

Merger Control

The international regulation of mergers and joint ventures in 64 jurisdictions worldwide

2010

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Consulting editor: John Davies,
Freshfields Bruckhaus Deringer

Business development manager
Joseph Samuel

Marketing managers

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George Ingledew
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Robyn Hetherington
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Nadine Radcliffe
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Subeditors

Jonathan Allen
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Ariana Frampton
Sarah Dookhun

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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Law

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Research

Introduction Michael Han, Álvaro Iza and Bruce McCulloch <i>Freshfields Bruckhaus Deringer</i>	3
Timelines Michael Bo Jaspers and Claudia Lange-Tramoni <i>Freshfields Bruckhaus Deringer</i>	8
Acknowledgements	21
Albania Guenter Bauer, Sokol Nako and Mariana Spasojevic <i>Wolf Theiss</i>	23
Argentina Marcelo den Toom <i>M & M Bomchil</i>	28
Australia Wendy Peter and Jacqueline Downes <i>Allens Arthur Robinson</i>	35
Austria Axel Reidlinger and Heinrich Kühnert <i>Freshfields Bruckhaus Deringer</i>	46
Belgium Laurent Garzaniti, Thomas Janssens and Vincent Mussche <i>Freshfields Bruckhaus Deringer</i>	52
Bolivia Jorge Luis Inchauste <i>Guevara & Gutiérrez SC</i>	57
Bosnia and Herzegovina Guenter Bauer, Sead Miljkovic and Mariana Spasojevic <i>Wolf Theiss</i>	61
Brazil José Regazzini and Marcelo Calliari <i>TozziniFreire Advogados</i>	66
Bulgaria Nikolai Gouginski and Miglena Ivanova <i>Djingov, Gouginski, Kyutchukov & Velichkov</i>	71
Canada Neil Campbell, Mark Opashinov and SORCHA O'Carroll <i>McMillan LLP</i>	77
Chile Isabel Díaz <i>Isabel Diaz & Asociados</i>	84
China Alex Potter and Michael Han <i>Freshfields Bruckhaus Deringer</i>	90
Colombia Javier Cortázar-Mora <i>Manrique & Associates</i>	95
Croatia Boris Babic, Marija Gregoric, Katarina Fulir and Boris Andrejas <i>Babic & Partners Law Firm</i>	100
Czech Republic Lucie Bányaiová and Alena Bányaiová <i>Salans Europe LLP</i>	104
Denmark Morten Kofmann, Jens Munk Plum and Erik Bertelsen <i>Kromann Reumert</i>	110
Estonia Katri Paas and Martin Simovart <i>Lepik & Luhaäär LAWIN</i>	115
European Union John Davies and Rafique Bachour <i>Freshfields Bruckhaus Deringer</i>	120
Faroe Islands Morten Kofmann, Jens Munk Plum and Erik Bertelsen <i>Kromann Reumert</i>	129
Finland Christian Wik and Niko Hukkinen <i>Roschier, Attorneys Ltd</i>	133
France Jérôme Philippe and Jean-Nicolas Maillard <i>Freshfields Bruckhaus Deringer</i>	138
Germany Helmut Bergmann and Frank Röhling <i>Freshfields Bruckhaus Deringer</i>	145
Greece Aida Economou <i>Panagopoulos, Vainanidis, Schina, Economou</i>	155
Hong Kong Connie Carnabuci, Margaret Wang and Ivy Yam <i>Freshfields Bruckhaus Deringer</i>	160
Hungary Zoltán Marosi and Gábor Fejes <i>Oppenheim</i>	166
Iceland Helga Melkorka Öttarsdóttir <i>Logos Legal Services</i>	172
India Suchitra Chitale and Abhishake Sinha <i>Chitale & Chitale Partners</i>	179
Indonesia Rikrik Rizkiyana, Vovo Iswanto and Albert Boy Situmorang <i>Rizkiyana & Iswanto Antitrust and Corporate Lawyers</i>	183
Ireland Philip Andrews and Damian Collins <i>McCann FitzGerald</i>	187
Israel Eytan Epstein, Tamar Dolev-Green and Michelle Morrison <i>Epstein, Chomsky, Osnat & Co</i>	193
Italy Gian Luca Zampa <i>Freshfields Bruckhaus Deringer</i>	200
Japan Akinori Uesugi and Kaori Yamada <i>Freshfields Bruckhaus Deringer</i>	209
Kenya Richard Harney <i>Coulson Harney, Advocates</i>	217
Korea Keum Seok Oh and Seong Un Yun <i>Bae, Kim & Lee LLC</i>	222
Latvia Liga Hartmane and Martins Gailis <i>Klavins & Slaidins LAWIN</i>	226
Liechtenstein Helene Rebholz and Corina Bölsterli Maier <i>Dr Dr Batliner & Dr Gasser</i>	232
Lithuania Marius Juonys and Laura Šlepaitė <i>Lideika, Petrauskas, Valiūnas ir partneriai LAWIN</i>	236
Luxembourg Patrick Santer and Léon Gloden <i>Elvinger, Hoss & Prussen</i>	242
Macedonia Biljana Cakmakova and Eva Veljanovska <i>Mens Legis Cakmakova Advocates</i>	245
Malta Ian Gauci and Cynthia Van Der Weerden <i>GTG Advocates</i>	249
Mexico Gabriel Castañeda <i>Castañeda y Asociados</i>	256
Netherlands Winfred Knibbeler, Paul Kreijger and Peter Schepens <i>Freshfields Bruckhaus Deringer</i>	261
New Zealand Andrew Peterson, Sarah Keene and Troy Pilkington <i>Russell McVeagh</i>	267
Nigeria Babatunde Irukera and Ikem Isiekwena <i>SimmonsCooper Partners</i>	274
Norway Mads Magnussen and Simen M Klevstrand <i>Wikborg Rein</i>	279
Poland Dorothy Hansberry Bieguńska and Andrzej Madala <i>Wardyrński & Partners</i>	284
Portugal Mário Marques Mendes and Pedro Vilarinho Pires <i>Marques Mendes & Associados</i>	289
Romania Anca Ioachimescu <i>Rubin Meyer Doru & Trandafir SCA</i>	296
Russia Igor Gerber and Alexander Viktorov <i>Freshfields Bruckhaus Deringer</i>	302
Serbia Guenter Bauer, Maja Stankovic and Mariana Spasojevic <i>Wolf Theiss</i>	307
Singapore Lim Chong Kin and Ng Ee Kia Joy <i>Drew & Napier LLC</i>	314
Slovakia Peter Oravec <i>PRK Partners sro</i>	321
Slovenia Pavle Pensa <i>Jadek & Pensa</i>	326
South Africa Robert Legh and Tamara Dini <i>Bowman Gilfillan</i>	332
Spain Paco Cantos, Álvaro Iza and Margarita Fernández <i>Freshfields Bruckhaus Deringer</i>	342
Sweden Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg <i>Mannheimer Swartling Advokatbyrå</i>	347
Switzerland Marcel Meinhardt, Benoît Merkt and Astrid Waser <i>Lenz & Staehelin</i>	352
Taiwan Mark Ohlson and Charles Hwang <i>YangMing Partners</i>	357
Turkey Gonenc Gurkaynak <i>ELIG, Attorneys-at-Law</i>	364
Ukraine Alexey Pustovit <i>Konnov & Sozanovsky</i>	371
United Kingdom Nicholas French, Alison Jones and Martin McElwee <i>Freshfields Bruckhaus Deringer</i>	376
United States Ronan P Harty <i>Davis Polk</i>	385
Venezuela José H Frías <i>D'Empaire Reyna Abogados</i>	393
Zambia Charles Siamutwa <i>Corpus Legal Practitioners</i>	397
Introduction to the ICN John Fingleton <i>Chair of the steering group of the ICN</i>	401
Quick Reference Tables	403

Canada

Neil Campbell, Mark Opashinov and Sorcha O'Carroll

McMillan LLP

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 creates jurisdiction for the review of mergers that affect the Canadian market. The Act is enforced by the commissioner of competition, a federal cabinet appointee, who serves renewable five-year terms. 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 commissioner not be able to resolve perceived difficulties with a merger with the parties, he or she can refer the matter to the Competition Tribunal (the Tribunal) for adjudication.

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 litigated 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 30.

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 might be subject to pre-merger notification. These are: asset acquisitions, share acquisitions, acquisitions of an interest in an unincorporated combination, amalgamations and the formation of unincorporated combinations (if they meet certain party and transaction size thresholds, discussed in question 5).

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 18.)

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 a 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 (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 (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 might 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, originally issued in 1991 to provide the business and legal communities with the commissioner's interpretation of the rather open-textured language of the Act, and substantially revised and reissued in 2004) contemplate that 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?

The Act's substantive jurisdiction extends to all mergers that affect 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 there as opposed to merely a passive investment). The obligation to notify is contingent upon satisfaction of both a party-size threshold and a transaction-size threshold:

- Party-size threshold: Parties to a transaction, together with their world-wide 'affiliates' (defined generally as those entities in a relationship of control to one another or under common

control), have assets in Canada or 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: Generally, the assets in Canada that are the subject of the transaction or the revenues generated from those assets (domestic plus export sales) are in excess of C\$70 million (this threshold is subject to an annual inflation adjustment by regulation).

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 (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 (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 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.

- 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.

Parties occasionally notify voluntarily where there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the commissioner that he or she will not challenge the merger. However, the significant filing fees required on notification (see question 9) 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 might be subject to substantive review wherever they occur, if competitive effects occur within Canada from the transaction. 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.

Notification and clearance timetable

- 8** 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 10).

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. 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 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.

- 9** 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 the second party to the transaction. In hostile 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. It is usually paid by the acquirer, but this is a matter of negotiation between the parties. An additional 5 per cent (C\$2,500) federal goods and services tax is required if an Advance Ruling Certificate (ARC) is requested, unless the applicant is a foreign entity that is eligible for 'zero-rating' of the GST. Provincial sales tax or harmonised sales tax also applies in some provinces.

- 10** 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, require the parties to submit additional information that is relevant to the commissioner's assessment of the proposed transaction (the supplementary information request process). If the commissioner issues a supplementary information request, a second 30-day no-close waiting period begins on the day that the required information has been received by the commissioner.

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. However, in more complex cases, reviews may extend beyond the waiting periods. In such cases, the commissioner may request that the parties refrain from closing their transaction until his or her review is complete. There is no obligation to accommodate such a request, but historically (under the prior filing regime) the parties have often done so. The commissioner can, as an alternative, 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.

The current economic crisis has not had any material effect on the waiting period regime.

- 11** 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 is subject to a penalty of up to C\$10,000 for each day of non-compliance.

Regardless of whether the waiting period has expired, closing before clearance carries the risk that the commissioner will challenge the merger after completion (the applicable limitation period is one year) and seek a divestiture or dissolution order.

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

The commissioner will focus 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 Remedies Bulletin indicates that the circumstances where the Bureau will currently consider agreeing to the use of such hold-separate agreements are narrow.

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

As noted in question 9, rules exist to ensure that targets in hostile takeover bids supply their portions of notifications in a timely manner.

14 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. Prior to the adoption of amendments to the Competition Act in March 2009, Canada had two alternative notification forms, which triggered different waiting periods. At the time of writing, parties can still elect to file either the old short form or the old long form notification; however, draft regulations have been issued that, when promulgated, will establish a new single form of notification. The new notification form will require the same information as the old short form notification (set out below) plus a copy of the legal documents used to implement the proposed transaction and all studies, surveys, analyses and reports prepared or received by a senior officer 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)). It is anticipated that the regulations will be completed before the end of 2009.

The main requirements of the old short form filing are:

- an overview of the transaction structure;
- a list of the foreign antitrust authorities that have also been notified;
- a description of the business objectives of the transaction;
- 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; and
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales.

It is now possible for the Bureau to demand significantly more information than set out above pursuant to a supplementary information request (akin to a US second request). The Bureau has issued draft guidelines for the new merger review process. These (non-binding) guidelines state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a supplementary information request to a maximum of 30 individuals. The guidelines also state that the Bureau will limit the search period for hard copy and electronic records to two years from the date of the request and will limit the relevant time period for data requests to three years from the date of the request. 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.

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

In most non-complex cases the commissioner's review is concluded within 14 days. However, in more complex cases the Bureau's review process will frequently 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:

- two weeks for non-complex mergers;
- 10 weeks for complex mergers; and
- five months for very complex mergers.

These periods only begin to run once the Bureau has received completed notifications, as well as any other information and documents that the Bureau considers necessary to assess the proposed transaction. 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 9.) 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 aid the Bureau and expedite completion of the review process.

16 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 and suppliers set out in the parties' filings to solicit information from them regarding the proposed transaction. In addition, the Bureau may invite the parties to the merger to provide additional information or documents such as estimates of market shares. If the commissioner plans to issue a supplementary Information request, the scope of this request may be discussed during the initial 30-day waiting period and these discussions may continue after the request is issued. More complex mergers also might face compulsory production of large volumes of documents and occasionally compulsory testimony under subpoena (similar to but not as onerous as the US 'second request' process), as well as face-to-face meetings with Bureau staff, and possibly federal Department of Justice lawyers and external experts retained by the Bureau. Regardless of complexity, regular communication between the Bureau staff and the parties' counsel is the norm.

Substantive assessment

17 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 or her investigation) is to consider in applying this substantive test:

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

The Act also requires that the Tribunal shall not make a determination on the basis of market shares or concentration ratios alone and the Act, uniquely among mature competition regimes, provides a statutory efficiency defence that allows an otherwise anti-competitive merger to be 'saved' if there are offsetting efficiencies (see question 21 with respect to economic efficiencies).

The MEGs elaborate on the commissioner's views of each of the evaluative factors set out in the Act and establish 'safe harbours' within which the commissioner will generally not challenge a merger with respect to 'unilateral effects' and 'coordinated effects' theories of competitive harm. On a unilateral basis if the combined post-merger market share of the merged entity is less than 35 per cent, the merger will generally be considered competitively benign. For coordinated theories of harm, the Bureau generally will not challenge transactions 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.

Notwithstanding the current economic circumstances, the failing firm factor continues to be interpreted very strictly by the Bureau, in accordance with the approach set out in the MEGs.

18 Is there a special substantive test for joint ventures?

Joint ventures usually fall within the definition of mergers (see question 3) and are thus subject to the same substantive test (see question 17). 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 of the joint venture's activities and duration, 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.

Effective March 2010, two new provisions will come into force dealing with agreements between competitors that may be subject to either criminal prosecution or challenge as a reviewable practice before the Tribunal. The framework for the reviewable practice is very similar to the merger provisions. Once the Bureau has decided which track to pursue, there are double jeopardy protections that preclude it from using the other tracks.

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

In general, the Bureau will consider whether a proposed transaction 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 former theory of harm, the Bureau will consider whether the merged entity will be likely to be able to sustain in a profitable manner higher prices than would otherwise exist in the absence of the merger without relying on an accommodating response from its competitors (see question 17). Under the latter 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. Conglomerate mergers might also give rise to Bureau concerns about the prevention 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*. Finally, vertical mergers might raise concerns when they increase barriers to entry or facilitate coordinated behaviour. It should be noted that, in addition to price, the Bureau also assesses the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The MEGs, Tribunal jurisprudence and media statements by senior Bureau staff indicate that merger review is informed in 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 and thus have not changed materially during the current economic crisis.

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. (Also see question 30 in respect of Canada's foreign investment review legislation.)

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

As stated above (see question 17), the Act provides a statutory efficiency defence that allows an otherwise anti-competitive merger to be 'saved' by offsetting efficiencies. The scope of the efficiencies defence was examined in the *Superior Propane* case. This decision marked the first time a party argued successfully that an otherwise anti-competitive merger should be 'saved by its overriding efficiencies'. The main issue was whether a 'total surplus' or 'consumer welfare' standard should be used to evaluate the efficiencies claimed by the merging parties. 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 set out in a bulletin published in March 2009).

Remedies and ancillary restraints

22 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 from doing anything 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 either situation, it may also, with the consent of the parties, order any other action to be taken.

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

Divestitures are the primary type of remedy used in merger cases. 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.

24 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 on the failure of the merging parties to do so in a timely manner. The Bureau also has broad discretion to negotiate such terms or behavioural remedies to be embodied in a consent agreement.

Formerly, divestiture commitments generally had provided the merging parties with six to 12 months to effect a sale, after which a trustee would have had a similar time period to sell the assets. However, the Bureau's 2006 Remedies Bulletin makes clear that the Bureau 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 divestitures be effected within three to six months, according to the Bulletin. If the merger parties 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.

25 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, 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*, *GE/Instrumentarium*, *Procter & Gamble/Gillette* and *Boston Scientific/Abbott/Guidant* where the remedies required by the US and European authorities were seen as sufficient to address Canadian concerns. See also question 33, which discusses cases in which remedies have been required in foreign-to-foreign mergers in Canada.

26 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

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

The Bureau will routinely contact 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 and thus complainants may have a formal voice in the proceedings at this stage.

28 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 Bureau to share information and documents received with a Canadian law enforcement agency or with other third parties (which the Bureau believes may include foreign antitrust agencies) if the information is communicated for the purposes of the administration or enforcement 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 Bureau does not announce the receipt of filings or commencement of investigations. It occasionally publishes press releases or 'backgrounders' regarding decisions in high-profile cases.

Where a challenge occurs or a remedy is embodied in a consent agreement, relevant materials will be filed on the public record at the Tribunal.

29 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, Costa Rica, Japan, Korea, Mexico and New Zealand.

30 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. Thus, under this statute, all non-Canadians must either file an application for review or a 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 persons who are citizens of countries that are members of the World Trade Organization); the value 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 in excess of C\$312 million. (This is the 2009 threshold amount; however, March 2009 amendments to the Investment Canada Act will increase this threshold to an enterprise value of C\$600 million. The new threshold will come into force on a date to be determined by regulation.) If the acquisition 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 cultural activities, or if neither the investor nor the vendor are WTO Investors, the applicable thresholds for direct and indirect investments would be C\$5 million and C\$50 million, respectively. For indirect cases, the review can be done on a post-closing basis.

An application for review is made to the Investment Review Division of the federal Department of Industry (or the Department of Heritage, where the merger involves any cultural businesses). There is an initial review period of 45 days, which may be extended by 30 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. 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 in addition to completing its own review.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act will not oblige an acquirer to make an application for review. However, even where the transaction falls below the thresholds, it must still be notified by way of a simple two-page form to the Investment Review Division of the Department of Industry (or the Department of 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 Heritage.

The March 2009 amendments to the Investment Canada Act introduced 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 minister may initiate a review of the transaction regardless of the size of the business or transaction, the nationality of the acquirer 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 and broadcasting.

Judicial review

31 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 as well, in practice he or she is accorded a high amount of deference as an investigative agency.

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

An appeal from a decision of the Tribunal is a long process. For example, in the *Superior Propane* case the commissioner's initial appeal of the Tribunal's decision took eight months from the Tribunal's decision.

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

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

Because the commissioner acts as the Tribunal's gatekeeper, merging parties (both domestic and foreign) will typically work with the commissioner to address any concerns he or she might have with their transaction, rather than face a lengthy and expensive process of defending their merger in 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 remedy in *Weldwood/West Fraser* and resisting a challenge to the agreed divestiture by an intervener. However, the commissioner failed to obtain a remedy in the *Superior Propane* case as a result of the respondent's efficiency defence (see question 21) and, more recently, the commissioner was unsuccessful in attempting to obtain a temporary injunction against the *Labatt/Lakeport* merger in the brewing sector. On 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 *Lafarge/Blue Circle*, *Bayer/Aventis CropScience*, *Pfizer/Pharmacia* and *Johnson & Johnson/Pfizer*.

mcmillan

Neil Campbell
Mark Opashinov
Sorcha O'Carroll

neil.campbell@mcmillan.ca
mark.opashinov@mcmillan.ca
sorcha.ocarroll@mcmillan.ca

Brookfield Place
181 Bay Street
Toronto
Ontario M5J 2T3
Canada

Tel: +1 416 865 7000
Fax: +1 416 865 7048
www.mcmillan.ca

34 What are the current enforcement concerns of the authorities?

As discussed above, the March 2009 amendments to the Competition Act included the introduction of a merger review process that is similar to the second request process in the United States. During the first three months under the new regime, supplementary information requests were issued in connection with at least four transactions. Responding to these requests has required a significantly greater investment of time and resources than preparing a 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 Bureau has indicated that they are working to develop a supplementary information request process that will generate a volume of responses that will allow effective assessment of transactions without overburdening the Bureau's resources.

The substantive merger enforcement framework, as set out in the 2004 Merger Enforcement Guidelines and discussed above, has not changed. The Bureau remains focused on cases that could substantially lessen competition through unilateral or coordinated effects.

35 Are there current proposals to change the legislation?

As set out in questions 5, 10 and 14, significant amendments to the pre-notification regime under the Competition Act were adopted in March 2009. It is expected that regulations establishing a new notification form will come into force in autumn 2009.

Additional changes to the merger provisions are not anticipated. It should, however, be noted that the March 2009 amendments to the Competition Act included significant changes to other provisions dealing with competitor agreements, which may potentially apply in parallel with the merger provisions in some situations (eg, joint ventures). These new provisions will come into force in March 2010. The provisions include a new *per se* criminal offence for hard-core cartel conduct and a civil reviewable practice for other types of competitor agreements. The analytical framework for the reviewable practice is almost identical to the merger framework.



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