greater scrutiny to divestitures of less than a standalone operating business since there is limited or no proven track record that the components of the business will be able to operate both effectively and competitively. Furthermore, when divestitures of less than a standalone operating business 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 asset(s).[20]

18. The Bureau also applies greater scrutiny to situations in which the proposed divestiture package is created out of a mixture of assets (*i.e.*, referred to as a "**mix and match**" approach) from both merging parties. Mix and match remedies are often less successful at preserving competition, as such asset packages have an unproven track record of business viability and are subject to integration issues, which are usually more difficult to resolve than with divestitures comprised of a standalone operating business.

19. In light of these above reasons, the Bureau generally prefers a divestiture of a standalone operating business(es) from one merging party, normally the target company being acquired in the merger, to one buyer[21]. This approach reduces the uncertainty associated with both the viability of the divestiture package and integration issues, and limits the detrimental effects that could arise from the acquiring party in the merger obtaining confidential information about the asset(s) to be divested.

20. Prior to agreeing to a divestiture package, the Bureau may seek information from the marketplace. Such "**market testing**" is particularly important in those situations where the marketability, viability, and ultimately the effectiveness of a divestiture package in eliminating the substantial lessening or prevention of competition arising from a merger, are uncertain or in doubt. Market testing may include seeking information from industry participants such as competitors, customers and suppliers, as well as from industry experts.[22]

21. In addition to considering whether a divestiture consisting of one (or more) standalone operating business(es) and/or one or more components of a standalone operating business(es) is

[20] In such cases, the Bureau is also more likely to require crown jewel provisions, which are discussed further below.

[21] This approach is commonly referred to as a "clean sweep".

[22] In some cases, before agreeing to a divestiture package, the Bureau may consult with industry experts to determine the market value of possible asset(s) to be divested.

required, the following provisions are helpful in ensuring the viability of the asset(s) to be divested and are therefore given careful consideration when designing remedies.

Hold-separate Provisions

22. 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, the Bureau will normally require the merging parties to "hold separate" those asset(s) that could be the subject of a Tribunal order, until the divestiture is completed.[23] Hold-separate provisions preserve the Bureau's ability to achieve an effective remedy *pending its implementation*.[24] Hold-separate provisions also reduce the likelihood that the asset(s) will deteriorate during the divestiture process. Moreover, such provisions ensure the merging parties do not combine their operations or share confidential information before the divestiture occurs, thereby avoiding the problem of "unscrambling the eggs" if the merger has to be restructured at a later date. Hold separate provisions also preserve the Tribunal's flexibility to order an alternate remedy should the original divestiture not be effected.

23. The Bureau will usually require that hold-separate provisions apply to asset(s) beyond those that are to be divested pursuant to a consent agreement. In limited cases, such as those involving the divestiture of a standalone operating business, the Bureau may require the hold-separate provisions to cover only the portions of the merger that are likely to result in anti-competitive effects. Hold-separate provisions are further discussed in section III of this Bulletin: Implementing Remedies.

Alternatives to Hold-Separate Provisions

24. In very limited circumstances, it may be sufficient to direct the acquiring party, which must divest the asset(s)/business(es) ("**the vendor**"), to maintain the competitive viability of the asset(s) to be divested, without having to hold such asset(s) separate from the vendor's other operations. To this end, "**maintenance provisions** " rather than hold-separate provisions may be sufficient when:

- the asset(s) to be divested cannot operate on a standalone 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 (*e.g.* if pricing and cost information is

[23] The Bureau will not normally agree to hold-separate arrangements prior to the merger closing.

[24] 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. 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*.

transparent in the industry, or if there are specific provisions in the consent agreement that will prevent disclosure of such information).

25. In such cases, the vendor must provide sales, managerial, administrative, operational, and financial support, as necessary in the ordinary course of business, so as to promote the continued effective operation of the asset(s). The vendor may also be required to honour all material contracts (*e.g.* sales and employment contracts) and agree to other provisions to ensure the ongoing viability of the asset(s), including those provisions relating to maintaining employment. While the asset(s) 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 both facilitate due diligence for the buyer during the divestiture period, and to maintain the competitive viability of the asset(s) to be divested.

Representations and Warranties

26. To increase the attractiveness and viability of the divestiture package, the vendor must provide reasonable and ordinary commercial representations and warranties to the buyer. What is reasonable and ordinary will depend on the industry in question, as each industry may have unique requirements. Depending on the circumstances, such representations and warranties will usually need to remain in effect at least until all divestitures contemplated by the remedy are complete.[25] In addition, when necessary, the vendor must indemnify the buyer to offset liabilities that either cannot or should not be separated from the asset(s) to be divested. Following the appointment of a divestiture trustee (**"trustee**"), the trustee shall have the sole authority, with oversight and approval by the Bureau only, to determine the reasonable and ordinary commercial representations and warranties, for the purpose of effecting the divestiture. The vendor will agree to and accept such trustee determinations in the consent agreement.

(b) Ensuring Timeliness and Success of the Divestiture

27. 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 as quickly as possible, by minimizing the competitive harm, and by mitigating potential asset deterioration.

Fix-it-First

28. 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 closing the merger. A "**fix-it-first**" solution occurs when:

[25] In some cases, depending on the circumstances, certain representations and warranties might need to be extended past the divestiture period.

(i) the vendor is able to divest the relevant asset(s) to an approved buyer[26] prior to, or simultaneously with, 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.

29. 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 to the merging parties.

30. 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 asset(s) in question do not deteriorate, and preserves competition in the relevant market(s) as expeditiously as possible. While fix-it-first solutions are still subject to Bureau approval, the registration of a consent agreement is typically not required. However, if the Bureau believes that the divestiture may be delayed until after the merger closes, or may not occur at all, the Bureau will likely require a consent agreement, as the divestiture will no longer be effected on a fix-it-first basis. The consent agreement may not have to be registered if the divestiture is actually completed before the merger has closed.

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

Time Periods

32. Imposing and enforcing 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 of assets, the loss of customers and/or key personnel, or otherwise, will cause the divestiture to be ineffective. Certain safeguards, such as hold-separate provisions, may lessen the degree to which the asset package may deteriorate. Such provisions are temporary and are designed to maintain the current state of the asset(s).

33. 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 the vendor can negotiate with potential buyers. The initial sale period will be between three and six months,[27]

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[26] For the criteria in which the Bureau's approval of a buyer is based, see the section in this Bulletin entitled "Obtaining Bureau Approval of a Qualified Buyer".

[27] Based on both the Bureau's past experience in Canada and the experience of competition authorities in other jurisdictions, the Bureau has determined that three to six months is an appropriate initial sale period. Nonetheless, within this range, the actual time period in a given case will be a reflection of the business realities in question.

which is considered sufficient time in which to both initiate and complete the divestiture. The actual time period allotted for the initial sale period will normally be confidential. The Bureau may grant a short extension of this time period in exceptional circumstances, which will be determined on a case-by-case basis. During the initial sale period, the vendor will normally be required to meet certain milestones, which will be pre-determined on a case-by-case basis.[28] Compliance with such milestones must be reported to the Bureau at the Bureau's request.

34. As further explained in section IV of this Bulletin, if the vendor cannot sell the asset(s) within the initial sale period, a trustee appointed by the Bureau will have a period of time ("**trustee period**"), the duration of which will be made public at the outset of the trustee period, in order to complete the divestiture without any limitations on price. During the trustee period, the trustee shall have the authority to control the divestiture process, subject to oversight and approval by the Bureau only.

No Minimum Price

35. 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.[29] As the sale price and terms of which the divestiture package are to be determined by the trustee, the Bureau will not agree to provisions or terms that refer in any way to a minimum or floor price.[30] The trustee's primary obligation is to divest the remedy package to a qualified buyer at no minimum price.

"Crown Jewel" Provisions

36. 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 such competition concerns. However, given the prospective nature of proposed divestitures, there is frequently some uncertainty as to whether the remedy will be viable (*i.e.*, whether the divestiture will be completed). Thus, an additional asset package

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[28] For example, such milestones will normally include: the preparation of offering materials, soliciting interest in the asset(s) to be divested, and entering into negotiations.

[29] The term "no minimum price" also includes those uncommon situations whereby the vendor will have to compensate (*i.e.*, make payment to) the buyer. For example, in cases where the asset(s) to be divested cannot be separated from certain liabilities, the vendor will have to compensate the buyer for any costs associated with such liabilities. Similarly, in cases where the costs associated with such liabilities are uncertain, the vendor may need to indemnify the buyer.

[30] For example, this includes terms and provisions such as, but not limited to, "fair market value," "going concern," "liquidation price," "going out of business," and "fire sale."

(commonly referred to as a "**crown jewel**") may be required as part of the remedy in order to reduce any such uncertainty.

37. Crown jewel provisions allow for specified asset(s) to be added or substituted into the initial divestiture package of asset(s), which limits any uncertainty by increasing the viability of the remedy. Importantly however, while crown jewel provisions do provide the vendor with an incentive for a timely completion of the initial divestiture package, such provisions are not intended to be punitive. That is, those asset(s) that comprise the crown jewel will, as much as possible, relate to the competitive harm.[31] In other words, crown jewel provisions are intended to not only provide the vendor with an incentive to divest the initial divestiture package, but also to provide the Bureau with confidence that if the initial divestiture package is unsuccessful, there will still be a viable remedy available.

38. While crown jewel provisions are usually determined before the trustee period commences, such provisions are triggered only during the trustee period. Both the existence and content of crown jewel provisions are not made public until the trustee period commences. Crown jewel provisions are not required in a fix-it-first solution.

(c) Independence and Competitiveness of the Buyer

39. The suitability of a buyer (*i.e.*, a market participant) is directly related to the viability and sufficiency of an asset package. An acceptable buyer must have both the ability and incentive to compete, so that competition will be preserved in the relevant market(s). The buyer must operate independently of the merged entity in all aspects of competition, even if various means of support (*e.g.* supply arrangements and other forms of technical assistance) are part of the remedy package for a transitional period of time. Ultimately, the acceptability of a buyer will depend on the particular facts of the case and will be guided by the Bureau's understanding of the competitive dynamics in the market and the theory of competitive harm (*e.g.* unilateral and/or coordinated effects). The approval of any buyer, whether proposed by the vendor or the trustee, during either the initial or trustee sale period respectively, is a matter for the Bureau alone to determine.

40. The capabilities and resources of prospective buyers are especially critical with divestitures consisting of less than an autonomous business 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 sometimes be necessary for the vendor to identify the buyer up-front before the Bureau agrees to the remedy package. This is known as an "**up-front buyer provision**".

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[31] In other words, a crown jewel is essentially a mechanism for correcting an unsuccessful remedy by making the remedy more viable. When determining the contents of a crown jewel, the *Southam* standard, as discussed in section I of this Bulletin, will apply.

41. An up-front buyer provision is different from a fix-it-first solution in that the buyer of the divested asset(s) must be approved by the Bureau in advance of registering a consent agreement, but the asset(s) are divested after the merger closes. This approach helps ensure the timeliness of the divestiture and the viability of the asset(s) to be divested, and may avoid the need for hold-separate provisions.[32] Since up-front buyer provisions do not entail an open bidding process or public offering, the Bureau will exercise increased vigilance to ensure the buyer and vendor are independent of one another.

B. Quasi-Structural Remedies[33]

42. In certain circumstances, an effective remedy may require the merging parties to take some action, in addition to or other than a divestiture, to remedy competition concerns. While allowing the merged entity to retain ownership of the asset(s) acquired in the merger, certain actions may have structural implications for the marketplace. This includes those actions that reduce barriers to entry, provide access to necessary infrastructure or key technology, or otherwise facilitate entry or expansion. Examples, under certain circumstances, 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 both vertical integration and a risk of foreclosure of inputs; or
- supporting the removal or reduction of quotas, tariffs, or other impediments imposed by regulatory bodies or industry groups, which may be achieved with the help of efforts by the merged entity.

43. While such measures may help preserve a competitive environment, it is necessary to fully examine their effects in the context of the particular industry as a whole. The Bureau will only accept quasi-structural remedies, if, once fully implemented, they adequately eliminate the substantial lessening or prevention of competition arising from the merger in the relevant market(s) on a continuing basis without the need for future intervention or monitoring. In other words, such remedies must satisfy the same requirements as any other structural remedy.

44. Remedial action involving intangible assets, such as intellectual property, is often accomplished through licensing rather than through an outright divestiture. While licensing agreements allow the merged entity to retain ownership rights to patents, trademarks, or other

[32] Up-front buyer provisions, however, do not obviate the need for "maintenance provisions." See the section on "Alternatives to Hold-Separate Provisions" in this Bulletin for more information concerning maintenance provisions.

[33] Quasi-Structural Remedies are a sub-category of structural remedies in that they effect structural change.

intellectual property, they may be quasi-structural when they reduce or eliminate an important barrier to entry by enabling one or more third parties (*i.e.*, parties who otherwise possess the necessary capabilities) to participate in markets that, in the absence of the licence, would be foreclosed to them. Licensing can also be efficiency enhancing since it is less likely to discourage future research and development.

45. 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 asset(s), including the right to operate under the licensed intellectual property; or
(iii) non-exclusive, such that multiple firms can have access to the intellectual property through sub-licensing provisions.

46. The scope of the licensing 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, it may be appropriate to allow the merged entity to 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. Sub-licensing may be appropriate when the owner of the intellectual property, pre-merger, previously licensed to multiple licensees and will likely engage in sub-licensing to other firms in the future.

C. Combination Remedies

47. 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 implemented 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 in a remedy may be useful if such components provide a buyer and/or other industry participants with the ability to operate effectively and as quickly as possible.

48. Examples of behavioural remedies that may support structural remedies include:

- short-term supply arrangements for the buyer of the asset(s) to be divested, at a price defined to approximate direct costs. This is especially effective if the buyer requires an immediate supply of inputs, but needs a short period of time to establish its own supply management capabilities;

- the provision of technical assistance to help a buyer or licensee train employees in complex technologies, especially for those technologies related to intellectual property;
- a waiver by the merged entity of restrictive contract terms that lock-in customers for long periods of time. This is especially effective when other switching costs deter customers from moving their business to the buyer of the divested asset(s); and
- codes of conduct, which can be readily monitored and expeditiously enforced by a third party (*e.g.* through binding arbitration procedures).

While such behavioural remedies may be important to the success of the buyer, and thus the preservation of competition, they would not, on their own, be effective alternatives to a successful structural remedy. Furthermore, as with all remedies, such behavioural remedies must require either minimal or no ongoing monitoring by the Bureau. Additionally, such remedies must be enforceable by either the Bureau or the Tribunal. If behavioural remedies do not meet such monitoring and enforceability criteria, the Bureau will neither agree to such remedies nor seek to impose them.

D. Standalone Behavioural Remedies

49. Standalone behavioural remedies are seldom 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 standalone behavioural remedy usually imposes an ongoing burden on the Bureau and market participants, including the merged entity, rather than providing a permanent solution to a competition problem.

50. Standalone behavioural remedies may be acceptable when they are sufficient to eliminate the substantial lessening or prevention of competition arising from a merger, and there is no appropriate structural remedy. Additionally, as stated previously, standalone behavioural remedies must require either no or minimal future monitoring by the Bureau, and be enforceable by either the Bureau or the Tribunal. Otherwise, the Bureau will neither agree to such remedies nor seek to impose them.

III. IMPLEMENTING REMEDIES

i. Hold-Separate Provisions

51. Hold-separate provisions, previously discussed in section II of this Bulletin, are required in most consent agreements pending completion of the agreed-upon remedy.[34] These provisions ensure that confidential information is not communicated to the vendor during the implementation phase of the remedy. These provisions also ensure that the designated asset(s) or business(es) to be divested are: preserved; economically viable; and operated at arm's length from the merged entity throughout both the initial and trustee sale periods. Hold-separate provisions may also be required when the vendor must make ongoing capital investments in, or otherwise support, the asset(s) to be divested during the implementation phase of the remedy.

52. Normally, it is necessary to immediately appoint an independent manager ("**hold-separate manager**") to operate the asset(s) to be divested until the divestiture is complete. The Bureau requires that a hold-separate manager 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 authority necessary to perform his or her duties and responsibilities under the consent agreement. To this end, the vendor must not exercise any direction or control over the management of the asset(s) to be divested. The hold-separate manager will be responsible for the day-to-day management of the asset(s) to be divested and, if necessary, will report directly to an independent monitor.

53. The Bureau will normally require the appointment of an independent third party to monitor compliance with the consent agreement ("**monitor**").[35] A monitor should have no ties, financial or otherwise, with the merging parties. The monitor will have complete access to all personnel, books, records, documents, facilities, or to any other relevant information that 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 will report, in writing, to the Bureau, as set out in the consent agreement.

ii. Responsibilities of the Vendor (General)

54. To keep the Bureau fully informed throughout the initial and trustee sale periods, the vendor must report to the Bureau in writing on a regular basis with respect to the status of the asset(s) to be divested, as well as the progress of the vendor's efforts to accomplish the divestiture. This allows the Bureau to monitor whether the vendor is making best efforts to complete the divestiture.

55. Reports should include a description of the divestiture 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

[34] 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.

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

vendor and prospective buyers and a description of the state of the asset(s) at the time of reporting. A description of any material changes in the value or status of the asset(s) to be divested, 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 divestiture.

56. The vendor of the designated asset package will be responsible for payment of services of the hold-separate manager, the monitor, and, if the asset(s) are not sold during the initial sale period, the trustee. The vendor will also be responsible for indemnifying the trustee with respect to any expenses and non-payment of fees associated with the divestiture.

iii. Obtaining Bureau Approval of a Qualified Buyer

57. In addition to approving the remedy package, the Bureau must approve the buyer of the divested asset(s), so as to ensure that such asset(s) will be operated by a vigorous competitor, and that the divestiture itself will not result in a substantial lessening or prevention of competition in the relevant market(s). Requiring such approval increases the likelihood that the buyer will preserve competition in the relevant market(s).

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

(i) the divestiture 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 asset(s) being divested must be used by the buyer to compete in the relevant market(s) post-divestiture. This means that the asset(s) must be sold to a firm that will compete effectively in the market and have the intention to keep the asset(s) in the relevant market(s) after the divestiture process. This determination will be based, in part, on business plans that explain how the proposed buyer plans to compete in the future.

59. When a remedy package includes assets in several geographic areas, so as 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.

IV. TRUSTEE PROVISIONS

60. 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 appoint a trustee to divest the asset(s).[36] As mentioned in section II of this Bulletin, the inclusion of trustee provisions provides some assurance that the asset(s) will be divested in a timely and effective manner. The trustee period, the duration of which shall be made public at the outset of the trustee period, will be between three and six months. The Bureau may grant a short extension of this time period in exceptional circumstances, which will be determined on a case-by-case basis.

61. Prior to the start of the trustee period, the trustee must be given sufficient time and information to become familiar with the terms of the consent agreement and the asset(s) to be divested. This ensures that the divestiture process can proceed without delay at the initiation of the trustee period.

62. During the trustee period, the trustee will have the authority to control the divestiture process, subject to oversight and approval by the Bureau only. The vendor will not normally be included in the divestiture process, including negotiations. Furthermore, the vendor will have no contact with prospective purchasers, unless otherwise approved by the Bureau.

63. During the trustee period, the trustee must have full and complete access to personnel, books, records, facilities related to the asset(s) in question, or any other information deemed relevant by the trustee to effect the divestiture. To facilitate the necessary degrees of access, the trustee will, among other things, be entitled to attend, as frequently as the trustee determines necessary, the physical premises of the vendor. The vendor will be required to respond, both promptly and fully, to all requests from the trustee. To this end, the vendor must identify a person who is responsible for responding to all trustee information requests.

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

65. The completion of the divestiture is subject to the Bureau's approval only, and must be made to a "qualified"[37] buyer who meets the criteria stipulated in the consent agreement (or divestiture order). The trustee shall use commercially reasonable efforts to negotiate the most

[36] In the case of a divestiture order in a contested case, the Bureau will seek the authority to appoint the trustee to divest the asset(s).

[37] This includes the buyer having, or acquiring, the capabilities and resources to operate the asset(s) and any other conditions identified in this Bulletin (*e.g.* for details regarding what constitutes a "qualified" buyer, see the sections in this Bulletin entitled **"**Independence and Competitiveness of the Buyer" and **"**Obtaining Bureau Approval of a Qualified Buyer").

favourable terms and conditions[38] available at that time, and if necessary to effect the divestiture, may sell the asset(s) at no minimum price.[39] The trustee's opinion of what constitutes "most favourable" terms and conditions is subject to approval by the Bureau only. As the trustee's primary obligation is to divest the remedy package to a qualified buyer, the vendor's right to challenge the terms and conditions of the divestiture is limited to situations whereby the trustee commits malfeasance, gross negligence, or acts in bad faith.

66. 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, the trustee period may be extended at the Bureau's sole discretion. In the event that the asset(s) to be divested have not been divested within the trustee period (including any applicable extensions to this period), the Bureau may apply to the Tribunal for such order as is necessary to effect the divestiture,[40] and the parties will submit in the consent agreement to the Tribunal's jurisdiction to grant such relief required to achieve that objective. Depending on the particular circumstances of the case, the Bureau may recommend to the Tribunal that other asset(s), or steps be taken, in addition to those required in the divestiture package, are needed to effect the divestiture.

V. CONFIDENTIAL SCHEDULES

67. The Bureau aims to be as transparent as possible with respect to 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 sale period only. In particular, the length of the initial sale period, the fact that there is no minimum price, and both the existence and the specific asset(s) that form part of the crown jewel package, may be considered by the Bureau for inclusion in confidential schedules to a consent agreement.

68. 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 confidential schedules.

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[38] "Terms and conditions" includes, among other things, the sale price of the divestiture asset(s).

[39] In certain circumstances, it may be necessary for the vendor to provide, or to add to, transitional means of support provided to the purchaser (*e.g.* supply arrangements and other forms of technical assistance) so that the asset(s) to be divested remain viable. Such transitional means of support, when deemed reasonable and necessary, will be in the discretion of the trustee to negotiate and conclude once the trustee period begins. Such discretion by the trustee is subject to the oversight and approval of the Bureau only.

[40] For clarity, "the divestiture" implies both the initial divestiture package, as well as any subsequent crown jewel asset(s).

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

70. 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.

VI. COMPLIANCE AND ENFORCEMENT OF MERGER REMEDIES

71. 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.

72. 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.

73. The nature of the non-compliance will determine the type of action that will likely be taken by the Bureau. When substantive issues relating to competition arise, it may be sufficient, in some cases, to discuss such issues 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 wilfully 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, as well as any other action that may be necessary.[41]

74. 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 to address the substantial lessening or prevention of competition under section 92 of the Act.

VII. INTERNATIONAL COORDINATION AND COOPERATION

[41] For example, the Bureau may seek the imposition of civil and/or criminal penalties.

75. The increasing number of global mergers has enhanced the need for communication, coordination, and cooperation among competition authorities in different jurisdictions. The Bureau uses a number of cooperation arrangements or agreements with its foreign counterparts to help facilitate information exchange, investigations, and ultimately the coordination of remedies.[42] When the Bureau requires confidential information from its foreign counterparts, such cooperation is facilitated by the provision of waivers by the merging and/or affected third parties to the antitrust authorities in foreign jurisdictions.[43] When foreign competition agencies require confidential information from the Bureau, such cooperation is subject to the confidentiality provisions of section 29 of the Act.

76. 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 are similar to those in other jurisdictions.

77. The greater the extent to which competition issues identified in Canada are similar to those in other jurisdictions, the greater the likelihood that coordinated remedies will be effective. As 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 whereby a remedy in one jurisdiction may not be acceptable in another. Consistent and coordinated remedies can also lead to a more effective resolution than would be attained through independent enforcement action. Furthermore, such remedies reduce uncertainty for businesses.

78. To resolve competition concerns within Canada, the Bureau may either take specific action or it may determine that action beyond what will be taken in 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 Canadian impact is particularly significant, when the asset(s) to be divested reside in Canada, or when it is critical to the enforcement of the terms of the settlement.[44] In

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[42] The Bureau's current cooperation agreements and arrangements can be found at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=141&lg=e>

[43] Such waivers allow for the exchange of confidential information from foreign competition agencies to the Bureau, which would otherwise be prohibited by law in the respective foreign jurisdictions.

[44] This could arise in circumstances where issues with a multi-jurisdictional merger are the same in Canada as a foreign jurisdiction. In one case, the foreign jurisdiction may conclude that because of costs or the size of markets, it should order the sale of a business, including

contrast, the Bureau may rely on the remedies initiated through formal proceedings by foreign jurisdictions when the asset(s) 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.[45] However, the Bureau will do so only if it is satisfied that the actions taken by foreign authorities are sufficient to resolve the competition issues in Canada.

79. 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 and/or market share levels in relevant markets in Canada, 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.

80. While consistent and coordinated remedies are desirable, each jurisdiction must retain the authority and ability to ensure remedies that 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 will generally take another jurisdiction's interests and policies into account only to the extent that such interests and policies do not limit or prevent Canadian competition concerns from being remedied.

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intellectual property rights, on a worldwide basis. In a different case, the foreign authority might conclude that because of costs or scale of business, it would be sufficient to simply order the sale of the business, including the intellectual property rights, within its own jurisdiction. In the latter case, Canada would need its own Canada-specific remedy.

[45] 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 transaction at the Tribunal.