Blakes

A Guide for Getting
Your Deal Done in Canada

Toolkit for Merger Planning and Review

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Blakes Means Business

About Blakes

As one of Canada's top business law firms, Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. We focus on building long-term relationships with clients. We do this by providing unparalleled client service and the highest standard of legal advice, always informed by the business context.

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TOOLKIT FOR MERGER PLANNING AND REVIEW

Helping You Navigate the Complexities of Merger Review

Introduction

We have prepared this *Toolkit for Merger Planning and Review* (Toolkit) to help guide you through the merger review process in Canada. Many government agencies, including the Canadian Competition Bureau and Investment Canada, have the authority to review, challenge or block a merger. Effective navigation of the Canadian merger review process is essential to getting your deal done, and Blakes can help you along the way.

We begin by answering some of the most common questions about merger review, including whether a transaction must be reported to the Competition Bureau or Investment Canada before closing.

We then offer guidance on internal preparations your company should undertake, specifically looking at what to do before the deal is announced with respect to due diligence, deal negotiations and allocating risk through transaction structuring. The Toolkit then takes you through the formal filing process.

Finally, the Toolkit provides guidance on responding to information requests from the government and effective use of technology that can assist you in responding to such requests. We also present an overview of failing firm arguments that may assist in getting your deal through if certain criteria are met.

Blakes prides itself on delivering creative strategies that provide optimal solutions to meet our clients' business needs, and we do so on your timeline.

Navin Joneja
Group Co-Chair, Partner

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1.1 Merger Review: Commonly Asked Questions

Who reviews mergers in Canada?

The Commissioner of Competition (Commissioner) and staff at the Competition Bureau (Bureau) can review all mergers in Canada, regardless of whether the merger is notifiable. The federal Minister of Innovation, Science and Industry or the Minister of Canadian Heritage reviews certain mergers involving foreign investors, and the federal Minister of Transport reviews certain mergers involving transportation businesses. There may also be federal or provincial industry-specific regulators that could review mergers in specific industries, such as banking, telecommunications, broadcasting, defence and energy. This Toolkit is focused on the most common merger review process in Canada — the one the Bureau conducts and falls under Canada's foreign investment regime. Reviews the Minister of Transport or other industry-specific regulators undertake are outside the scope of this Toolkit.

When does a merger have to be notified to the Bureau?

Parties to mergers that exceed certain control and monetary thresholds cannot complete their transaction until they notify the Bureau and receive clearance either through the issuance of an advance ruling certificate (ARC) or expiry or waiver of the applicable waiting period. These thresholds are:

- The parties to the transaction, together with all of their affiliates, must have assets in Canada or gross revenues from sales in, from or into Canada in excess of C$400-million; and
- The book value of the assets in Canada that are acquired, or the gross revenues from sales in, from or into Canada for all of the assets/entities acquired, must exceed C$93-million (adjusted annually).

In addition, notification is required only where a transaction is structured in a manner captured by the *Competition Act* (e.g., a share or asset acquisition, an amalgamation, etc.). Where the structure of the transaction is not specifically captured, it is not notifiable. However, amendments introduced in 2022 included a new anti-avoidance rule to require notification where a transaction has been "designed to avoid" the notification requirement.

Are there any exemptions?

The notification rules can be technical, and there are exemptions. It is important to consult counsel to assess notification requirements, particularly in connection with joint ventures or acquisitions of real property.

What timelines are associated with merger reviews under the Competition Act?

There is a 30-day waiting period, starting from the date that the merging parties file notification forms with the Bureau, during which the transaction cannot close. If the Commissioner issues a supplementary information request (SIR), the waiting period is extended until 30 days after the merging parties have complied with the SIR. Once the applicable waiting period has expired, the parties may close the transaction unless an injunction is in place or there are other contractual conditions to be satisfied.

What is the typical time needed to complete a merger review under the Competition Act?

This will depend on the complexity of the issues raised by the merger. For example, during the Bureau's 2023-2024 fiscal year, the Bureau completed 190 merger reviews:

- 124 non-complex – average of nine days
- 66 complex – average of 36 days

If a merger is reviewed and SIRs are issued (eight such cases in 2023-2024), the review timeline is significantly increased.

What is the likelihood of the Bureau undertaking an in-depth review?

This depends on the competition concerns raised by the proposed transaction, which increase significantly in circumstances where the merging parties would have a combined market share of more than 30% in any relevant market after completion of the proposed transaction or where the rebuttable structural presumption for mergers is met.

The rebuttable structural presumption is met where the merger results in an increase in the "concentration index" (defined as the sum of the squares of the market shares of all market participants) of more than 100 and either (i) the post-merger concentration index is or is likely to be greater than 1,800 or (ii) the parties' combined share is or is likely to be greater than 30%. Where this presumption is met, the onus is on the merging parties to show, on a balance of probabilities, that the merger will not prevent or lessen competition substantially.

Where a transaction is likely to give rise to competition concerns, or where the rebuttable structural presumption is met, the Bureau is likely to issue a SIR.

What comfort can I receive that my merger will not be challenged by the Bureau?

If a transaction is notified to the Bureau, definitive clearance can be provided in one of two ways:

- An ARC precludes the Commissioner from making an application to the Competition Tribunal relating to the proposed transaction if closing occurs within one year of receipt. In practice, only the least complex cases receive an ARC.
- A no-action letter (NAL) indicates that the Commissioner does not, at that time, intend to make an application to the Competition Tribunal relating to the proposed transaction, though the Commissioner retains the discretion to do so for one-year post-closing. In practice, post-closing challenge of a merger that had received a NAL is rare.

If a transaction does not require a mandatory pre-merger notification, merging parties may still submit a request for an ARC seeking substantive comfort from the Bureau. Should the Bureau issue an ARC or a NAL, the parties would obtain the substantive comfort noted above. In addition, even if the Bureau did not issue either an ARC or a NAL, by requesting an ARC the merging parties would benefit from a shorter period during which the Bureau can challenge the merger: one year post-closing rather than three years.

Can the merger be blocked or restructured?

Yes. Under the *Competition Act*, the Commissioner may apply to the Competition Tribunal, which is a specialized competition law court, for an injunction blocking the closing of a merger if the Bureau requires additional time to complete its review or if the Commissioner intends to challenge the merger on the merits and believes that the merger would cause harm to competition in the interim while the challenge is ongoing. If the Commissioner brings an application for additional time or to block closing pending a challenge on the merits, there is an automatic bar to closing until the application is disposed of. The Tribunal can temporarily block or restructure a transaction pending a trial, or permanently block a transaction after a full trial. To issue a permanent remedy, the Tribunal must find that the merger would or would be likely to "prevent or lessen competition substantially" in one or more relevant markets. Where the rebuttable structural presumption for mergers has been met, the Tribunal shall find that the merger prevents or lessens competition substantially, unless the merging parties prove the contrary, on a balance of probabilities.

How does the Commissioner determine if a merger would be likely to prevent or lessen competition?

When assessing whether a merger would or would be likely to "prevent or lessen competition substantially," the Commissioner will consider several factors:

- The extent to which effective competition by foreign products or competitors exists
- Whether a business of a party to the merger has failed or is likely to fail
- The availability of acceptable substitutes for products supplied by the parties to the merger
- Any barriers to entering a market (existing or as a result of

the merger)

- The extent to which effective competition would remain in the market
- Whether the merger would result in the removal of a vigorous and effective competitor
- The nature and extent of change and innovation in a relevant market
- Network effects within a market
- Whether the merger would contribute to the entrenchment of the market position of leading incumbents
- Any effect on price or non-price competition, including quality, choice or consumer privacy
- Any change in concentration or market share that the merger or proposed merger has brought about or is likely to bring about
- Any likelihood that the merger or proposed merger will or would result in express or tacit coordination between competitors in a market
- Any other factor relevant to competition in an affected market

What are the filing fees?

The filing fee is currently C$86,358.76 (indexed annually).

What is the role of in-house counsel during the merger review process?

In-house counsel play a critical role during the merger review process in developing the legal strategy for getting a merger cleared, coordinating with the business teams to gather evidence relevant to a review, participating in meetings and calls with government agencies, and commenting on submissions and other advocacy documents.

Will my company's customers or suppliers be contacted?

Yes, notification filings to the Bureau require merging parties to provide names and contact information for their 20 most important customers and suppliers for each principal category of products. The Bureau will typically contact these customers and suppliers to determine whether they have any concerns about the proposed merger. Merging parties will often give their customers and suppliers a notice of likely calls from the Bureau.

Will my company's documents get subpoenaed?

Possibly. If deemed necessary, the Bureau can request voluntary productions, issue an SIR or seek a court order (Section 11 Order) requesting extensive volumes of documents, data and other information. This is done to determine whether a merger would or would be likely to prevent or lessen competition substantially. Blakes can assist parties in complying with these requests.

Will I need to make commitments as part of getting the deal done?

If the Commissioner identifies competition concerns in the course of reviewing a merger, they may request that the merging parties divest assets or enter into contractual commitments as a condition of granting clearance.

How can Blakes help?

We can assist you in all phases of merger review before all relevant government agencies. In the planning stages, we can evaluate the risk of a protracted review and potential requirements for divestitures or other remedies. In pre-signing, we can negotiate provisions in the transaction agreement allocating the regulatory risk between merging parties. We can prepare the required filings, draft submissions and advocate for the proposed transaction with the Bureau and any other relevant regulator. We can also assist with remedy negotiations if required or litigate at the Tribunal if the Bureau decides to oppose a transaction.

Get the big picture.

To request the complete Toolkit, email **hannah.campaigne@blakes.com**.