

COMPETITION BUREAU ISSUES CONSENT AGREEMENT TEMPLATE

Posted on September 29, 2016

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On September 29, 2016, the Canadian 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 news 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 may identify anti-competitive effects and seek 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 even licensing rights (quasi-structural remedies).

The Bureau’s preference is to negotiate a Consent Agreement, where it believes that remedies will overcome the anticipated effects of a merger. This is in large part because litigation proceedings are costly, time consuming and uncertain.

Where an acceptable remedy can be negotiated, which preserves competition, that serves the public interest. The key provisions found in the template include:

- Obligations to Complete Divestitures within Prescribed Time Periods
- Divestiture Trustee Sale Process
- Requirement for Approval of Divestiture by Commissioner of Competition
- Obligations to Hold Certain Assets of Merger Separate

- Behavioural Commitments and Transitional Support Obligations
- Relations with and Obligations to Employees
- Consequences for Failure of Divestiture
- Appointment of Monitor Re Compliance with Consent Agreement
- Ongoing Compliance Obligations
- Duration of Agreement
- Preservation of Divestiture Assets

In the news release accompanying the form of template for consent agreements, 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 parties and their counsel may not 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. However, it 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 whose industries and the market structures in which they operate vary considerably. 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.

Below are some important links related to the Bureau’s merger review guidance.

Consent agreement template <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02310.html>

Competition and Compliance Framework

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>

Merger Review Process Guidelines <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html>

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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