Merger Control

The international regulation of mergers and joint ventures in 77 jurisdictions worldwide

Consulting editor
John Davies

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GCR GLOBAL COMPETITION REVIEW

GETTING THE DEAL THROUGH

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

In Canada, all mergers are governed by the federal Competition Act (the Act), which establishes jurisdiction for the review of mergers affecting the Canadian market. The Act is enforced by the Commissioner of Competition (the Commissioner), a federal appointee, who generally is appointed to a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Industry. The Commissioner and, by extension, the Bureau, has broad powers to investigate and evaluate a merger. Should the parties to a merger not be prepared to cure competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal generally has the powers of a regular court and is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings 'as informally and expeditiously as the circumstances and considerations of fairness permit', the Tribunal operates with many of the procedural trappings of an ordinary court and, consequently, hearings routinely take many months to complete.

For mergers subject to foreign investment or other specific regulatory approvals, see question 8.

2 What kinds of mergers are caught?

Subject only to industry-specific statutes of concurrent or pre-emptive jurisdiction, all mergers (and the term is defined very broadly) that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to investigation and evaluation by the Commissioner and possible referral to the Tribunal. However, the Act's pre-merger notification regime is of more limited scope. Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds (discussed in question 5). These are: asset acquisitions, share acquisitions, acquisitions of an interest in an unincorporated combination, amalgamations and the formation of unincorporated combinations.

3 Are joint ventures caught?

Generally, joint ventures with a sufficient Canadian nexus are caught by the Act's broad definition of 'merger' and are subject to the Act's substantive jurisdiction. Depending on how it is structured, a joint venture could be caught under the mandatory pre-merger notification regime as an unincorporated combination (usually a partnership), a share acquisition or a corporate amalgamation. However, there are exemptions for joint ventures that meet certain conditions. (There are also separate provisions in the Act dealing with competitor agreements that may apply to joint ventures – see question 20.)

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Act contains a bright-line definition of 'control': the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, the holding or acquisition of an interest in the partnership entitling the holder or acquirer to more than 50 per cent of the profits of the partnership or of its assets on dissolution. However, the Act's pre-merger notification regime does not require that control be acquired to trigger a filing obligation. The acquisition of 'any of the assets in Canada of an operating business' (other than in the ordinary course) or of shares yielding cumulative ownership of more than 20 per cent of the shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the shares of a private company or interests in a combination (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will be sufficient to trigger a notification obligation (provided that other financial criteria discussed in question 5 are met).

Additionally, minority interests less than outright control may be caught by the substantive provisions of the Act because it defines a merger to include any transaction by which a party acquires a 'significant interest' in the business of another person. What constitutes a 'significant interest' is not defined by the Act. However, the Commissioner's Merger Enforcement Guidelines (MEGs) contemplate that the acquisition of a 'significant interest' could occur at as low as a 10 per cent ownership interest or indeed without an equity interest if contractual or other circumstances allow material influence to be exercised over the business of another person.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act's substantive jurisdiction extends to all mergers that have a real and substantial effect on the Canadian marketplace regardless of size. However, the Act's pre-merger notification requirements are triggered by bright-line thresholds designed to give certainty to merging parties regarding filing obligations. The transaction must involve an 'operating business' in Canada (in the sense that employees regularly report for work within Canada as opposed to merely a passive investment – but, in the Commissioner's view, such employees may be those of an agent or contractor). The obligation to notify is contingent upon satisfaction of both a party-size threshold and a transaction-size threshold.

Party-size threshold

The parties to the transaction, together with their worldwide 'affiliates' (defined generally as those entities in a relationship of control to one another or under common control), collectively have assets in Canada or gross revenues from sales in, from or into Canada (domestic sales plus exports and imports) in excess of C$400 million in the most recently completed fiscal year.

Transaction-size threshold

The transaction size threshold is based on the value of assets in Canada that are held by the entity which is the subject of the transaction or which are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2014 the general threshold (for assets or revenues) is C$82 million. (Note: the threshold is subject to an annual inflation adjustment by regulation, which is typically announced in January of the year. Consequently, the threshold is likely to be higher than C$82 million in 2015.)

As noted in question 4, if the underlying party-size and transaction-size thresholds are met, the acquisition of more than 20 per cent of the shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will be sufficient to trigger a notification obligation in the case of share transactions. Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business otherwise than through a corporation (eg, a partnership) is also notifiable, if the party-size and transaction-size thresholds are met, and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits or of the assets on dissolution. Similar, but more complex, thresholds apply to amalgamations and combinations.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification is mandatory for transactions that exceed the thresholds set out in question 5. A narrow exemption exists for asset securitisations meeting certain criteria. There are also other exceptions of very limited scope (eg, transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by requesting an Advance Ruling Certificate), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner that he will not challenge the merger. However, the significant filing fees required on notification (see question 10) make formal voluntary filings relatively rare.

If a non-notifiable merger comes to the Bureau's attention from other sources (eg, marketplace complaints), a notification is not required but the Bureau may request or compel production of relevant information to carry out an assessment under the substantive merger provisions of the Act.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Canada asserts an 'effects' test for jurisdiction. Thus, foreign-to-foreign mergers may be subject to substantive review under the Competition Act even though they occur outside of Canada, if competitive effects from the transaction would occur within Canada. The competitive effects of primary interest are impacts on customers located in Canada.

Foreign-to-foreign transactions are notifiable under the Act if the entities involved have Canadian activities (directly or through affiliates) that exceed the notification thresholds set out in question 5. For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the financial thresholds are met (see question 5).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, acquires control of a Canadian business regardless of whether it is owned by Canadians or other non-Canadians. All non-Canadians must either file an application for review or a post-closing notification of the investment unless a specific exemption applies.

To determine whether an investment is reviewable under the Investment Canada Act it is necessary to consider whether the investor (or the vendor) is a 'WTO investor' (ie, controlled by citizens of countries that are members of the World Trade Organization); the book value of the assets of the Canadian business being acquired; and whether the Canadian business being acquired engages in cultural activities (such as books, magazines, film, television, audio or video recordings, and radio or television broadcasting).

Where a WTO investor is involved, and if the Canadian business is being acquired directly and is not engaged in cultural activities, an investment will be reviewable only if the Canadian operating business being acquired has assets with a book value in excess of C$354 million for 2014. (Note: the threshold is typically increased in January of each year, and would be expected to increase in January 2015, unless pending amendments to the Investment Canada Act increase this threshold before then. Such amendments are expected to both increase the threshold, and to change it from an 'assets' test to an 'enterprise value' test. Once the amendments come into force the initial threshold will be an enterprise value of C$600 million, increasing two years later to C$800 million, and after a further two years to C$1 billion. The new threshold will come into force on a date to be determined by regulation once the definition of enterprise value has been finalised.)

If the acquisition by a WTO investor is indirect (ie, the acquisition of shares of a foreign corporation that controls a Canadian business) the transaction is not reviewable.

Where the Canadian business engages in any of the activities of a 'cultural business', or if neither the investor nor the vendor are WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value of C$5 million or C$50 million, respectively.

An application for review is made to the Investment Review Division of the federal Department of Industry (or the Department of Canadian Heritage, where the merger involves any cultural businesses). There is an initial review period of 45 calendar days, which may be extended by 30 calendar days at the discretion of the agency, and further upon consent of the investor.

On an application for review, the substantive test applied is whether the proposed transaction is likely to be of net benefit to Canada. Any economic impact on Canada may be considered, including employment, investment, productivity, R&D, exports, Canadian management participation in the business and other factors. If the acquirer is a state-owned enterprise, the review will also examine whether it is likely to operate the acquired Canadian business in an ordinary commercial manner. The Investment Canada Act approval is parallel to but separate from Competition Act reviews, and the Bureau provides input into this process with respect to a transaction's effects on competition in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act, but it is common for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review. However, even where the transaction falls below the thresholds, it must still be notified by way of a two-page form to the Investment Review Division of the Department of Industry (or the Department of Canadian Heritage for cultural cases). Notification may be submitted by the acquirer any time before or up to 30 days after consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the level of assets) within 21 days of receipt of the notification by the Department of Canadian Heritage.

The Investment Canada Act also establishes a national security review regime. Where the minister of industry in consultation with the minister of public safety and emergency preparedness determines that a transaction may be injurious to national security, the federal cabinet may initiate a review of the transaction regardless of the size of the business or transaction, the nationality of the acquirer, whether the transaction involves an acquisition of control or of a minority interest and whether or not the transaction has closed. To date, no guidance has been provided as to the types of transactions that may be injurious to national security.

In addition to the general reviews under the Competition Act and, if applicable, the Investment Canada Act, there are sector-specific review regimes in areas such as financial services, transportation, broadcasting and telecommunications.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act does not set out deadlines for filing. When to submit a notification is a decision of the parties. However, a transaction that is notifiable may not be consummated until the applicable statutory waiting period has expired (see question 11).

Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence with possible fines of up to C$50,000 as well as the possibility of civil penalties of up to C$10,000 per day. Parties with a notification obligation that fail to file do so at their peril as the Bureau is vigilant in monitoring financial press accounts of transactions and is also made aware of transactions through competitor, customer or supplier complaints. While to date there have been no convictions or penalties imposed for failure to notify, parties should expect this provision of the Act to be enforced zealously unless the failure to notify was inadvertent, in which case a decision not to prosecute or other resolution might be negotiable with the Commissioner and the director of public prosecutions.

10 Who is responsible for filing and are filing fees required?

Generally, both parties to the transaction have the obligation to file. In the case of a share acquisition, the Act deems the target entity, not the vendor, to be a party to the transaction. In hostile or unsolicited takeover bids, the bidder makes an initial filing (which commences the waiting period) and the Commissioner then requisitions the counterpart filing from the target (which must be filed within 10 days).

The filing fee for a notification is C$50,000. The same filing fee applies to a voluntary notification and seeking an Advance Ruling Certificate. It is usually paid by the acquirer, but this is a matter of negotiation between the parties.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There is a 30-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs).

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (somewhat similar to a US 'second request') requiring the parties to submit additional information that is relevant to the Commissioner's assessment of the proposed transaction. If the Commissioner issues a SIR, a second no-close waiting period continues until 30 days after the day that the required information has been received by the Commissioner and certified complete by the parties. While the issuance of a SIR is a formal process established by the Act, requests by the Commissioner during the initial waiting period for the voluntary disclosure of additional information are common and do not affect the statutory waiting period.

The Act provides for early termination of the waiting periods by the Commissioner. This can be expected to occur if the review has been completed but is unlikely when the review is ongoing.

Implementation of the transaction is suspended during the waiting periods. In more complex cases, reviews may extend beyond the waiting periods. If the parties proceed by way of an application for an Advance Ruling Certificate, the no-close period runs until the Commissioner has either issued a certificate or closed the file and provided a waiver of the filing requirements. However, in such cases, the Commissioner often simply requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but merging parties often do so. Formal timing agreements between the parties and the Bureau are another possible option by which parties may agree not to close the transaction for a period of time after the expiry of the statutory waiting period and to respond voluntarily to information requests in an effort to avoid a SIR (see question 15 in respect of the SIR process) or an application for an injunction. The Commissioner can seek a temporary injunction to prevent the transaction from closing for a further 30 (extendable to 60) days to allow the Bureau to complete its review.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Closing prior to expiry of the applicable waiting period, or without filing, is a criminal offence which can be subject to a fine of C$50,000 and also a civil penalty of up to C$10,000 for each day of non-compliance. While there have been no reported cases of prosecutions, and while some leniency has been shown in cases of inadvertence, the Commissioner is likely to enforce this provision rigorously if it appears that the non-compliance was intentional.

Regardless of whether the waiting period has expired, closing before clearance carries the risk that the Commissioner will challenge the merger after completion of the review and will seek a divestiture or dissolution order. The applicable limitation period for doing so is one year after the date of closing.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Subject to crafting a local hold-separate resolution as noted in the answer to question 14, if the transaction is notifiable in Canada, even if foreign-to-foreign, the penalties for early closing would apply.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

As noted in the response to question 11, the parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing and the Commissioner has not obtained an injunction.

The Commissioner will focus primarily on Canadian issues in all cases. In a foreign-to-foreign merger, the Bureau and Tribunal will typically be receptive to local divestiture (or, occasionally, behavioural) remedies as long as they are sufficient to address the domestic anti-competitive effects. Local hold-separate arrangements pending resolution of a Bureau review or Tribunal proceeding have been employed in the past. However, the Bureau's Remedies Bulletin indicates that the circumstances in which the Bureau will consider agreeing to the use of such hold-separate agreements are narrow.

15 Are there any special merger control rules applicable to public takeover bids?

As noted in question 10, rules exist to ensure that targets of hostile or unsolicited takeover bids supply their initial notification in a timely manner.

16 What is the level of detail required in the preparation of a filing?

The information required for a pre-merger notification filing is set out in the Act and regulations promulgated pursuant to the Act. The main requirements of the pre-merger notification filing are:

- an overview of the transaction structure;
- an executed or draft copy of the legal documents used to implement the proposed transaction;
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified;
- a summary description of the principal businesses carried on by each party and of the principal categories of products within such businesses, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information;
- an indication of the geographic scope of sales of each of the party's principal businesses;
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales; and
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction (similar to the '4(c)' documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act)).

If the Bureau concludes during the initial 30-day review period that more detailed review is warranted, it may issue a SIR requiring the production of whatever additional documents and data are considered relevant to the review. The Bureau's (non-binding) guidelines on the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals. The guidelines also state that the default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant time period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years. Finally, the Bureau has suggested that, where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau will work with the parties to try to limit the list of custodians to any list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

17 What is the timetable for clearance and can it be speeded up?

In most straightforward cases the Commissioner's review is typically concluded within two to three weeks. However, in more complex cases the Bureau's review process may be substantially longer.

Although it is non-binding, the Bureau's Fee and Service Standards Handbook sets out the following 'service-standard' periods to which the Bureau will attempt to adhere in its review process:

- 14 days for non-complex mergers;
- 45 days for complex mergers, except where a SIR is issued; and
- 30 days after compliance with a SIR, for complex mergers where a SIR is issued (this corresponds with the statutory no-close waiting period following compliance with a SIR).

The Bureau commences its service standards when it receives sufficient information to assign complexity, as outlined in its Competition Bureau

Fees and Service Standards Handbook for Mergers and Merger-Related Matters. However, they are intended to be maximums and the Bureau often completes cases in less than the full service-standard period.

It is possible to speed up the timetable for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the 'service-standard' periods (or both) expire. (The Commissioner's power to terminate a waiting period early is discussed in question 11.) Parties and their counsel will usually provide additional information as requested by the Bureau on a voluntary basis and often submit detailed 'competitive impact' analyses to the Bureau to expedite completion of the review process.

18 What are the typical steps and different phases of the investigation?

After notifications have been filed, the Bureau will typically have follow-up questions and conduct its own independent investigations. Bureau staff will usually contact some or all of the customers set out in the parties' filings to solicit information from them regarding the proposed transaction. Suppliers and competitors may also be contacted. In addition, the Bureau may request that the parties to the merger provide additional information, documents or data such as estimates of market shares.

If the Commissioner plans to issue a SIR, the scope of this request will be discussed during the initial 30-day waiting period and these discussions may continue after the request is issued. Pursuant to the SIR provisions, more complex mergers will typically involve compulsory production of large volumes of documents and data. The provision of compulsory testimony through depositions before a reviewing officer is possible but rarely used in practice.

Most complex mergers will involve face-to-face meetings with Bureau staff, and possibly federal Department of Justice lawyers as well as experts retained by the parties or the Bureau. Regardless of complexity, regular communication between the Bureau staff and the parties' counsel is the norm.

Substantive assessment

19 What is the substantive test for clearance?

The substantive test for the Commissioner to challenge and the Tribunal to issue a remedial order is whether the merger or proposed merger is 'likely to prevent or lessen competition substantially' in any relevant market. The Act sets out a number of evaluative factors that the Tribunal (and, by implication, the Commissioner during his investigation) is to consider in applying this substantive test:

- the availability of acceptable substitute products;
- the effectiveness of remaining competition;
- foreign competition;
- whether the merger will remove a vigorous competitor from the market;
- whether the target entity has failed or is about to fail;
- barriers to entry;
- the nature and extent of change and innovation in the market; and
- any other relevant factors (which will often include the possible existence of countervailing buyer power).

The Act also requires that the Tribunal not make a determination on the basis of market shares or concentration ratios alone.

Uniquely among mature competition regimes, the Act provides a statutory efficiency defence that allows an otherwise anti-competitive merger to be 'saved' if there are offsetting efficiencies (see question 23 with respect to economic efficiencies).

The MEGs elaborate on the Bureau's views of each of the evaluative factors set out in the Act. They also establish 'safe harbours' within which the Commissioner generally will not challenge a merger with respect to 'unilateral effects' and 'coordinated effects' theories of competitive harm (see further discussion in the response to question 21). In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent.

20 Is there a special substantive test for joint ventures?

Joint ventures often fall within the definition of mergers (see question 3) and are thus subject to the same substantive test (see question 19). However, the Act specifically exempts from substantive review certain unincorporated 'combinations' in connection with one-off projects or programmes, provided a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities, and the extent of the adverse effect of the joint venture on competition. Part IX of the Act contains an imperfectly analogous notification exemption for 'combinations' that meet specified criteria.

In March 2010, two new provisions came into force dealing with agreements between competitors. Such agreements may be subject either to criminal prosecution under the conspiracy offence or to challenge as a reviewable practice by way of an application to the Tribunal for a prohibition order. The framework for the reviewable practice is very similar to the merger provisions. Once the Bureau has decided which track to pursue (merger, civil agreement among competitors or criminal conspiracy), there are double jeopardy protections that preclude it from using the other tracks.

The Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be used for 'naked restraints' (cartel-like conduct) and that those bona fide joint ventures that do not constitute mergers will normally be reviewed under the competitor agreements reviewable practice.

21 What are the 'theories of harm' that the authorities will investigate?

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current competitors) is likely to lead to a substantial prevention or lessening of competition on either a unilateral effects basis or a coordinated effects basis. Under the first theory of harm, the Bureau will consider whether the merged entity will likely be able to profitably raise prices (or lessen competition in other non-price dimensions) than would exist in the absence of the merger without relying on an accommodating response from its competitors (see question 19). Under the second theory of harm, the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor, or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses. Vertical mergers may raise concerns when they increase barriers to entry, raise rivals costs or facilitate coordinated behaviour. Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market de novo and erode the existing market power of the other party.

In addition to price, the Bureau may also assess the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising.

22 To what extent are non-competition issues relevant in the review process?

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed in limited part by the Act's purpose clause, including its concern with ensuring that 'small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy'. However, as a practical matter, non-competition issues such as industrial policy considerations are generally not relevant to the Commissioner's review process.

Bureau reviews of proposed mergers in the federal financial services and transportation sectors on competition grounds operate in parallel with systems of ministerial approval that are based on broader public interest considerations. In both systems, the Commissioner's views on the competitive ramifications of proposed mergers inform but do not bind the relevant minister in making a decision on public interest grounds. Thus, the Act specifically provides that the Tribunal shall not make an order in respect of a merger involving financial institutions or transportation undertakings in respect of which the federal minister of finance or transport, as the case may be, has certified to the Commissioner that the merger would be in the public interest.

Acquisitions of Canadian companies by foreign acquirors are subject to broader review under Canada's foreign investment review legislation – see question 8 above.

23 To what extent does the authority take into account economic efficiencies in the review process?

As stated above (see question 19), the Act provides an efficiency defence that allows an otherwise anti-competitive merger to be 'saved' by efficiencies that will be greater than and offset any prevention or lessening of competition. The scope of the efficiencies defence was examined in the *Superior Propane* case, and more recently in the *CCS* case. The *Superior Propane* decision marked the only time a party has argued successfully to the Tribunal that an otherwise anti-competitive merger should be saved by its overriding efficiencies. The main issue in the case was whether a 'total surplus' or 'consumer welfare' standard should be used to evaluate the trade off between efficiencies and anti-competitive effects. The Tribunal adopted the 'total surplus' standard, but the Federal Court of Appeal rejected this approach and remanded the case back to the Tribunal for reconsideration of the proper standard to apply. At the rehearing, the Tribunal again rejected the consumer welfare standard but adopted a 'balancing weights' approach, which gives some consideration to the redistributive effects of a merger (eg, negative impacts on low-income consumers) in addition to the overall magnitude of efficiency gains. This decision was upheld by the Federal Court of Appeal. The decision remains controversial and the Bureau continues to scrutinise efficiency defence claims rigorously. Its approach is detailed in the MEGs.

In the more recent *CCS* case decided by the Tribunal and upheld by the Federal Court of Appeal, the Tribunal rejected the efficiency defence, determining that the cognisable efficiencies created by the transaction were minimal.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Tribunal, on application by the Commissioner, may order the parties to a proposed merger to refrain from implementing their merger or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially. If a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares. In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken as part of the remedy for a proposed or completed merger.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Divestitures are the primary remedy used in merger cases. In the *CCS* case, the Bureau sought dissolution as the preferred remedy but the Tribunal concluded that a divestiture order would be appropriate. While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Any divestiture or other remedy ordered by the Tribunal must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. The Tribunal has broad jurisdiction to attach detailed terms and conditions to divestiture orders, including deadlines for completion and provisions appointing and empowering trustees to effect such divestitures if the merging parties fail to do so in a timely manner. The Bureau also has broad discretion to negotiate the terms of divestiture or dissolution orders or behavioural remedies to be embodied in a consent agreement.

The Bureau's 2006 Remedies Bulletin indicates that it prefers 'fix-it-first' remedies whereby an approved up-front buyer is identified and, ideally, consummates its acquisition of the stand-alone business to be divested at the same time as the merger parties consummate their own transaction. When it is not possible to fix it first – which, in practice, is frequently – the Bureau will expect that divestures be effected by the merging parties within three to six months. If they fail to do so, a trustee will be appointed to complete the sale in a similar time frame without any guaranteed minimum price to the seller.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As noted in question 7, foreign-to-foreign mergers with competitive effects within Canada are subject to the Act, including its remedial provisions. Consequently, remedies up to and including divestitures of Canadian assets have been required in foreign-to-foreign mergers. However, in some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anti-competitive concerns in Canada. Examples include *BASF/Ciba, Dow/Rohm & Haas, GE/Instrumentarium, Procter & Gamble/Gillette, UTC/Goodrich* and *Thomson/Reuters* where the remedies required by the US and European authorities were seen as sufficient to address Canadian concerns. See question 34 for additional discussion of cases in which remedies have been required for foreign-to-foreign mergers in Canada.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Bureau will consider ancillary restrictions as part of its consideration of the transaction as a whole. Thus, the Bureau's clearance of a transaction will normally also cover any ancillary restrictions that are known at the time of the review.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Bureau routinely contacts customers, and often also suppliers and competitors, for factual information and their views about a merger. However, the Act authorises the Commissioner alone to bring an application to the Tribunal. Consequently, a complainant has no direct ability to challenge a merger.

The Bureau is attentive to complaints from all types of private parties. The Act also provides that any six residents of Canada can compel the Commissioner to conduct an inquiry into a merger, but the Commissioner remains the sole 'gatekeeper' who can commence a challenge before the Tribunal.

The Competition Tribunal Rules provide that, if the Commissioner brings an application to the Tribunal, any party affected by the merger may seek leave to intervene. Thus complainants may obtain a formal voice in the proceedings at this stage.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All documents (including pre-merger notifications) and information provided to the Bureau are treated confidentially. However, the Act does permit the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases); the Bureau also asserts that this power to share documents includes foreign antitrust agencies. In addition, the Commissioner may disclose information if the information is communicated for the purposes of the administration of the Act. This includes the Bureau's 'field contacts' with customers, suppliers and competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information. The Commissioner's interpretation of the confidentiality safeguards in the Act is articulated in the Bureau's 2013 information bulletin on the Communication of Confidential Information Under the Competition Act. This interpretation is perceived by some as controversial and has not been tested before the courts.

Update and trends

Canada's two-stage merger process – with a supplementary information request (SIR) as the possible second stage – has been in effect for more than five years, and both merging parties and the Competition Bureau have become familiar with the new system and its demands. SIRs are being issued, on average, in about 5 per cent of merger cases, which is an increase from the first couple of years of the new system, and is higher than was generally anticipated when it was introduced. On the other hand, both the volume of records produced in response to the typical SIR, and the time to complete such production, has decreased significantly from the early years. The lesson seems to be that, while the Bureau has been more willing to issue SIRs than had been expected, it has also become more targeted in the records it seeks.

The other recent lesson, arising in particular out of the *CCS* case, is that small mergers that do not exceed the notification thresholds will not get a pass just because of their size. If the Bureau believes there to be serious competition problems, it is likely to review and challenge whatever the volume of commerce involved.

The Bureau does not announce the receipt of filings or commencement of investigations in the merger context. It has, with increasing frequency, published press releases or 'position statements' regarding decisions in high-profile cases and, in respect of completed merger reviews, publishes a monthly registry containing the names of merger parties, the industry in which they operate and the outcome of the Bureau's review.

Where a challenge occurs or a remedy is embodied in a consent agreement, most of the relevant materials will be filed on the public record at the Tribunal. However, commercial or competitively sensitive material may be placed on a confidential record.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust cooperation agreements exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United States, the European Union and the United Kingdom, as well as between Canada and each of Australia, Brazil, Chile, Japan, Korea, Mexico and New Zealand. Unlike many of its sister agencies, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, as long as such sharing of information is likely to result in assistance to the Bureau in its review of a transaction (see the response to question 30).

Judicial review

32 What are the opportunities for appeal or judicial review?

The Tribunal Act provides for an appeal from the Tribunal on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal lies, with leave, to the Supreme Court of Canada. The courts have held that, as an expert tribunal, the Tribunal is entitled to a considerable amount of deference within its sphere of operation.

Although it is theoretically possible to obtain judicial review of the Commissioner's decisions or actions as well, in practice he is accorded a very high amount of deference because he is responsible for investigative rather than adjudicative functions.

33 What is the usual time frame for appeal or judicial review?

An appeal from a decision of the Tribunal can be a relatively long process. For example, in the *Superior Propane* case, the Federal Court of Appeal took eight months to render its decision on the Commissioner's initial appeal of the Tribunal's decision, from the date of the Tribunal's judgment. Similarly, in the more recent appeal of the Tribunal's order in the *CCS* case, the Federal Court of Appeal released its decision nine months from the date of the Tribunal order.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada would be expected to take a few months before leave is granted, and if granted many more months before a hearing is held and the court renders its decision.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

Because the Commissioner effectively acts as the Tribunal's gatekeeper in the merger context, merging parties (both domestic and foreign) will typically work with the Commissioner to address any concerns he might have with their transaction, rather than face a lengthy and expensive process of defending their merger through litigation before the Tribunal. The Commissioner has a mixed record in the few contested proceedings before the Tribunal. For example, the Commissioner was successful in obtaining a Tribunal divestiture order in the *CCS* case, and met with mixed success in the *Southam* newspaper case. However, the Commissioner failed to obtain a remedy in the *Hillsdown* or *Superior Propane* cases and the Commissioner was also unsuccessful in attempting to obtain a temporary injunction against the *Labatt/Lakeport* merger in the brewing sector. In many other cases, the Bureau has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers including, most recently, *Novartis/Alcon, The Coca-Cola Company/Coca-Cola Enterprises, Teva/Ratiopharm* and *Live Nation/Ticketmaster*.

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35 What are the current enforcement concerns of the authorities?

The current merger review process was adopted in March 2009. During the first five years under the new regime, SIRs were issued in connection with 39 transactions. Responding to these requests has required a significantly greater investment of time and resources than preparing the former 'long-form' notification or responding to a voluntary information request under the prior regime. The Bureau has not received additional resources to support the enforcement of the new regime. The time frame for the completion of the Bureau's review of a transaction subject to a SIR has ranged from three months to seven-and-a-half months.

The substantive merger enforcement framework is set out in the 2011 Merger Enforcement Guidelines discussed above and has not changed at the time of writing. The Bureau remains focused primarily on horizontal cases that could substantially lessen or prevent competition through unilateral or coordinated effects.

36 Are there current proposals to change the legislation?

No.

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