Blakes

A Guide for Getting
Your Deal Done in Canada

Toolkit for Merger Planning and Review

Sample

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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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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 the efficiencies defence and 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.

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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 target business, together with its subsidiaries, must have assets in Canada or gross revenues from sales in or from Canada generated from Canadian assets in excess of 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 2021–2022 fiscal year, the Bureau completed 252 merger reviews:

- 180 non-complex – average of nine days
- 57 complex – average of 38 days

If a merger is reviewed and SIRs are issued (nine such cases from 2021 to 2022), 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 35% in any relevant market after completion of the proposed transaction. In its 2021–2022 fiscal year, the Bureau issued SIRs in approximately 4% of the mergers it reviewed.

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.

Can the merger be blocked or restructured?

Yes. Under the *Competition Act*, the Competition Tribunal, which is a specialized competition law court, can block or restructure a transaction on a temporary basis pending a trial or on a permanent basis after a full trial. To issue a permanent remedy, the Tribunal has to find that the merger would or would be likely to "prevent or lessen competition substantially" in one or more relevant markets and that the efficiencies from the merger did not exceed the anti-competitive or negative effects.

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 the 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 other factor relevant to competition in an affected market

What are the filing fees?

The filing fee is currently C$82,719.12 (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.

Get the big picture.

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