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Behavioural Remedies: Not Dead, Just Resting

Competition and antitrust authorities around the world regularly proclaim their strong preference for structural over behavioural remedies in merger cases. Structural remedies, as the name implies, mean that the firms involved are restructured in some way – the most extreme restructuring being prohibiting the merger, and a more modest approach being a requirement that assets or divisions be sold off in order to remedy competitive problems associated with the proposed merger. Behavioural remedies, by contrast, do not involve a divestiture of pieces of the business. Rather they involve some sort of agreement that the merged business will behave differently.

For a number of reasons, enforcement authorities prefer structural to behavioural remedies. As set out in the Canadian Competition Bureau's Merger Remedies Bulletin[1]:

> "…structural remedies are usually necessary to eliminate the substantial lessening or prevention of competition arising from a merger."
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> "Structural remedies are typically more effective than behavioural remedies."
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> "Competition authorities and courts generally prefer structural remedies over behavioural remedies because the

[1] Competition Bureau, Information Bulletin, "Information Bulletin on Merger Remedies in Canada" (22 September 2006) at 5-6, online: Competition Bureau http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf.

> terms of such remedies are more clear and certain, less costly to administer, and readily enforceable."

As noted in the Bureau's Bulletin, structural remedies are self policing. Once the assets are in independent hands, the forces of competition drive the process without the involvement of regulators or courts. By contrast, behavioural remedies rely on the merged firm behaving differently than it would otherwise have chosen to. That, typically, requires policing.

Most authorities take the position that behavioural remedies generally will not be considered if there is an alternative[2]**:**

> "Standalone behavioural remedies are seldom accepted by the Bureau."
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> "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."

However, it ain't necessarily so. In the right case, behavioural remedies are considered. One such circumstance is a "quasi" structured remedy – such as some sort of permanent license agreement so that while no asset is divested, the right to use a relevant asset – very often intellectual property rights – is given to other firms. Another example would be an agreement to seek and obtain duty remissions or other regulatory changes so that additional competitors from outside the geographic market can compete.

And sometimes, behavioural remedies alone will do the trick. On March 13, 2014 the Canadian Competition Bureau announced[3]

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[2] *Ibid* at 16.

[3] Competition Bureau, Media Release, "GardaWorld provides Competition Bureau with commitment in Quebec" (13 March 2014) online: Competition Bureau http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03694.html.

that it had issued a No Action Letter, indicating that it would not challenge a merger transaction – at least for now – with respect to Garda World Security Corporation's acquisition of G4S Cash Solutions (Canada) Ltd. GardaWorld and G4S were the two largest providers of armoured car services in Quebec. Brinks was the only other meaningful competitor. While in other overlap businesses the Bureau found that there was sufficient remaining competition, in the armoured car business in Quebec the merger looked to be a problem. The Bureau found that barriers to entry into the business were high – including reputational barriers, significant investment costs, the need to achieve sufficient scale to service large customers, and the long-term contracts between GardaWorld and G4S and their important customers. The Bureau found that for even an established armoured car service supplier to compete for long-term contracts, renewal periods and penalty clauses for early termination would significantly hinder entry. Over 85% of the contracts apparently contained automatic renewal clauses and penalties for early termination. Contracts with larger customers tended to have terms for three years or longer.

Despite these findings, rather than prohibiting the merger, or requiring that the merged business sell off significant assets, the matter was resolved[4] on the basis that, with respect to its customers in Quebec, GardaWorld would:

1. Allow customers to terminate contracts without penalty on 30 days' written notice.
2. Limit contracts to two years unless a longer term was requested by the customer.
3. Not have a right of first refusal or be entitled to know about contract offers that a customer receives from a third party.
4. Notify customers 45 days in advance of any price increase.
5. Notify all its customers about the terms of its commitment to the Bureau.

[4] Although the Bureau indicated that it will continue to monitor the situation for the coming year.

This resolution is interesting in a couple of respects. As noted, unlike most approaches the Bureau takes, this resolution involved a behavioural rather than a structural remedy. As well, and again unlike the Bureau's usual approach, the remedy was by way of commitments made by GardaWorld to the Bureau, and was not memorialized in a Consent Agreement filed with the Competition Tribunal and enforceable as though it were a court order. The case is a reminder that, with the right facts, creative resolutions to merger problems may be possible.

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a cautionary note