

JULY 22, 2019

Canada's Competition Bureau Releases Draft Model Timing Agreement for Merger Efficiencies Claims

Authors: [Anita Banicevic](#) and [Mark Katz](#)

Canada's Competition Bureau has released a draft model timing agreement for mergers where the parties wish to raise efficiencies claims. For context, Canada's efficiencies defence provides that no remedy may be imposed in respect of a merger that substantially lessens competition when the efficiencies arising from the merger would outweigh the anticompetitive harm.

In addition to agreeing not to close without providing at least 30 days' notice to the Bureau, the draft timing agreement contemplates that parties that seek to raise the efficiencies defence with the Bureau will agree to:

- Effectively decide whether to pursue the efficiencies defence at an early stage of the review (and before the parties know whether the Bureau will be asserting that the merger will result in lessening competition, an approach that is likely to present practical challenges).
- Respond to extensive information requests relating to any efficiencies claim as part of the second stage of the review (i.e., where a supplementary information request [SIR] has been issued) and be subject to a much longer second-stage review than is contemplated by the statute. More specifically, the draft timing agreement contemplates that the Bureau would have approximately 110 days after the parties have complied with the SIR to identify the markets in which a remedy is required. By comparison, the statutory waiting period would expire 30 days after the parties have complied with any SIR.
- Identify employees who will be subject to oral interviews under oath in respect of the claimed efficiencies.

The draft timing agreement is open for public comment until August 30.

Implications

As currently proposed, the draft timing agreement would impose various procedural hurdles and delays for parties wishing to raise efficiencies claims with the Competition Bureau. This more aggressive approach to reviewing efficiencies claims is not, however, altogether surprising. The current Commissioner (and Commissioners before him) as well as senior Bureau staff and economists have repeatedly voiced their disapproval of the availability of (and the continued need for) such a defence. In this vein, Commissioner Boswell has argued that recent Supreme Court of Canada [jurisprudence](#) imposes a significant burden on the Bureau to quantify the anticompetitive effects of a merger (to allow the effects to be weighed against any efficiencies).

Since this draft agreement is open for public commentary until the end of August, the final version of any model timing agreement may ultimately be quite different from the current draft. Even if this draft is made final, it remains to be seen if merging parties will agree to be subject to such delays and hurdles. Given that the benefits of the draft timing agreement are largely one-sided (in the Bureau's favour), merging parties may elect to close after the statutory waiting period expires and test any efficiencies claims before the Competition Tribunal and appeal courts. With an expedited hearing process now available for Competition Tribunal hearings, the prospect of a contested hearing may, in fact, be more palatable to merging parties.

Key Contacts: [Anita Banicevic](#), [Mark Katz](#) and [Charles Tingley](#)

This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.