GETTING THE DEAL THROUGH

Merger Control

The international regulation of mergers and joint ventures in 60 jurisdictions worldwide

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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 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 present Commissioner is Sheridan Scott, who has served since January 2004. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency under 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, 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. Subject to section 8 of the Competition Tribunal Act, the Tribunal has the powers of a regular court of record 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 may 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. (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 in order to trigger a filing obligation. The acquisition of 'any of the assets in Canada of an operating business' 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 (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, 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 business people and their advisers regarding filing obligations. 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 which are the subject of the transaction or the revenues generated from those assets (domestic plus export sales) are in excess of C$50 million (or C$70 million in the case of a proposed amalgamation).

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. A narrow exemption exists for asset securitisations meeting certain criteria.

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

Notification is only mandatory for transactions that exceed the thresholds set out in question 5. The business in Canada must also be an 'operating business' (in the sense that employees regularly report for work there) as opposed to merely a passive investment.

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 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 in order 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?

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. Canada asserts an 'effects' test for jurisdiction. Thus, foreign-to-foreign mergers may be subject to substantive review wherever they occur, if competitive effects occur within Canada from the transaction.

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 with zeal unless the failure to notify was inadvertent; a decision not to prosecute or other resolution may be negotiable with the Commissioner and the attorney general.

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 and the Commissioner then requisitions the counterpart filing from the target.

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 6 per cent (C$3,000) 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?

Parties that have a notification obligation can choose to file either a 'short-form' or a 'long-form' filing. The no-close waiting periods are 14 and 42 calendar days from the day the filing is certified complete (usually, the same day as filing occurs) in the case of the short-form and long-form notifications respectively. If a short-form filing is made by the parties, the Commissioner may, within the initial 14-day waiting period, require the long-form to be submitted, after which the further 42-day waiting period will apply once the long-form is deemed complete.

Implementation of the transaction is suspended during the waiting periods. However, in more complex cases, reviews will often extend beyond the waiting periods. In such cases, the parties are free to proceed to close (with the risk of a future challenge by the Commissioner) unless a temporary injunction has been obtained by the Commissioner.

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 an offence which carries a maximum penalty of C$50,000.

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 three years) and seek a divestiture or dissolution order.

The review period for any merger with significant competitive issues will always exceed the 14-day (and often the 42-day) waiting periods. The Commissioner may request that the parties refrain from closing their transaction until her review is complete. There is no obligation to accommodate such a request, but parties will usually do so. The Commissioner can, in the alternative, seek a temporary injunction to prevent the transaction from closing until the Bureau has completed its review.

12 What solutions (such as a local 'hold-separate' arrangement) 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 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 confirms that the circumstances where the Bureau may 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?

If a transaction is effected through a stock exchange in Canada and long-form notifications are submitted, the relevant waiting period is equivalent to the time allowed by the stock exchange rules for the shares to be taken up but no less than 21 trading days and no more than 42 calendar days. However, this alternate waiting period is not applicable to bids conducted through a foreign stock exchange or tender offers that are not made under the procedures of a Canadian stock exchange.

As noted in question 9, rules also 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. The short-form filing is relatively straightforward but requires significant detail. The main requirements are:
- an overview of the transaction structure;
- an indication of which foreign antitrust authorities 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.

In addition to the information requirements for short-form filing, a long-form filing requires considerably more information, including:
- contact information for the top 40 customers and suppliers for each principal product category of each principal business;
- details on overlapping products;
- additional information about facility locations, geographic sales data and transportation costs;
- the legal documents used to implement the proposed transaction;
- proxy solicitation circulars, prospectus and other documents filed with securities commissions;
- 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 '4(c)' documents under the US Hart-Scott Rodino Act); and
- marketing, business and strategic plans and similar documents related to Canada for the last three years.

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 the 14-day statutory waiting period or sooner. However, in more complex cases the Bureau's review process frequently exceeds this statutory waiting period, sometimes substantially.

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 time periods only begin to run once the Bureau has received completed notifications, including any other information and documents that are 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.

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 or require the parties to the merger to provide additional information or documents such as estimates of market shares. More complex mergers also may 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 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 concentration ratios alone and the Act, uniquely among mature competition regimes, provides a statutory efficiency defence which 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' theories of competitive harm. If the combined post-merger market share of the merged entity is less than 35 per cent it 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.

18 Is there a special substantive test for joint ventures?

Joint ventures usually fall within the definition of mergers and are thus subject to the same substantive test (see question 3). 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.

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). 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. Under the latter theory of harm, the Bureau considers whether the proposed merger is likely to reduce the competitive vigour 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 may 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 may raise concerns when they increase barriers to entry or facilitate coordinated behaviour.

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

Non-competition/efficiency issues are generally not relevant to the Commissioner's review process. However, the MEGs, recent Tribunal jurisprudence and recent media statements by senior Bureau staff suggest that merger review is informed in part by the Act's purpose clause and its concern with ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy."

In addition, 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 approach but adopted a 'balancing weights' approach which gives some consideration to the redistributive effects of a merger in addition to the overall magnitude of efficiency gains. The Tribunal's decision was appealed again but was upheld by the Federal Court of Appeal. The decision remains controversial and the Bureau continues to scrutinise efficiency defence claims rigorously.

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; from doing anything the Tribunal determines is necessary to ensure the merger (or a part of it) does not prevent or lessen competition substantially; or with the consent of the parties, any other thing. If a merger has already been completed, the Tribunal may order the dissolution of the merger, the divestiture of assets or shares or, with the consent of the parties, any other action to be taken.

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

Prohibition of proposed mergers and dissolution or divestitures for completed mergers are the primary available remedies (see question 22) unless the merging parties consent to other commitments. While it is possible (and frequently of interest to merging parties) to resolve issues through the use of so-called '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 and registered 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, last year's release by the Bureau of its Information Bulletin on Merger Remedies makes clear that the Bureau expressly prefers so called 'fix-it-first' remedies whereby an approved upfront 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 within three to six months, according to the bulletin. Moreover, if the merger parties fail to do so, a trustee will be appointed to complete the sale 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 *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.

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 their input on 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.

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 Mexico, Chile, Costa Rica and Japan. It is vital for counsel to merger parties in such circumstances to coordinate with their colleagues in each jurisdiction affected to ensure an orderly and consistent approach to multiple antitrust authorities.

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 book value of assets of the Canadian business being acquired; and whether the Canadian business being acquired engages in one of the following four sensitive sectors: the production of uranium; financial services; transportation services; or 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 any of the specific sectors named above, an investment would be reviewable only if the Canadian operating business being acquired has assets in excess of C$281 million (this is the 2007 threshold amount; the amount is inflation-adjusted each January). If the acquisition is 'indirect' (ie, the acquisition of shares of a foreign corporation that controls a Canadian business) the transaction is usually not reviewable; moreover, where required, a review in such circumstances can be done on a post-closing basis. In the four sensitive sectors, 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.

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 but separate from Competition Act reviews, and the Bureau provides input into this process 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 (except for cultural sector deals) oblige an aquiror 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. 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 be ordered regardless of the level of assets within 21 days of receipt of the notification by the Department of Heritage.

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 she is accorded a high amount of deference as an investigative authority.

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

An appeal from a decision of the Tribunal is a long process, as the *Superior Propane* case made clear most recently. (In that case, a decision from the Commissioner's initial appeal of the Tribunal's decision took eight months from the Tribunal's decision.) Subsequent appeal from the Federal Court of Appeal to the Supreme Court of Canada should be expected to take many months more before leave is granted (if at all), 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 she may 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*.

34 What are the current enforcement concerns of the authorities?

Three enforcement trends have emerged of late. Formerly in 'non-complex' cases, the Bureau tended to clear such mergers largely on the basis of the representations of the parties as to the competitive effects of the proposed transaction. Of late, however, the Bureau seems more inclined to make marketplace inquiries in cases that present no or minimal overlap as a means of testing the assertions of the parties. A second trend relates to documentary requirements in merger transactions. In the past, parties would often submit a short-form notification with supplemental materials to address areas of particular interest or concern to the Bureau. More recently, however, the Bureau seems inclined to require long-form notifications from the parties instead, which is a substantially more onerous documentary disclosure obligation than the 'short-form-plus-supplements' approach that had prevailed. Additionally, the Bureau's Information Bulletin on Merger Remedies in Canada indicates that remedy negotiations and implementation processes will be more rigorous and expeditious.

35 Are there current proposals to change the legislation?

There are no current proposals to change the merger review regime of the Act. The Merger Enforcement Guidelines have also recently been updated and no further substantive changes are anticipated in the foreseeable future.

Update and trends

Last year's release by the Bureau of its Information Bulletin on Merger Remedies in Canada was a helpful clarification of the Bureau's stance on a number of issues in merger remedies, including its preference for structural (rather than behavioural) remedies and for so called 'fix-It-first' divestitures by which approved up-front buyers are identified and acquire divested businesses from one or both of the merger parties before or at the same time as the merger parties consummate their own transaction. The bulletin also makes clear that the Bureau will expect that, if a fix-it-first remedy cannot be effected, a remedial divesture must be effected within three to six months, failing which, a trustee will be appointed to complete the sale without any guaranteed minimum price to the seller.

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