

# Competition Tribunal rejects the Bureau's challenge of the Rogers-Shaw merger

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The Competition Bureau lost its high-profile challenge of Rogers Communications Inc.'s acquisition of Shaw Communications Inc. The Competition Tribunal held that the Bureau's challenge ignored the parties' proposed divestiture of the most competitively contentious Shaw assets, the Freedom Mobile business, to a competitor, Videotron Inc. The Tribunal concluded that the Bureau's approach was "divorced from reality".

The Bureau is appealing its loss, and a hearing at the Federal Court of Appeal is set for January 24. The merger remains on pause pending the outcome of the appeal.

## Decision of the Tribunal

### Post-challenge agreements between parties may be considered

The Bureau's case focused on the harm to wireless customers in Ontario, Alberta and B.C. from Rogers acquiring Freedom Mobile and Shaw Mobile, and blocking the whole deal would best preserve competition. However, the key issue at the Tribunal hearing was whether the Tribunal could consider a post-challenge agreement to sell Freedom Mobile to Videotron as a critical aspect of the proposed merger.

The Bureau argued that the Tribunal could only assess the merger as contemplated at the time of its initial challenge—one that was never going to take place. It argued the Tribunal should ignore the divestiture as being "irrelevant and beyond the jurisdiction" of the Tribunal to consider.

The Tribunal disagreed and ruled that asking it to "spend scarce public resources assessing something that will never happen [the acquisition of Freedom Mobile assets by Rogers] is divorced from reality". It said that the "proposed merger, as defined by the Commissioner, is *no longer being proposed* ... [and] intervening events occurring after the filing of an application can have a material impact on a proceeding ... [and] cannot be ignored" (emphasis in original).

Assuming the Tribunal decision is upheld on appeal, binding post-challenge divestitures or "remedies" agreed to by merger parties now need to be considered in a merger assessment. This may impact the scope and timing of Bureau reviews where parties bring a merger that has an agreed preemptive divestiture solution to address competition issues. It is open to argue for quicker reviews and fewer productions for hypothetical aspects of a transaction "that will never happen". The Tribunal emphasized that its approach is consistent with the wording of the *Competition Act*, which provides for a forward-looking assessment of the "likely" competitive outcomes of a proposed merger.

### Freedom Mobile is viable competition

The second major issue in the trial was whether Videotron buying Freedom Mobile would preserve competition in the relevant wireless markets. The Tribunal heard detailed, credible evidence of Videotron's go-forward expansion and operational plans. It found that a Videotron-owned Freedom Mobile would be able to compete effectively and "expects that Videotron would be a more aggressive and effective competitor than ... Shaw".

The Tribunal findings highlight the importance of demonstrating that a divestiture buyer will be an effective and committed operator of the divested business. The evidence showed that "Videotron [had] a long history of being a highly disruptive, innovative competitor", could offer competitive bundling packages similar to Shaw, and would be acquiring Freedom Mobile on advantageous terms ensuring a favourable cost base from which to operate.

## Acquisition of Shaw not an issue in Alberta and B.C.

The Tribunal also determined that Rogers' acquisition of Shaw Mobile (Shaw's non-Freedom Mobile business) would not result in a substantial lessening of competition in the provinces where Shaw Mobile operates (Alberta and B.C.).

## No ruling on efficiencies defence

Much of the Tribunal hearing focused on establishing the efficiencies defence, which involves a 'trade-off' analysis between the efficiencies expected to be gained versus any anti-competitive effects of the merger. If a merger is more efficient than anti-competitive, it will be allowed to proceed. Contrary to expectation, the Tribunal declined to comment on efficiencies because it was not necessary to reach their conclusion.

## Other key takeaways from the Tribunal decision

The Tribunal also found these important points that could impact merger review, and which merging parties may consider in their transaction analysis:

- **Evolving industry considerations.** Where evidence demonstrates a market is likely to change, the analysis must remain "forward-looking in nature" and incorporate these changes in the comparison between the likely future with and without the merger.
- **Interim operations.** The Tribunal confirmed that the "but for" impact analysis of a merger starts at the date of the agreement and that merger parties cannot benefit from any weakening of their competitive position after the merger agreement is announced.
- **Parties' post-merger pricing commitments.** Usually, pricing commitments by merger parties are not relevant to the Tribunal's analysis. However, Videotron's commitments to offer comparable wireless pricing in Ontario and Western Canada as it does in Québec were considered relevant in this case because its purchase of Freedom Mobile would not give it the ability to exercise market power.
- **Competitor responses to a merger.** The fact that, since the announcement of the merger and the Freedom Mobile divestiture, major competitors such as Bell and Telus took steps to increase their competitiveness was important to countering allegations of post-merger coordinated behaviour in the wireless industry.
- **Regulation.** The extensive regulation of the telecommunications industry was also significant to the competitive impact analysis of the merger.

*To discuss these issues, please contact the author(s).*

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