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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Canada --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

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-- CANADA --

1. Introduction

1. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's 29 November 2016 roundtable on "Agency decision-making in merger cases: trade-offs between prohibition decisions and conditional clearances."

2. In Canada, the Commissioner of Competition (the "Commissioner") cannot unilaterally prohibit a merger or impose remedies on merging parties.¹ In the vast majority of merger cases where the Commissioner concludes that a transaction is likely to prevent or lessen competition substantially, a remedy is formalized in an agreement between the Commissioner and the parties to the transaction. These consent agreements are registered with the Competition Tribunal (the "Tribunal") and have the force and effect of a Tribunal order.² Since 1986, more than 70 consent agreements involving mergers have been registered with the Tribunal; 19 in the past five years. Examples of remedies negotiated within the last five years range from the divestiture of all of the assets of the Canadian business to the divestiture of certain retail locations or pharmaceutical products. In one instance, the Bureau has also required the implementation of administrative firewalls to prevent the sharing of competitively sensitive information.

3. Where the parties do not agree to an acceptable remedy in a consent agreement and do not otherwise abandon the transaction, the Commissioner may seek an order from the Tribunal to remedy the anti-competitive effects of a transaction. This may sometimes include seeking an order to prohibit a transaction entirely.

4. Since the introduction of the merger provisions in Canada's *Competition Act* (the "Act")³ in 1986, the Commissioner has applied to the Tribunal to challenge thirteen transactions. In seven⁴ of these

¹ Where the Commissioner has determined that a transaction is likely to substantially lessen or prevent competition and is not able to negotiate an acceptable resolution with the merging parties, the Commissioner may file an application with the Competition Tribunal ("Tribunal"). The Tribunal is a separate adjudicative body that has the jurisdiction to hear and dispose of all applications made by the Commissioner under the merger provisions of the Act.

² Section 105 of the Act.

³ The Act is available online at <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>

⁴ *Director of Investigation and Research v. Dennis Washington*, CT-1996-001; *Director of Investigation and Research v. Canadian Pacific Limited*, CT-1996-002; *Commissioner of Competition v. Superior Propane Inc.*, CT-1998-002 [Superior Propane]; *The Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*, *James Richardson International Limited*, *6362681 Canada Ltd.*, *6362699 Canada Ltd.* and *Canadian Pacific Railway Company*, *Canadian National Railway Company*, *Canadian Wheat Board*, *Vancouver Port Authority*, CT-2005-009; *The Commissioner of Competition v. CCS Corporation*, *Complete Environmental Inc.*, *Babkirk Land Services Inc.*, *Karen Louise Baker*, *Ronald John Baker*, *Kenneth Scott Watson*, *Randy John Wolsey*, and *Thomas Craig Wolsey*, CT-2011-002 [CCS-Babkirk]; *The Commissioner of Competition v. Air Canada*, *United Continental Holdings Inc.*, *United Airlines Inc.*, and *Continental Airlines Inc.*, CT-2011-004; *The Commissioner of Competition v. Staples, Inc. Staples AMS, Inc. and Office Depot Inc.*, CT-2015-012 [Staples-Office Depot].

matters, the Bureau sought prohibition or dissolution. While the Tribunal did not order dissolution or prohibit a merger in its entirety, in several of these matters remedies were obtained. There have been three proposed mergers in the past five years that parties have voluntarily abandoned based on concerns raised by the Bureau and, in certain instances, competition agencies in other jurisdictions.⁵

2. Anti-Competitive Effects and the Remedial Standard for Mergers in Canada

2.1 *Anti-Competitive Harm and Efficiencies*

5. Where the Commissioner seeks to prohibit a transaction or to obtain some other form of relief from the Tribunal under the merger provisions of the Act, he must establish on a balance of probabilities that the merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.⁶ If the Commissioner successfully makes out his case, the Tribunal will formulate an order that remedies the competitive harm, based on its findings of anti-competitive harm and the submissions of the Commissioner and the parties as to the appropriate remedy.⁷

6. The Act contains an explicit efficiencies defence. Section 96 provides a trade-off framework in which gains in efficiency that are likely to be brought about by a merger (and that would likely be lost as a result of the order) are evaluated against the likely anti-competitive effects of the merger.⁸ The Tribunal cannot issue the order if it finds that such efficiencies would be greater than, and would offset, the anti-competitive effects. If an efficiencies defence is raised by the parties, a separate and subsequent step is carried out by the Tribunal to determine whether it can issue the order in question.⁹

⁵ These transactions were Louisiana-Pacific Corporation's proposed purchase of Ainsworth Lumber Co. Ltd., Bragg Communications Inc.'s proposed purchase of Bruce Telecom and Staples Inc.'s proposed purchase of Office Depot Inc. The Bureau's position statements for the LP-Ainsworth and Bragg-Bruce matters can be found at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03738.html> and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03790.html>, respectively. The Bureau's application to the Tribunal regarding the Staples-Office Depot matter can be found at http://www.ct-tc.gc.ca/CMFiles/CT-2015-012_Notice%20of%20Application_1_38_12-7-2015_4759.pdf. The transactions may have been abandoned because remedying the competition concerns to the satisfaction of the Bureau would not be practicable, either for business reasons, the expense of litigation or for other reasons.

⁶ Section 92 of the Act states that the Tribunal, on application by the Commissioner, may make an order to dissolve or alter a merger where it "finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially."

⁷ The remedial standard is discussed in detail below.

⁸ In obiter remarks at paragraph 391 in its Reasons for Order and Order in the CCS-Babkirk matter, the Tribunal framed the trade-off analysis as follows: "In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order. The former cost is the aggregate of the lost efficiencies that otherwise would likely be attained as a result of the merger. The latter cost is the aggregate of the effects of any prevention or lessening of competition likely to result from the merger, if the Section 92 Order is not made."

⁹ Subsection 96(1) of the Act states that "The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made."

7. This bifurcation of the efficiencies analysis from the substantive competition and remedial design analyses is somewhat particular to the Canadian merger control regime. In contrast to regimes where these analyses are fully integrated, under Canadian merger law, efficiencies do not need to eliminate the likely anti-competitive effects of the merger to be cognizable.¹⁰

8. The Bureau's approach to analyzing mergers, including efficiencies, is set out in more detail in its *Merger Enforcement Guidelines* (the "MEGs").¹¹ The Bureau, in determining whether a transaction is likely to lead to a substantial lessening or prevention of competition, considers the likely magnitude and duration of any price increase that is anticipated to follow from the merger (or to be prevented by the merger).¹² The Bureau does not consider a numerical threshold for the material price increase. Instead, it bases its conclusions about whether the prevention or lessening of competition is substantial on an assessment of market-specific factors that could have a constraining influence on price following the merger. Additionally, where the merging firms, individually or collectively, have pre-existing market power, smaller impacts on competition resulting from the merger will meet the test of being substantial.

2.2 Remedial Standard for Mergers

9. The Bureau's general approach for remedial action is to find a viable and effective structural remedy that is tailored to the harm, but where a tailored remedy is not possible, it may be necessary to seek dissolution or prohibition. An effective remedy is based on the unique circumstances of the case and the theory of competitive harm, as alleged by the Bureau or determined by the Tribunal. In terms of assessing whether a remedy is acceptable, the Commissioner must be satisfied that the remedy is sufficient to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.¹³ As a result, the competitiveness of a market pre-merger will be important in determining whether a proposed remedy will be sufficient to remedy the harm. For example, where a market is highly uncompetitive pre-merger an acceptable remedy is more likely to be one that returns the market to pre-merger competitive levels.¹⁴

10. There will also be situations where a remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level in order to fully eliminate the substantial prevention or lessening of competition.¹⁵ For example, assets outside of the relevant market may need to be divested

¹⁰ Where the efficiencies defence under s.96 of the Act is relied upon, the Bureau is required to quantify the anti-competitive effects in a manner that is "as analytically rigorous as possible" (*Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 at paragraph 125).

¹¹ The MEGs (2011) are available online at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/\\$FILE/cb-meg-2011-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf)

¹² See the MEGs (2011) at section 2.13.

¹³ The Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 [Southam] at para 85 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."

¹⁴ In its Reasons and Decision regarding *Director of Investigation and Research v. Imperial Oil Limited*, [Imperial Oil] the Tribunal stated that, "While there is a range of acceptable solutions to an uncompetitive post-merger situation, the scope of that range is conditioned by the extent to which the pre-merger situation was itself uncompetitive." (Imperial Oil, CT-1989-003, Reasons and Decision, pg. 16). The Tribunal also referenced this reasoning in Imperial Oil in its decision regarding *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* [Tele-Direct], an application that the Director made under sections 75, 77 and 79 of the Act, (Tele-Direct, CT-1994-003, Reasons and Order, pg. 365).

¹⁵ The Southam decision states that "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

when economies of scale and/or scope are important or when the assets of the relevant market would not constitute a stand-alone operating business.^{16,17}

11. That same analytical framework applies where the Commissioner proceeds by way of consent agreement. The Bureau must have collected sufficient evidence and done sufficient analysis to conclude that a merger or proposed merger is likely to substantially prevent or lessen competition; however, in terms of available remedies, while the Tribunal may only order that the merger or part of the merger not proceed or that certain actions by the parties be prohibited, the Act provides for a greater range of remedies with the consent of the Commissioner and the merging parties.¹⁸

12. The Bureau's current policy on merger remedies is set out in its *Information Bulletin on Merger Remedies in Canada*.¹⁹ The Remedies Bulletin provides guidance on the objectives for remedial action and discusses the general principles applied by the Bureau when it seeks, designs and implements remedies.

13. The Bureau has also recently published its template for merger consent agreements to provide stakeholders with better insight into the Bureau's expectations when negotiating remedies in the mergers context and to improve transparency and predictability in how the Bureau enforces the Act.²⁰ The template reflects the Bureau's ongoing experience regarding the efficacy of previously implemented remedies and has been at least partly adopted by the Tribunal. For example, in the context of an application by the Commissioner for an interim injunction where the purchaser had proposed to divest certain assets and terminate a supply agreement to address the alleged anti-competitive harm, the Tribunal held that the proposed commitments:²¹

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." (Southam at paragraph 89)

¹⁶ *Information Bulletin on Merger Remedies in Canada* (2006) [Remedies Bulletin] at paragraph 14.

¹⁷ Such a scenario may arise in when it is not possible to sever product lines or separate facilities, where critical assets or infrastructure need to be added to constitute a viable stand-alone business, or in other situations.

¹⁸ Section 92(1)(e) provides that where a merger has closed, the Tribunal may only order dissolution of the merger or disposition of assets or shares. For a proposed merger, section 92(1)(f) provides that the Tribunal may only direct that the merger or part of the merger not proceed, or otherwise prohibit certain actions by the merging parties. Whereas 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.

¹⁹ The Remedies Bulletin is available online at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/\\$FILE/Mergers_Remedies_PDF_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf)

²⁰ The Bureau's template consent agreement for mergers is available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02310.html>.

²¹ *The Commissioner of Competition v. Parkland Industries Ltd., Parkland Fuel Corporation, Pioneer Petroleum Holding Limited Partnership, Pioneer Energy LP, Pioneer Petroleum Transport Inc., Pioneer Energy Inc., Pioneer Fuels Inc., Pioneer Petroleum Holding Inc., Pioneer Energy Management Inc., 668086 N.B.Limited, 3269344 Nova Scotia Limited and 1796745 Ontario Ltd.*, CT-2015-003 [Parkland-Pioneer], Reasons and Order Granting in part an Application for Interim Relief Under Section 104 of the Competition Act, paragraph 42.

“...are not defined enough and sufficient to allow the Tribunal to conclude that they would remedy the competition concerns in the 11 local markets covered by them, to the point where no serious issue would remain in respect of these markets. The Parkland Divestitures were not accompanied with a draft detailed divestiture agreement like those typically found in consent agreements filed before this Tribunal to resolve competition concerns in merger matters. They provide no details as to when and how the proposed divestitures will take place; they do not specify who the potential or suitable purchasers of the Corporate Stations or suppliers to the Independent Dealer Stations will be, or whether they will need to be approved by the Commissioner; and they do not refer to what measures will be put in place to keep the assets viable and competitive pending divestitures. In addition, there is no indication of the time period which will be required before the proposed divestitures and commitment actually take place.”

14. The Tribunal subsequently issued an interim hold separate and preservation order that adopted the Bureau’s template language.

15. To minimize the risk of ineffective implementation of remedies, a consent agreement cannot include terms that are unenforceable or would lead to no enforceable obligation, because, for example, they are too vague,²² and will typically include:

- a process for the Commissioner’s approval of a potential purchaser where the assets are being sold either by the parties during an initial sales period or by a divestiture trustee;
- the appointment of a divestiture trustee where the divestiture is not completed within the initial sales period,²³ who may sell assets at no minimum price;
- the appointment of a hold separate manager who is responsible for the day-to-day management of the hold separate assets to be divested and reports directly to the monitor;
- the appointment of an independent monitor who will ensure the merging parties comply with the terms of the consent agreement, including full access to the relevant records and facilities, who will report regularly to the Commissioner; and
- ongoing reporting obligations.

²² In its decision regarding Parkland-Pioneer, the Tribunal stated that, “To accomplish their purpose, remedies in merger matters should be couched in clear terms and be sufficiently well defined to be effective and enforceable.” (Reasons and Order granting in part an Application for Interim Relief under Section 104 of the Competition Act, at paragraph 43). In the proceedings following from Kobo’s application to rescind or vary the terms of a consent agreement under subsection 106(2) of the Act, the Tribunal also found that such an application may be successful for certain reasons which included consideration as to whether the terms of the consent agreement were vague or ambiguous (*Rakuten Kobo Inc. v. The Commissioner of Competition, Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc., HarperCollins Canada Limited, Holtzbrinck Publishers, LLC, Simon & Schuster Canada, A division of CBS Canada Holdings Co.*, CT-2014-002, Reasons for Order and Order in the matter of a Reference to the Tribunal under subsection 124.2(2) of the Competition Act, paragraph 3).

²³ To ensure a timely divestiture, the Bureau has determined that three to six months is the appropriate period of time for an initial sales period. The actual time period within this range in a given case will be a reflection of the business realities in question (see Remedies Bulletin at footnote 27).

3. Seeking Prohibition or the Voluntary Abandonment of Mergers

16. There are various scenarios where prohibition is likely the only means of adequately addressing the anti-competitive effects arising from a proposed merger. A few of these are discussed below.

3.1 *Likely substantial lessening or prevention of competition in every market where the merging parties operate.*

17. One scenario in which the prohibition of a proposed merger between competitors may be the only means of adequately addressing the anti-competitive effects is where there is a likely substantial lessening or prevention of competition in every or nearly every product and geographic market in which the merging parties operate.

18. In one merger, the Bureau sought dissolution of a merger between competitors after determining that there would be a likely substantial lessening or prevention of competition in the supply and delivery of propane and propane equipment, and service and maintenance of propane equipment in a number of local markets as well as a market for national accounts.²⁴

19. The Tribunal found that there was likely to be a substantial lessening or prevention of competition caused by the merger²⁵ and that the sole effective remedy would be a total divestiture, specifically noting that,

“[...] since the merger between Superior and ICG is likely to prevent or lessen competition substantially in many local markets across Canada, an order for total divestiture is the sole effective remedy available to the Tribunal. Indeed, the Tribunal is of the view that any order for partial divestiture remedy, while less intrusive, would not effectively restore competition in these markets to the level at which it can no longer be said to be substantially less than it was prior to the merger.”²⁶

3.2 *Assets beyond affected markets may be necessary for divestiture*

20. As discussed above, there are instances where, although there is not a likely substantial lessening or prevention of competition in all market where the parties operate, to ensure a viable and effective remedy, assets beyond the markets of concern must also be divested. In these instances, prohibition of the merger may be the only means of preventing the anti-competitive effects, even if there are concerns that pertain only to a subset of the product and/or geographic markets in which the parties operate.

3.2.1 *The Commissioner of Competition v. Tervita*

21. Tervita (formerly CCS) is a provider of waste landfill services and operates two secure landfills in British Columbia that accept solid hazardous waste. In February 2010 it acquired Complete, a company that held a permit for the development of the Babkirk site, another proposed secure landfill site in British Columbia. The Commissioner filed an application with the Tribunal alleging that the transaction would lead to a substantial prevention of competition in the market for the disposal of hazardous waste within

²⁴ Superior Propane.

²⁵ While the Tribunal found that there was likely to be a substantial lessening or prevention of competition from the merger and contemplated the appropriate remedy, it also found that the gains in efficiencies would, on a balance of probabilities, be greater than and offset the anti-competitive effects.

²⁶ Superior Propane, Reasons and Order (FINAL) at paragraph 316.

Northeastern British Columbia.²⁷ The Commissioner sought an order dissolving the transaction or, in the alternative, requiring the sale of the Babkirk site and the related secure landfill permit. While the acquisition of Complete involved the acquisition of certain additional assets, such as municipal contracts for waste collection, the primary assets related to the proposed Babkirk landfill site. Dissolution was sought in order to ensure that Babkirk did not remain in the hands of CCS, the monopolist for secure landfill services in British Columbia.

22. That said, the Tribunal did not dissolve the merger and instead ordered the divestiture of the Babkirk site. Had the Tribunal determined that Complete’s additional assets outside of the Babkirk site and permit were necessary to ensure an effective remedy, dissolution would likely have been required. Instead, the Tribunal held that the divestiture was both a viable and effective remedy and that dissolution would be “intrusive, overbroad and will not necessarily lead to a timely opening of the Babkirk Facility as a Full Service Secure Landfill.”²⁸ The Tribunal also highlighted certain advantages that a divestiture could hold, including the Commissioner’s right to pre-approve the purchaser and certainty on the timing and ultimate completion of the sale.²⁹

3.2.2 *Holcim Ltd. and Lafarge S.A.*³⁰

23. Following a review of the global cement merger between Holcim and Lafarge, the Commissioner concluded that the proposed transaction was likely to result in a substantial lessening of competition in Canada for cement. The parties initially offered to sell all of Holcim’s Canadian operations as well as certain cement terminals in the United States Great Lakes region. While this initial offer constituted Holcim’s entire stand-alone business in Canada in relation to ready-mix concrete, aggregates and construction services, it did not constitute Holcim’s entire stand-alone business for its cement operations in Canada. In particular, Holcim’s cement operations in Alberta relied extensively on supply from a plant located in Three Forks, Montana. To ensure a viable and effective remedy, the Bureau entered into a consent agreement with Holcim, which required the sale of all of Holcim’s Canadian operations and all associated assets together with Holcim’s United States-based cement plant in Three Forks, Montana.³¹ Given the global nature of the transaction, the opportunity to work very closely with the Federal Trade Commission to determine the acceptability of Holcim’s initial remedy proposal was critical to ensuring a viable and effective remedy in Canada.

3.2.3 *The Commissioner of Competition v. Staples, Inc. Staples AMS, Inc. and Office Depot Inc.*

24. In his application opposing Staples’ proposed acquisition of Office Depot, the Commissioner sought an order prohibiting Staples from acquiring Office Depot or, in the alternative, an order that Staples not proceed with that part of the acquisition necessary to ensure that the acquisition did not lessen competition substantially in Canada.³²

25. The Commissioner put forward a relevant product market, based on the needs of a set of customers that included a large bundle of products and services. He also defined the relevant geographic

²⁷ CCS-Babkirk. The Tribunal’s decision was appealed and the appeal was allowed before the Supreme Court of Canada. Nonetheless, the comments from the Tribunal discussed within this report are still useful guidance to the Bureau.

²⁸ CCS-Babkirk, Reasons for Order and Divestiture, at paragraph 341

²⁹ CCS-Babkirk, Reasons for Order and Divestiture, at paragraph 343.

³⁰ The Bureau’s position statement regarding this merger is available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03920.html>.

³¹ Holcim also included in the agreement five cement terminals located in the U.S. which it believed would enhance the attractiveness of the sale of the Canadian assets.

³² *The Commissioner of Competition v. Staples, Inc. Staples AMS, Inc. and Office Depot Inc.*, CT-2015-012.

market to be Canada, again based on the needs of a set of customers, who in the aggregate required delivery of the relevant products across the country in a timely manner. Owing to this market definition, he sought relief that contemplated the need for a standalone business capable of offering a large bundle of products and services to customers requiring fast delivery to locations dispersed across Canada. Implicit in the relief sought in this matter was the acknowledgement that Staples should be prevented from acquiring parts of the Office Depot business that would impair the ability of the remaining business from competing effectively in the relevant market post-transaction, including potentially assets outside of the relevant market that might be needed to ensure the effectiveness of that business in the relevant market. To the extent substantially all of the Office Depot business outside of the relevant market was required to ensure a standalone business that would be effective in the relevant market, prohibition of the merger might have been deemed necessary by the Tribunal.

26. However, the Commissioner was not required to proceed with his application before the Tribunal as the parties abandoned the transaction following the issuance of an injunction in the United States preventing the parties from closing the proposed global merger.

3.3 *Transaction is no longer commercially viable because of remedies required to resolve competition concerns and parties voluntarily abandon transaction.*

27. Following an in-depth review of Louisiana-Pacific Corporation's proposed acquisition of Ainsworth Lumber Co. Ltd. the Bureau expressed serious concerns that the transaction was likely to substantially lessen competition for the sale of oriented strand board (OSB), a product primarily used in the construction or renovation of homes, in British Columbia.³³ The United States Department of Justice ("US DOJ") also expressed concerns about the transaction's likely anti-competitive effects.

28. While divestitures were contemplated, the parties were not able to reach a resolution with the Bureau and the US DOJ and ultimately terminated their agreement. In a press release Louisiana-Pacific stated that, "regulatory approvals (including in particular expiration of the applicable waiting period under the *Hart-Scott-Rodino Antitrust Improvement Act of 1976*, as amended, and approval under the Canadian *Competition Act*) cannot be obtained without divestitures significantly beyond those contemplated in the Arrangement Agreement without engaging in lengthy and expensive litigation with the regulatory authorities in the US and Canada."³⁴

3.4 *Behavioural remedy is not acceptable and full structural divestiture is necessary to adequately remedy the harm.*

29. The Bureau prefers remedial measures that are structural or have a primary structural component. Structural remedies are typically more effective than behavioural remedies for a number of reasons, including the cost and certainty associated with the remedy. In cases where neither a behavioural remedy nor a less intrusive structural remedy would be viable and effective, prohibition of a merger may be necessary.³⁵

³³ The Bureau's position statement regarding this matter is available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03738.html>.

³⁴ LP's statement is available online at <http://lpcorp.com/community/newsroom/press-releases/corporate/lp-and-ainsworth-announce-termination-of-agreement/>.

³⁵ As mentioned above, there may be situations where a remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level in order to fully eliminate the substantial prevention or lessening of competition. The Tribunal has recognized that such a remedy should be preferred to one that does not go far enough (Southam at paragraph 89).

30. The Tribunal has provided some guidance regarding behavioural remedies. In a matter involving the disposal of commercial waste in certain cities in Ontario, the Commissioner filed an application with the Tribunal seeking the divestiture of a landfill in Ontario while the parties proposed a behavioural “airspace agreement”, which would allow third parties to use its landfill in a specified manner.³⁶ In its decision ordering the divestiture of the landfill, the Tribunal stated,

“[...] 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[...].”³⁷

31. While the divestiture in this case did not involve the entirety of the acquired business, it does demonstrate a set of circumstances under which such a scenario could arise.

4. Resolution of Anti-Competitive Effects Through Negotiated Remedies

32. Where the Commissioner has concluded that a merger is likely to result in a substantial prevention or lessening of competition in only certain product and/or geographic markets and that a remedy that addresses the loss of competition in those markets is sufficient to resolve the anti-competitive harm arising from the merger,³⁸ the Bureau will typically seek divestitures in those markets and allow the remainder of the transaction to proceed. Recent examples include retail and pharmaceutical mergers. Where structural remedies are either unavailable or insufficient on their own, behavioral remedies may be required to address competition concerns in certain markets. The Bureau has recent experience with remedies that include behavioral commitments, specifically in retail gasoline mergers.

4.1 Mergers in the Retail Sector

33. In the past five years, the Bureau has entered into seven consent agreements involving the divestiture of local retail operations in a range of industries including grocery, agri-products and automobile fuel.³⁹ Of note, three of these consent agreements have required the divestiture of agri-product retail outlets and standalone anhydrous ammonia (“AA”) businesses⁴⁰ in certain local markets in Western Canada. Given the sequential nature of these divestitures, the Bureau had the opportunity to assess their effectiveness *ex post*, in particular those related to the AA businesses. Market participants indicated that in

³⁶ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, (CT-2000-002). [CWS-BFIL]

³⁷ CWS-BFIL, Reasons and Decision Regarding Remedy, paragraph 110.

³⁸ Given the lack of a proven track record that the components of the business will be able to operate effectively and competitively, the Bureau will apply greater scrutiny to divestitures of less than a standalone business, and will typically need to be satisfied, in advance of consenting to a remedy, that willing purchasers with the necessary capabilities are available to purchase the assets. Engaging with market participants, and in many cases industry experts, is integral to making this determination.

³⁹ *The Commissioner of Competition v. Sobeys Inc.*, CT-2013-009; *Commissioner of Competition v. Loblaw Companies Limited*, CT-2014-003; *The Commissioner of Competition v. Agrium Inc.*, CT-2013-006; *The Commissioner of Competition v. Crop Production Services (Canada) Inc.*, CT-2016-005; *Commissioner of Competition v. Crop Production Services (Canada) Inc.*, CT-2016-012; Parkland-Pioneer.

⁴⁰ In many cases, AA is kept in storage tanks that are not co-located with the retail facility. The retailer will often service agricultural customers using trucks that pick up AA at the location of the tank.

order to ensure the competitiveness of the AA businesses, the purchaser must be able to provide additional agri-products from a nearby retail facility.⁴¹ The Bureau was able to include this requirement in a subsequent consent agreement, thereby improving the effectiveness of the remedy.

34. Another challenge that often arises when divesting less than a complete network or standalone business is the implementation of an effective hold separate arrangement pending the divestiture of the assets. Given the integrated nature of some businesses, for example with respect to components such as transportation logistics, information technology services, human resources or certain pricing policies, significant challenges may arise when trying to separate a portion of such a business. Further, merging parties often seek to integrate back office systems immediately post-closing and it can be difficult or even impossible to implement firewalls necessary to ensure that competitively sensitive information is not shared in a timely manner or at all. In those situations, it may be necessary to hold separate assets beyond those to be divested.

35. Although the Bureau has entered into a number of consent agreements requiring the divestiture of local retail operations, it is important to note that where the number of problematic markets is significant, local market divestitures may be not be sufficient to remedy the likely anti-competitive effects and it maybe be necessary to divest the brand and/or retail locations beyond those in the problematic markets to ensure network efficiencies are obtained or to seek an order prohibiting the merger.

4.2 Mergers in the Pharmaceutical Sector

36. Pharmaceutical mergers is another area where divestitures of specific overlapping product lines have been determined to be sufficient to resolve the substantial prevention or lessening of competition in the relevant markets.

37. Earlier this year, the Bureau reached a consent agreement with Teva Pharmaceutical Industries Ltd. relating to Teva's acquisition of Allergan plc. The Bureau concluded Teva's acquisition of Allergan's pharmaceutical business was likely to substantially lessen or prevent competition in Canada for the supply of two generic drugs: tobramycin inhalation solution and buprenorphine/naloxone tablets.⁴²

38. The terms of the consent agreement require Teva to divest either its own or Allergan's Canadian assets relating to the two products. In this instance, it was determined those assets alone were sufficient to ensure that a purchaser would be positioned to compete effectively in the supply of those products in Canada.

⁴¹ As stated in the Bureau's position statement regarding the CPS-Wendland merger, "market contacts emphasized that it was important for an agri-product retailer to be able to provide additional products, beyond anhydrous ammonia, so they can compete effectively with other retailers. As a result, when determining whether to approve a proposed purchaser, the Commissioner will take into account the likely competitive impact of the divestiture on competition, which may include whether the proposed purchaser of a divested anhydrous ammonia tank has effective complementary retail facilities nearby" (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04070.html>).

⁴² The Bureau's position statement regarding this matter is available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04065.html>.

4.3 Mergers in Retail Gasoline

39. The Commissioner filed an application in April 2015 challenging Parkland Fuel Corporation's acquisition of certain assets of Pioneer Energy LP.⁴³ He concluded that the acquisition by Parkland was likely to result in a substantial lessening of competition in certain local markets for the retail sale of gasoline.

40. Retail gasoline mergers can present challenges for the construction of remedies given frequent vertical integration by gasoline companies and resulting supply arrangements between these companies and downstream retail operators. Parkland and Pioneer own and lease corporate retail gas stations at which they set the price of gasoline. They also supply gasoline to retail gas stations owned or leased by third party operators or dealers under exclusive, long-term contracts. During the terms of these contracts, Parkland and Pioneer can increase the wholesale price of gasoline charged to dealers at any time, thereby influencing retail gasoline prices set by those dealers. Owing to this, the Bureau's analysis necessarily accounted for the ability of Parkland post-merger to influence pricing at retail locations where it supplied gas to maximize profits across the network of stations it owned and supplied.

41. Following the first mediation process undertaken in a Tribunal proceeding, the Commissioner and Parkland reached a consent agreement that resolved the issues in dispute in eight retail gasoline markets. In six of these markets, Parkland was required to divest a station or gasoline supply agreement in order to remove the overlap resulting from the merger. In two additional markets, where the parties' overlap was limited to the supply of gasoline to dealer stations, Parkland was prohibited from increasing any profit margin earned on the sale of gasoline, thereby removing its ability to influence the retail price of gasoline in those markets.

5. Conclusion

42. This submission provides an overview of the Bureau's experiences in assessing the trade-offs between seeking to prohibit a merger and negotiating remedies. As has been demonstrated by the examples discussed above, in the vast majority of instances, the structural remedies sought or agreed to by the Commissioner involve the divestiture of assets rather than an outright prohibition or dissolution of the merger. However, situations do arise where prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable.

⁴³ The Bureau's position statement regarding this matter is available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04053.html>.