Stikeman Elliott

Merger Control 2024
Canada

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Merger Control

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).

The Competition Bureau (the "**Bureau**") is an independent, federal law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "**Act**"). The Bureau is part of "Innovation, Science and Economic Development Canada" (*i.e.*, the Canadian industry ministry) and is headed by the Commissioner of Competition (the "**Commissioner**"). The Commissioner is appointed for a five-year term, which may be renewed. The current Commissioner is Matthew Boswell, who was appointed on March 5, 2019. Commissioner Boswell joined the Bureau in 2011, prior to which he practised law, primarily as a prosecutor.

The Competition Tribunal (the "**Tribunal**") is a specialised adjudicative body that operates independently of the Bureau and is responsible for hearing applications made under certain provisions of the Act, namely with respect to mergers, abuse of dominance and certain civil matters. The Tribunal has all such powers, rights and privileges as are vested in a superior court of record, including with respect to the attendance and examination of witnesses, the production and inspection of documents and the enforcement of its orders. The Tribunal may issue a range of formal remedial orders with respect to mergers, including divestiture orders.

Orders issued by the Tribunal may be appealed to the Federal Court of Appeal (the "**FCA**") on questions of law and of mixed fact and law. An appeal from a decision of the FCA may be made, with leave, to the Supreme Court of Canada.

The Tribunal does not have jurisdiction to hear criminal matters in Canada (most notably, alleged criminal cartel and bid-rigging matters). Criminal matters are adjudicated by provincial superior courts.

1.2 What is the merger legislation?

Merger control in Canada is governed by the Act.

The Act's merger provisions consist of pre-merger notification provisions in Part IX and substantive merger review provisions in Part VIII. While only mergers that surpass certain thresholds are subject to notification under Part IX, any merger can be challenged by the Commissioner and may be subject to the substantive merger review provisions of Part VIII for up to one year following closing.

In addition to the Act, Parliament has enacted regulations that support the administration of the Act, including the *Notifiable Transactions Regulations*. The Bureau has also published several enforcement guidelines to assist in the interpretation of the Act (which do not have the force of law), including the *Pre-Merger Notification Interpretation Guidelines*, the *Merger Enforcement Guidelines*, the *Merger Review Process Guidelines*, and the *Hostile Transactions Interpretation Guidelines*.

1.3 Is there any other relevant legislation for foreign mergers?

The *Investment Canada Act* (the "**ICA**") applies to every acquisition of control of a Canadian business by a non-Canadian-controlled investor. The ICA requires either a pre- or post-closing "net benefit" review or a post-closing notification, depending on certain statutory criteria. Investments (including non-controlling investments) in Canadian businesses by non-Canadians may also be subject to review under the ICA if they give rise to national security concerns in Canada. Transactions involving "cultural businesses" (*i.e.*, businesses engaged in the production, sale or distribution of books, magazines, periodicals, newspapers, audio, video and broadcasting) are subject to lower thresholds for review.

There is no fee associated with any ICA filing, irrespective of whether the filing is an application or a notification. For additional information about the Canadian foreign investment regime, please refer to the Canada chapter in the 2023 edition of *ICLG – Foreign Direct Investment Regimes*.

Mergers in certain industries may also be subject to specific public interest reviews and foreign ownership restrictions, including transactions involving transportation undertakings, financial institutions and telecommunications companies.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Yes. While the Act applies across all industries with no sector-specific rules, mergers in certain industries are subject to separate concurrent review processes, including transactions in the following sectors: transport (*Canada Transportation Act*); finance (*Bank Act*); and telecommunications and broadcasting (*Broadcasting Act* and *Telecommunications Act*).

Additionally, the ICA has specific rules for acquisitions of Canadian cultural businesses (*i.e.*, businesses engaged in the production, sale or distribution of books, magazines, periodicals, newspapers, audio, video and broadcasting).

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

Mergers that raise potential national security concerns may be subject to review under the national security provisions of the ICA, as further discussed in question 1.3.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The merger control legislation in Canada consists of two parts: (a) the pre-merger notification provisions in Part IX of the Act; and (b) the substantive merger review provisions in Part VIII of the Act. All "mergers" (as defined below) may be subject to substantive review and challenge for up to one year after completion. However, only transactions that exceed the applicable thresholds require mandatory notification to the Bureau (see question 2.4).

The substantive merger revision provisions apply to any "**merger**", which is defined broadly as the acquisition, in any manner, of control over, or of a significant interest in, the whole or part of the business of another person.

"**Control**" under the Act refers to ownership of more than 50% of the voting shares of a corporation. For non-corporate entities, control occurs where a person holds an interest that entitles them to receive more than 50% of the entity's profits or more than 50% of the entity's assets upon dissolution. Importantly, control does not flow through a general partner interest; as such, the manager of a partnership that carries on a private equity fund does not have legal control of the fund unless it also owns more than 50% of the fund's economic interest.

The Act does not define "**significant interest**". However, in the *Merger Enforcement Guidelines*, the Bureau notes that it believes a significant interest may be held where "the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour of the target business". This influence may impact decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights, amongst other things. Factors that may be relevant to the Bureau's analysis of whether a particular interest confers material influence include:

- Voting rights attached to the purchaser's interest in the target.
- Whether the target is widely or closely held.
- Whether the purchaser will be the largest shareholder or have the ability to carry or block votes in a typical meeting.
- The extent of shareholder approval rights for non-ordinary course transactions.
- The extent of the purchaser's influence over the selection of management or members of board committees.
- The access the purchaser has to confidential business information.
- The practical extent to which the purchaser can otherwise impose pressure on the target's business-making processes.

A merger that is not subject to the pre-merger notification provisions in Part IX of the Act may close at any time. However, the Commissioner has substantive jurisdiction to review and challenge any transaction that may give rise to a substantial lessening or prevention of competition in a market in Canada any time prior to closing and for up to one year after closing.

As noted above, while any "merger" is subject to the substantive review provisions of the Act, mandatory notification applies only to a narrower set of transactions that exceed certain thresholds. See question 2.4.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes. Acquisitions of a minority share may be caught under the pre-merger notification provisions of the Act where the relevant thresholds are met. Acquisitions of a minority shareholding are also typically caught under the substantive merger review provisions of the Act if the transaction satisfies the broad definition of a "merger". See question 2.1.

2.3 Are joint ventures subject to merger control?

Yes. Joint ventures are generally considered "mergers" under the Act and are therefore subject to substantive merger review provisions (see question 2.1). Joint ventures may also be subject to pre-merger notification where the relevant thresholds described in question 2.4 are met.

However, certain unincorporated joint ventures (defined as "combinations" under the Act) are exempt from notification (but not substantive review) where:

- There is a written joint venture agreement that will govern a continuing relationship between the joint venture partners.
- There is an obligation on one or more of the joint venture partners to contribute assets to the joint venture.
- The transaction does not involve a change of control over either of the joint venture partners.
- The joint venture's range of activities is restricted through a written agreement.
- Written provision has been made for the orderly termination of the joint venture.

2.4 What are the jurisdictional thresholds for application of merger control?

Five types of transactions may be subject to mandatory pre-merger notification under Part IX of the Act: (i) asset acquisitions; (ii) share acquisitions; (iii) amalgamations; (iv) the formation of unincorporated combinations to carry on business; and (v) acquisitions of an interest in unincorporated business combinations.

In order for a transaction to trigger a notification filing requirement, the target must qualify as an operating business, which is defined as a "business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work". In addition, the following jurisdictional thresholds must each be exceeded:

- **Shareholding**: Applies to acquisitions of shares of a corporation (and interests in unincorporated entities) only. This is exceeded when the purchaser, as a result of the transaction, comes to own more than 20% of the voting interests of the target (if it is publicly traded) or 35% of the voting interests (if it is not publicly traded). If this threshold is already exceeded prior to the acquisition, it can be exceeded again if the purchaser comes to own more than 50% of the voting interests.
- **Size-of-transaction**: Exceeded where the target, together with the companies it controls, has assets in Canada whose book value exceeds C$93 million, or annual gross revenues in or from Canada generated from such assets exceeding C$93 million. The size-of-transaction threshold is adjusted annually for inflation. (Note that the size-of-transaction threshold applies slightly differently to amalgamations and Delaware mergers.)
- **Size-of-parties**: Exceeded when the purchaser and the target, together with all entities under common ultimate control with them, have combined assets in Canada whose book value exceeds C$400 million, or annual gross revenues from sales in, from or into Canada exceeding C$400 million.

The Act defines ultimate control on the basis of ownership of more than 50% of the voting shares (of a corporation) and entitlement to profits or assets on dissolution (in the case of partnerships and other non-corporate entities). Importantly, control does not flow through a general partner interest (in a private equity fund, for example).

If a transaction is designed to avoid the pre-merger notification rules, the Act contains an anti-avoidance provision that deems such a transaction subject to mandatory pre-merger notification notwithstanding the avoidance.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. Where a merger exceeds the applicable thresholds, notification is required regardless of whether there is substantive overlap. See question 2.4.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The pre-merger notification thresholds described in question 2.4 are applicable regardless of whether the merger is between parties outside of Canada. Where the thresholds are met, the transaction will be subject to mandatory pre-closing notification.

Mergers that are not notifiable but have a sufficient Canadian nexus (*i.e.*, a "real and substantial connection" to Canada) are subject to the substantive merger review provisions of the Act, even if the merger is between parties outside of Canada.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are no mechanisms to override the operation of the jurisdictional thresholds of the Act. However, the Act does provide for concurrent review with respect to certain regulated industries (including transport, banking and telecommunications), as well as certain statutory exemptions from the application of the substantive merger provisions of the Act (namely, in certain transportation-industry transactions that give rise to public interest considerations).

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Bureau's general policy for mergers that take place in stages is that each step should be considered separately. However, the Bureau's *Pre-Merger Notification Interpretation Guideline Number 2: Number of Notices – Multiple Step or Continuous Transactions* notes that "two or more proposed transactions will be considered one continuous transaction if all steps in the series of proposed transactions constitute a sufficiently connected sequence of events".

To demonstrate a sufficiently connected sequence of events, the transaction documents must show clearly, comprehensively and unequivocally that each event in the series may proceed only if each previous event in the series has been completed and that the entire series will be completed within one year from the day on which the transaction was notified. Alternatively, a continuous transaction that has been approved by a judicial or regulatory body, such as a court-approved plan of arrangement, may be considered one continuous transaction.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes. Notification is compulsory where the pre-merger notification thresholds described in question 2.4 are exceeded. The parties must submit notifications to the Commissioner prior to the completion of the transaction. Once the parties have submitted notifications, the transaction cannot be completed until the applicable statutory waiting period(s) have expired, been waived or terminated. The waiting period can be terminated or waived by the Commissioner prior to expiry following submission of a substantive request for clearance.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Certain transactions may be statutorily exempt from the application of the pre-merger notification provisions of the Act, even where the jurisdictional (and other) thresholds are met, including:

- transactions exclusively among affiliated entities;
- acquisitions of real property or goods in the ordinary course of business where no party would acquire all or substantially all of the assets of a business or an operating segment of a business;
- acquisitions of collateral or receivables, or acquisitions resulting from foreclosure or default forming part of a debt work-out, by a creditor pursuant to a good faith credit transaction;
- transactions exempted by the Minister of Finance as being in the public interest; and
- transactions involving the acquisition of voting shares only for the purpose of underwriting such shares.

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

Yes. As described in question 2.1, the Commissioner has substantive jurisdiction to review and challenge any transaction that may give rise to a substantial lessening or prevention of competition in a market in Canada any time prior to closing and for up to one year after closing. Reviews of non-notifiable transactions are more likely to occur if the parties are competitors and the Bureau receives complaints about the transaction from industry stakeholders. The Bureau will often reach out to merging parties to request information to make a preliminary assessment. If an inquiry leads to a significant investigation, the Commissioner may also apply to the FCA for an order requiring the parties to produce documents and data necessary for a more in-depth review. If the Commissioner reaches the conclusion that the transaction is likely to substantially lessen or prevent competition in Canada, he may apply to the Tribunal to seek remedies (including asset divestitures, behavioural remedies, prohibition of a transaction that has not been completed or dissolution of a completed transaction), or he may seek to negotiate voluntary remedies with the purchaser.

3.4 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failing to file a notification "without good and sufficient cause" is a criminal offence, punishable by a fine of up to C$50,000. Violation of the applicable waiting periods is also a civil offence, punishable by administrative fines of up to C$10,000 per day of non-compliance and compulsory dissolution and/or divestiture.

Where a party that fails to notify the transaction is a corporation, its officers, directors or agents may also be held criminally liable in certain circumstances. Individuals are liable to the same punishment as the corporation, regardless of whether or not the corporation has been prosecuted. There have been no convictions for failure to file a notification to date. In several instances where companies failed to file a notification and reported this oversight to the Bureau, the Bureau opted not to pursue criminal charges and instead required the companies to institute a compliance programme to ensure future compliance.

3.5 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Where a global merger is notifiable under the Act, global completion must be delayed until the applicable waiting period has expired. Once the waiting period has expired, the global merger may close even where the Commissioner's substantive review is ongoing.

3.6 At what stage in the transaction timetable can the notification be filed?

The merger notification can be filed at any point before the closing date to allow for the expiration of the applicable waiting period. A signed transaction agreement (or a good faith intention to complete the transaction) is not required.

However, as further discussed in question 4.4, the Bureau may conduct market outreach of the parties' top customers and suppliers once the notification is made. Accordingly, parties typically only file their notifications once a definitive agreement has been signed and/or the transaction has been made public. Filing also incurs a filing fee (approximately C$82,700), which is not refundable, in the event that the transaction is subsequently abandoned.

3.7 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

For notifiable mergers, the filing of pre-merger notification forms by the parties starts an initial 30-day statutory waiting period. The transaction may close following the expiry of the initial 30-day waiting period, unless the Commissioner issues a supplementary information request (an "**SIR**"), which is similar to a "second request" under the *Hart-Scott-Rodino Act* (the "***HSR Act***") in the United States. There is no specific timeframe in which the parties must respond to the SIR. However, SIRs typically contain ongoing production requirements if the parties do not comply with the SIR within 90 days of issuance, and SIR compliance typically requires at least one to three months. The parties may not close until 30 days after the parties have provided all the information requested by the Commissioner in the SIR.

It is important to note that, where the first or second 30-day waiting period has expired, the Bureau's review of the merger may continue beyond that period and the merger may be subject to remedies at a later time if the merger is determined by the Commissioner and Tribunal and results in a substantial lessening or prevention of competition. In complex cases, the Bureau can request, and the parties can agree, to extend the waiting period through a timing agreement. However, the parties are legally permitted to close after the expiry of the applicable 30-day waiting period.

In addition to the statutory 30-day waiting period, the Bureau also provides a non-binding service standard for its substantive reviews of notifiable mergers and indicates the anticipated time for completion of the review. The service standard is dependent on the complexity of the merger. The service standard for "**non-complex**" transactions is 14 days from filing. The service standard for "**complex**" transactions is 45 days, except where an SIR is issued, in which case the service standard ends 30 days after the parties comply. The Bureau's service standard may be paused where the parties fail to respond to voluntary information requests in a timely manner.

The parties may also close a transaction prior to the expiry of the applicable waiting period if the Commissioner issues substantive clearance in the form of an "advance ruling certificate" (an "**ARC**") or a "no-action letter" (a "**NAL**"). See question 3.9.

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

Implementing a notifiable merger before the expiry of the applicable waiting period is a civil offence, punishable by a variety of remedial orders, including dissolution of the completed merger, divestiture of assets and administrative monetary penalties of up to C$10,000 for each day that the waiting period was breached. In practice, no penalties have been imposed under this provision, and there are no publicly known instances of non-compliance.

3.9 Is a transaction which is completed before clearance is received deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

No. Transactions that are completed before the expiry of the applicable waiting period are not deemed invalid; however, dissolution of the completed merger and/or administrative fines of up to C$10,000 per day are potential penalties that can be imposed by a court as described in question 3.8.

3.10 Where notification is required, is there a prescribed format?

Section 16 of the *Notifiable Transactions Regulations* sets out the information to be provided in the pre-merger notification. While there is no prescribed format of the form, the Bureau provides a template form that may be used.

The pre-merger notification includes information relating to the transaction, the businesses of the parties and their affiliates, the most important customers and suppliers of the parties and their affiliates and general financial information. The parties must also provide copies of all studies, surveys, analyses and reports that were prepared or received by an officer or director of the party for the purposes of evaluating the impact of the transaction on competition. These would generally be the same documents as are provided in the United States as the "item 4(c)" documents under the *HSR Act*. A director or officer of each party must certify or attest that the notification is correct and complete in all material respects.

3.11 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Yes. In Canada, it is customary for all notifiable transaction filings to be accompanied by a separate, joint substantive filing requesting clearance for the proposed transaction. This filing – typically called a "request for an advance ruling certificate" or "**ARC request**" – does not have a prescribed format, but typically includes narrative information about the parties, the transaction mechanics and the reasons for which the transaction is unlikely to have anti-competitive effects. In the ARC request letter, the parties typically request early termination or a waiver of the applicable waiting period.

The granting of substantive clearance (in the form of an ARC, which precludes the Commissioner from challenging the transaction after closing, or in the form of a NAL, which does not) immediately terminates the applicable waiting period, and is typically accompanied by a waiver of the notification requirement if the parties have not yet submitted notification filings.

Transactions giving rise to no competitive overlap in Canada are typically designated as non-complex by the Bureau. As described in question 3.6, the Bureau aims to complete reviews of non-complex transactions and issue an ARC or NAL within 14 days from the date of filing, although this service standard is non-binding.

3.12 Who is responsible for making the notification?

Both the purchaser and the target must submit pre-merger notifications to the Bureau. Additionally, the purchaser typically prepares and files the ARC request (see question 3.9) and it is customary for the target to review and comment on the letter prior to filing.

3.13 Are there any fees in relation to merger control?

Yes. The current filing fee for a pre-merger notification is C$82,719.12 and is subject to an annual Consumer Price Index adjustment. The filing fee must be paid within 30 days of filing or it may incur interest.

The pre-merger notification filing fee is subject to the Bureau's Service Fees Remission Policy. Under this policy, the Bureau will remit a portion of the filing fee paid by the fee-payer in certain circumstances where a service standard is not met.

3.14 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The Act does not include any provisions that specifically govern public offers for a listed business.

However, the Act does provide certain protocols where the merger is a hostile takeover transaction. In a hostile takeover circumstance, the initial waiting period begins when the purchaser makes its notification filing (as opposed to both parties, as is the case for other mergers). The Bureau will then contact the target and demand that it similarly file a notification within 10 days. Where an SIR is issued, the second 30-day waiting period begins when the Bureau receives the requested information from the purchaser.

3.15 Will the notification be published?

No. Pre-merger notification forms, the ARC request letter and any other documents submitted by the parties are not published or otherwise made public by the Bureau.

However, the Bureau does maintain a monthly registry of concluded merger reviews. The registry includes the names of the parties, the industry involved (by way of the relevant NAICS code) and the outcome of the review. Additionally, in complex cases, the Bureau may publish a press release or position statement discussing its decision. Press release and position statement drafts are typically shared by the Bureau with the merging parties prior to publication.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test for intervention to be applied by the Bureau, and which must be satisfied for the Tribunal to issue a remedial order, is whether the merger is likely to substantially prevent or lessen competition in a market.

The *Merger Enforcement Guidelines* note that a substantial prevention or lessening of competition results only from mergers that are "likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power". When evaluating the potential competitive impact of a merger, the Bureau's primary concerns are price and output.

4.2 To what extent are efficiency considerations taken into account?

The Act contains an explicit efficiencies defence, pursuant to which a merger that leads to efficiency gains (*e.g.*, cost savings) that outweigh and offset the merger's anti-competitive effects cannot be subject to a remedial order. There is no requirement that the efficiency benefits will be passed on to consumers. However, as a matter of practice, the Bureau and the Tribunal will only consider efficiency gains that are transaction specific (*i.e.*, cannot be realised otherwise than through the impugned merger) and will only "count" efficiency gains that would be lost if an order were granted to cure the competition concerns.

4.3 Are non-competition issues taken into account in assessing the merger?

No. Issues not related to competition will not be considered when assessing a merger under the Act. However, mergers that are reviewable under sector-specific legislation (such as the telecommunication and transportation sectors) are considered pursuant to different statutory regimes that include non-competition issues.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

When reviewing a merger, the Bureau will typically reach out to the parties' most important customers and suppliers as provided in their respective pre-merger notifications, in order to understand the market's view of the transaction. The Bureau also contacts and receives complaints from customers, competitors and other industry stakeholders, which may impact the Bureau's decision of whether to review or challenge a merger.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

During the initial review period, the Bureau primarily gathers information through voluntary information requests to the parties and market outreach. There are no sanctions for non-compliance with voluntary information requests.

However, as described in question 3.6, the Commissioner has the statutory right to request any additional information relevant to his assessment by way of an SIR. The parties must respond to the SIR in full and certify the completeness of their responses before the second 30-day waiting period will commence. Where the Bureau determines that the parties have completed, or are likely to complete, a notifiable transaction without fully complying with an SIR, the Commissioner may apply to the court for a variety of remedial orders, including an order requiring that the requested information be submitted or an order prohibiting the closing of the transaction, or, where the transaction has already closed, dissolution of the completed merger, divestiture of assets and administrative monetary penalties of up to C$10,000 for each day that the parties failed to comply with any such order.

The Commissioner may also apply to the court for an order under section 11 of the Act to compel the attendance of witnesses for examination, the production of documents or the delivery of written returns under oath. A section 11 order may be made against any person, including a party to the transaction or third parties. Failure to comply with a section 11 order is a criminal offence subject to a fine at the discretion of the court and up to two years' imprisonment.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Bureau is generally required to treat all information it receives in the context of a merger as confidential. Exceptions to this mandatory confidentiality exist where:

- the information has otherwise been made public;
- the person providing the information has consented to its disclosure;
- the information is communicated by the Commissioner or the Bureau staff to another Canadian law enforcement agency; or
- the information is communicated for the purposes of the administration and enforcement of the Act (including in the context of litigation under the Act).

It is noteworthy that the Bureau interprets the "administration and enforcement of the Act" very broadly. In particular, the Bureau takes the position that – as a result of this language – it does not require a waiver from the merging parties to share information with foreign antitrust authorities. Most foreign antitrust authorities do, however, require a waiver to share information with the Bureau.

The Bureau is also subject to the *Access to Information Act*, which prevents public bodies, including the Bureau, from disclosing third-party information where the disclosure could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competition position of, a third party.

Third parties may seek a court order to obtain disclosure of documents held by the Bureau.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Mergers that are subject to the pre-merger notification provisions of the Act are permitted to close when the waiting period has expired, been waived, or been terminated through the issuance of an ARC or a NAL and a waiver of the notification filing obligation. See question 3.9.

However, as referenced in question 2.1, the Commissioner has substantive jurisdiction to review and challenge any transaction that may give rise to a substantial lessening or prevention of competition in a market in Canada for up to one year after closing, except where the Commissioner has issued an ARC.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Where the Bureau believes that a proposed merger will, or is likely to, prevent or lessen competition substantially, it typically initially seeks to reach a negotiated remedy agreement with the parties. However, if an agreement cannot be reached, the Commissioner may apply to the Tribunal, either before or up to one year after closing, seeking a remedial order.

Remedies can be both behavioural, such as supply arrangements or codes of conduct, or structural, such as divestitures. In its *Information Bulletin on Merger Remedies in Canada*, the Bureau notes a preference for structural remedies, as the terms of such remedies are generally more certain, less costly to administer and readily enforceable. Where a behavioural remedy is agreed to, there will typically be a reporting obligation requiring the relevant party to submit regular reports to the Commissioner to ensure compliance.

Remedies are memorialised in consent agreements, which are registered with the Tribunal, or in Tribunal orders. In either case, the remedy has the legal force of a court order in Canada, such that persons breaching the remedy can be subject to criminal penalties. See question 5.7.

5.3 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

The Bureau's *Information Bulletin on Merger Remedies in Canada* provides guidance on the types of remedies that the Bureau will accept. The Bureau prefers structural remedies (*i.e.*, divestitures) over behavioural remedies, as they are more clear, less costly to administer and easier to enforce. The Bureau will also sometimes accept quasi-behavioural remedies (*e.g.*, licensing intellectual property, removal of anti-competitive contract terms, granting non-discriminatory access rights to networks, etc.) in addition to or *in lieu* of a divestiture. Behavioural remedies which support structural remedies, such as commitments to provide transition services to divestiture buyers, are common. Standalone behavioural remedies are unlikely to be accepted by the Bureau because they are less effective and more difficult to enforce than structural remedies. Standalone behavioural remedies may only be acceptable when they are sufficient to address the substantial lessening or prevention of competition and there is no appropriate structural remedy. Standalone behavioural remedies typically must require either no or minimal future monitoring by the Bureau and typically must be enforceable by either the Bureau or the Tribunal.

5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

The Commissioner has the ability to seek remedies in foreign-to-foreign mergers. In certain foreign transactions, where a remedy has been agreed to in another jurisdiction (typically, the United States or Europe), the Bureau has insisted on a "mirror image" remedy in Canada. For example, in *Sherwin-Williams/Valspar*, Valspar agreed to divest its industrial wood coating assets in both Canada and the United States, after coordinated negotiations with the Bureau and the American competition agencies. In other instances, where no Canadian assets or unique Canadian issues are involved, the Bureau may not require any remedy in Canada, instead relying on remedies imposed in other jurisdictions. For example, in *UTC/Rockwell* and *Harris/L3*, the Bureau was satisfied that the implementation of American remedies was sufficient to adequately address the potential anti-competitive effects of the transaction in Canada.

The Act applies where the target business carries on an "operating business" in Canada, which is defined to mean a business in Canada to which employees ordinarily report for work. In theory, a national carve-out is possible if the target business does not include any "operating business" in Canada, although in practice, national carveouts are extremely rare or non-existent.

5.5 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

A remedy can technically be discussed, offered and accepted at any stage of the merger review process. However, as a practical matter, in complex cases, the Bureau often takes the position that it cannot seriously entertain remedy proposals until it has largely completed its substantive review and independently determined that remedies are necessary, and what remedies would be sufficient to resolve its concerns. So, it is typically not possible to meaningfully negotiate remedies with the Bureau until several weeks following compliance with an SIR.

The Bureau will typically require that any agreed-upon remedies be registered with the Tribunal prior to closing and, where the waiting period is ongoing, such remedies may be required to be registered before the Bureau will terminate the waiting period.

5.6 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Bureau's *Information Bulletin on Merger Remedies in Canada* outlines the criteria that must be met in order for a divestiture to provide effective relief to an anti-competitive merger:

- the asset(s) chosen for divestiture must be both viable and sufficient to eliminate the substantial lessening or prevention of competition;
- the divestiture must occur in a timely manner; and
- the buyer must be independent and have both the ability and intention to be an effective competitor in the relevant market(s).

To eliminate the risks and uncertainty associated with implementing a remedy post-closing, the Bureau has stated a strong preference for "**fix-it-first**" remedies, whereby merging parties are strongly encouraged to remedy competition issues arising from a merger by resolving them before, or simultaneously with, closing. Fix-it-first remedies sometimes do not require a consent agreement. However, where the Bureau believes that the divestiture may be delayed until after the merger closes, or may not occur at all, such that it is no longer considered a fix-it-first remedy, the parties will likely be required to enter into a consent agreement with the Bureau. If the divestiture is completed prior to closing, the consent agreement may not have to be registered with the Tribunal.

Where a consent agreement is required, the Bureau will normally require the merging parties to "hold separate" those asset(s) that could be the subject of a Tribunal order, until the divestiture is completed. The divesting party will also be required to provide reasonable and ordinary commercial representations and warranties to the divestiture buyer in respect of the asset(s).

While the Bureau has a stated preference for fix-it-first remedies, it will typically agree to provide the divesting party with an initial fixed period of time after closing to sell the remedy package at the best price and terms that the vendor can negotiate. This "**initial sale period**" is generally three months, with the possibility for extension if the process is unfolding smoothly. If the divestiture vendor is unable to sell the asset(s) within the initial sale period, the Bureau will appoint a trustee for a period of time, known as the "**trustee period**", during which the trustee has the authority to control the divestiture, subject to the oversight and approval of the Bureau only (with no minimum or reserve price).

5.7 Can the parties complete the merger before the remedies have been complied with?

See question 5.5 regarding pre-closing and post-closing remedies.

Mergers are legally permitted to close where the applicable waiting period has expired or been waived, or where the parties have received a NAL or an ARC. Where the waiting period is ongoing and the Bureau's termination of the waiting period is dependent on the registration of a consent agreement, the merger cannot close until the consent agreement is registered and the Bureau confirms that it has terminated its review.

5.8 How are any negotiated remedies enforced?

Negotiated remedies are primarily memorialised in a consent agreement, which is registered with the Tribunal and has the same force and effect as a Tribunal or superior court order.

Breach of a registered consent agreement is a criminal offence, subject to either:

- on summary conviction, a fine of up to C$25,000 and/or imprisonment for up to one year; or
- on conviction on indictment, a fine at the court's discretion and/or imprisonment for up to five years.

However, where a party inadvertently breaches a consent agreement, the Bureau will typically be open to discussion with the party to reach a resolution on the matter.

5.9 Will a clearance decision cover ancillary restrictions?

The Bureau will consider the entire competitive impact of the transaction during its review. Where the Bureau discovers contractual or ancillary restraints related to competition, it may consider the impact of such restraints during the merger review or in a separate investigation under other provisions of the Act.

For example, during the Bureau's review of Loblaw's acquisition of Shoppers Drug Mart (the acquisition of a drug store chain by a large grocery chain), the Bureau alleged that it discovered evidence that certain supplier policies implemented by Loblaw may have been implemented for an anti-competitive purpose and were contrary to the abuse of dominance provisions of the Act. While the merger received clearance from the Bureau on March 14, 2014, the Bureau initiated an investigation into the company's supplier policies shortly thereafter, which continued until 2017. The Bureau concluded that no further action was warranted. However, this case highlights the fact that merger clearance will not necessarily constitute clearance of contractual or ancillary restrictions that the Bureau may consider anti-competitive.

In circumstances where the Bureau develops concerns about contractual or ancillary restraints, quasi-structural remedies may be appropriate to address such concerns. Quasi-structural remedies permit the purchaser to retain ownership of the asset(s) acquired in a merger, but provide for structural changes in the marketplace to reduce barriers to entry, provide access to necessary infrastructure or key technology, or otherwise facilitate entry or expansion. Examples of quasi-structural remedies include licensing intellectual property, removing anti-competitive contract terms (*i.e.*, non-compete clauses and restrictive covenants), granting non-discriminatory access rights to networks, or supporting the removal or reduction of quotas, tariffs or other regulatory/industry impediments. The Bureau's guidance indicates that it will only accept quasi-structural remedies if, once fully implemented, they adequately eliminate the substantial lessening or prevention of competition arising from the merger in the relevant market without the need for future intervention or monitoring.

5.10 Can a decision on merger clearance be appealed?

Where the Bureau is of the opinion that a merger will, or is likely to, result in substantial lessening or prevention of competition in a market in Canada, the Commissioner may apply to the Tribunal seeking an injunction or a remedial order. There is a statutory right to appeal orders issued by the Tribunal to the FCA on questions of law and of mixed fact and law. Orders may also be appealed by leave of the FCA on questions of fact alone. An appeal from a decision of the FCA may be made, with leave, to the Supreme Court of Canada.

As a practical matter, an appeal from a decision of the Tribunal will likely be a long process. It may take several months, or a year or more, from the date of an initial Tribunal judgment. A subsequent appeal to the Supreme Court of Canada would be expected to take a similar length of time, if not longer.

5.11 What is the time limit for any appeal?

An interlocutory ruling by the Tribunal can be appealed within 10 days. Any other decision by the Tribunal must be appealed to the FCA within 30 days of the order (not including any days in July and August, during which time the FCA is in summer recess).

5.12 Is there a time limit for enforcement of merger control legislation?

The Commissioner may review and challenge any merger that may give rise to a substantial lessening or prevention of competition in a market in Canada for up to one year after closing, unless an ARC has been issued.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Bureau regularly cooperates with regulatory authorities in other jurisdictions for merger investigations involving international transactions. The Bureau takes the position that cooperation with other jurisdictions, including information sharing, is undertaken for the purpose of the administration and enforcement of the Act. As such, the Bureau takes the position that it does not require a waiver from the parties to share information with its foreign counterparts and, in the context of international merger reviews, such information-sharing is common.

In September 2020, the Bureau entered into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities alongside its foreign counterparts from Canada's "Five Eyes" partners (the United States Department of Justice, the United States Federal Trade Commission, the Australia Competition and Consumer Commission, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority). The competition enforcement framework is intended to improve the parties' ability to cooperate with one another in respect of international mergers.

In March 2021, the Bureau announced that it had joined a multilateral working group to analyse pharmaceutical mergers.

The working group includes the European Commission Directorate General for Competition, the United Kingdom Competition and Markets Authority, the United States Department of Justice, and the United States Offices of State Attorneys General. The working group will examine a variety of issues related to mergers in the pharmaceutical sector, including potential updates and expansion of current theories of harm, the evaluation of the full range of effects of a merger on innovation, and potential remedies to resolve emerging concerns.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

From April 1, 2022 to March 31, 2023, the Bureau completed a total of 212 merger reviews, including the issuance of 183 positive clearance letters. During this period, seven mergers were concluded by way of registered consent agreement memorialising competition remedies: *Neighbourly Pharmacy/Rubicon*; *Pembina/KKR/KAPS*; *Parkland/Federated Co-Operatives/Husky*; *Couche-Tard/Wilsons*; *Domtar/Resolute*; *Sika/MBCC*; and *Superior/Certarus*.

The Bureau has since concluded one additional review by way of registered consent agreement: *Shell/Sobeys*. Also, during this period, the Bureau lost its challenge of the *Rogers/Shaw* merger and won its challenge of the *Secure/Tervita* merger before the Tribunal (Secure's appeal of this decision was dismissed by the FCA).

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

In November 2022, the federal Minister of Innovation, Science and Industry began a public consultation on the future of competition policy in Canada. In connection with the consultation the federal government released a discussion paper titled "The Future of Competition Policy in Canada" which signalled that the government may be interested in making the following changes to the Canadian merger control regime: (i) revising the pre-merger notification thresholds to capture more "mergers of interest", including acquisitions of nascent companies; (ii) extending the limitation period after closing, during which the Commissioner may bring a challenge to the Tribunal for mergers (currently one year); (iii) introducing a voluntary notification mechanism for non-notifiable mergers; (iv) easing the conditions that the Commissioner must meet to obtain an injunction to prevent a merger from closing; (v) amending or revoking the efficiencies defence; and (vi) revising the "substantial lessening or prevention of competition" standard for a merger remedy. The period for public submissions to the consultation closed in March 2023. The government has not released any conclusions from the consultation or proposed any amendments to the Act as of the time of writing.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as at August 11, 2023.

7 Is Merger Control Fit for Digital Services & Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

Yes. On December 3, 2020, the Standing Committee on Industry, Science and Technology hosted a committee briefing attended by the Commissioner and other members of the Bureau. During the briefing, the Commissioner discussed the difficulties the Bureau faces with respect to administering and enforcing the Act in the digital economy, particularly in relation to "big tech" companies. The Bureau noted that the heightened complexity that accompanies investigations in the digital economy necessitates an increased need for resources. Outside organisations, such as the C.D. Howe Institute and the *Global Competition Review*, have also called on the Canadian government to increase the Bureau's resources to address these complexities. As noted in question 6.3, a speech by the Commissioner in October 2021 advocated for a comprehensive review of the Act, citing challenges with merger review timelines and Canada's broad efficiencies defence.

In October and November 2020, the Bureau hosted its first annual Digital Enforcement Summit, emphasising the Bureau's increased focus on competition in the digital age. The summit featured several panellists who discussed enforcement issues faced by competition agencies in the digital economy. At this summit, panellists acknowledged that the detection of anti-competitive activity has become an increasingly data-intensive process. On that basis, the panellists viewed the adoption of inter-disciplinary teams, which include data and behavioural scientists, as well as intelligence and IT analysts, as critical for enforcement agencies.

The discussion paper for the public consultation on the future of competition policy in Canada discussed in response to question 6.3 above included comments on the suitability of the current merger regime to address digital mergers. In particular, the discussion paper noted that incumbents in the digital economy may seek to acquire new and potentially innovative firms when they are at their early stages and will not trigger notification, so the merger notification thresholds may need to be changed in order to capture these mergers.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

In July 2019, the Commissioner appointed the Bureau's first Chief Digital Enforcement Officer. The Chief Digital Enforcement Officer assists the Bureau in monitoring the digital landscape, identifying and evaluating new investigative techniques and expanding the Bureau's digital intelligence gathering capabilities.

In February 2020, the Bureau released its *Strategic Vision for 2020–2024*, which outlines how the Bureau plans to carry out its mandate for this period. The publication is heavily focused on the digital economy and outlined actions that the Bureau would take to become a leading competition agency at the forefront of the digital economy. The *Strategic Vision for 2020–2024* includes a commitment to create a Digital Enforcement Office to provide specialised technological support for the Bureau's work. The *Strategic Vision for 2020–2024* places an emphasis on enforcement, rather than compliance through education and advocacy.

In July 2021, the Bureau announced that it has commenced a market study of Canada's healthcare sector in order to better understand existing or potential implications to innovation and choice, and possible opportunities for change, in digital healthcare. The study will enable the Bureau to better understand the competitive dynamics of the healthcare sector in order to make recommendations to decision-makers on how to support digital healthcare in Canada through pro-competitive rules.

On June 23, 2022, amendments to the Act came into force, including an expanded list of factors to be considered regarding a prevention or lessening of competition in order to capture factors that may arise in digital commerce. The new factors added include network effects within a market, whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents, and any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

In 2018, the Bureau reviewed a transaction, in which a large financial technology provider acquired a provider of accounts payable software that facilitates mass payouts to determine whether there could be anti-competitive effects from the proposed transaction. The Bureau particularly focused on the acquirer's digital payment platform, which it considered to be a multi-sided platform in that it facilitates both "pay-in" and "pay-out" transactions. The Bureau considered the level of cross-platform interdependence and how changes on one side of the transaction could affect demand on the other side of the platform. The Bureau ultimately issued a NAL for this transaction. However, the investigation highlighted the difficult analysis the Bureau is required to undertake with respect to digital mergers. Shortly after the Bureau concluded its review, three Bureau officers published an article on this transaction, discussing a possible framework for evaluating the competitive effects of mergers involving multi-sided platforms.

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