

Antitrust in a Financial Crisis—A Canadian Perspective

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The global economic downturn has created new challenges for governments and regulatory authorities around the world. One important issue raised is the appropriate interplay between antitrust policy and macroeconomic recovery imperatives. That is, what role, if any, should be afforded to competition law and policy considerations in responding to the current crisis?

On the one hand, it could be argued that competition principles should be subordinated to macroeconomic imperatives and thus should not be applied to interfere with measures that are necessary for economic stability, even if such measures are inconsistent with promoting competition. On the other hand, it is possible to contemplate a more significant role for competition law and policy in shaping and perhaps even monitoring recovery initiatives (particularly where significant mergers or other economic initiatives are proposed). The approach taken to this apparent dichotomy can have significant implications, particularly (although not exclusively) for merger review.

To date, the approach to the financial crisis by antitrust agencies worldwide has been anything but uniform. Several agencies have addressed the issue head on. In Korea, for example, the Federal Trade Commission has announced that it will allow competitors to form temporary cartels to deal with the country's worst financial crisis in decades.¹ In the European Union, the European Commission has demanded an active role for itself both with respect to merger review and the review of state aid proposals.² In the UK, John Fingleton, head of the Office of Fair Trading (OFT), recently gave a speech in which he acknowledged that competition authorities will have to "display a degree of pragmatism in recognising times when other policy interests may over-ride competition policy," but warned against the wholesale abandonment of competition principles in dealing with the fallout of the economic downturn.³ These statements followed on the heels of the UK government's quick approval of the merger between Lloyds TSB and HBOS as being in the public interest, despite the OFT's concerns.⁴

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¹ H. Stephen Harris, Jr., Peter Wang & Shinya Watanabe, *China: Korea Considers Antitrust Exemptions for Certain Cartels to Assist Economic Recovery* (Jan. 16, 2009), available at <http://www.mondaq.com/article.asp?articleid=72396>.

² See Neelie Kroes, European Commissioner for Competition Policy, *The Role of State Aid in Tackling the Financial and Economic Crisis*, Introductory Remarks at Press Conference (Dec. 8, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/683&format=HTML&aged=0&language=EN&guiLanguage=en>; Neelie Kroes, European Commissioner for Competition Policy, *Dealing with the Current Financial crisis*, Speech to the Economic and Monetary Affairs Committee, European Parliament (Oct. 6, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/498&format=HTML&aged=0&language=EN&guiLanguage=en>.

³ John Fingleton, *Competition Policy in Troubled Times*, Speech at the Charles River Associates Conference (Jan. 20, 2009), available at http://www.of.gov.uk/shared_of/speeches/2009/spe0109.pdf.

⁴ See Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002 (Oct. 31, 2008), available at <http://www.berr.gov.uk/files/file48745.pdf>; see also *Lloyds TSB's HBOS Deal Is Cleared*, BBC News, Oct. 31, 2008, available at <http://news.bbc.co.uk/2/hi/business/7702809.stm>.

Other agencies have been less proactive in stating their intentions, the Canadian Competition Bureau among them. In part, that is because Canada has yet to see as many business failures or mergers precipitated by the financial crisis as may be the case in other jurisdictions. Nonetheless, the issue of the application of competition principles during this global slowdown is as relevant in Canada as it is elsewhere: Will the Bureau continue to operate in a “business as usual” fashion or will it adjust its enforcement standards in order to accommodate broader economic concerns that may be inconsistent with the strict application of competition law? As discussed below, this issue is of particular relevance for merger review under Canada’s Competition Act.⁵ It also has implications for the government’s review of acquisitions by non-Canadians under the Investment Canada Act.⁶

Implications for Merger Review Under the Competition Act

Pursuant to recent amendments to the Competition Act’s merger review process, transactions that exceed certain financial thresholds and, in the case of share acquisitions, that exceed an additional voting interest threshold, cannot be completed before the expiration of a statutory waiting period of thirty days.⁷ Before that thirty-day period expires, the Competition Bureau may issue a “second request” for information, in which case the proposed transaction may not be completed until thirty days after the requested information is provided to the Bureau.⁸ The statutory test that the Bureau applies in reviewing transactions is whether the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market.⁹ If the Bureau decides to challenge a merger, and an agreement with the parties as to an appropriate remedy cannot be reached, the matter is referred to the Competition Tribunal for a hearing.

Role of Public Interest Considerations. As a general matter, there is no formal role for extrinsic, non-competition considerations in the Competition Bureau’s merger review process. The Bureau also prides itself on its independence and imperviousness to political pressure.

⁵ Competition Act, R.S.C., ch. C-34 (1985).

⁶ Investment Canada Act, R.S.C., ch. 28 (Supp. I 1985).

⁷ Bill C-10, Budget Implementation Act, 2009, 2d Sess., 40th Parl., 2009, § 439 (Can.). The purpose of these amendments is to more closely align the Canadian merger review process with that in the United States. Under the prior Canadian merger review regime, transactions could not be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing the prescribed information. The duration of the statutory waiting period depended on whether the acquirer elected to make a short form filing (14-day waiting period) or a long form filing (42-day waiting period). The Competition Bureau’s substantive review of transactions, however, ran on a different non-statutory timetable, based on the complexity of the transaction. According to the Bureau’s non-binding “service standard” periods, it aimed to complete its substantive review of “non-complex” transactions within two weeks; of “complex” transactions within ten weeks; and of “very complex” transactions within five months. COMPETITION BUREAU, FEE AND SERVICE STANDARDS HANDBOOK (Dec. 2003), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/ct02530e_a.pdf/\\$FILE/ct02530e_a.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/ct02530e_a.pdf/$FILE/ct02530e_a.pdf) [hereinafter *Fee and Service Standards Handbook*]. According to Draft Merger Regulations recently issued, the Bureau will “continue to make every effort to provide a response to merger notifications within the current 14-day service standard period for non-complex transactions and anticipates that the vast majority of mergers will continue to be cleared within a 30-day period.” Competition Bureau, Canada, Draft Enforcement Guidelines on the Revised Merger Review Process (Mar. 24, 2009), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02986.html>.

⁸ Bill C-10, *supra* note 7, § 439. Concerns have been raised about the adoption of a “second request” process in Canada. See, e.g., Letter from the Canadian Bar Association to Ron Parker, Senior Assistant Deputy Minister, Industry Canada (Feb. 3, 2009), available at <http://www.cba.org/cba/submissions/pdf/09-04-eng.pdf>. The Canadian Bar Association letter notes that the “second request” process amounts to a “substantial tax on merger activity,” imposing a lengthy and expensive review process on merging parties, and questions the wisdom of such an amendment, particularly in light of the current economic climate.

⁹ Competition Bureau, Merger Enforcement Guidelines, Part 2 (Sept. 1, 2004), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html>.

Nonetheless, there are two key industries where parallel “public interest” reviews are required in addition to the standard merger review process, i.e., banking and transportation. In both of these areas, one can envision a scenario where public-interest considerations could trump any antitrust analysis and thereby allow otherwise anticompetitive mergers to be approved.

BANK MERGERS. The question of the appropriate interaction between antitrust policy and other public interest considerations likely would be front and center in any merger between major Canadian financial institutions proposed as a result of the global economic crisis.

In the case of mergers between banks (as well as mergers between certain other financial institutions), the Competition Bureau’s review is clearly subordinate to the ultimate decision-making authority of the federal Minister of Finance. The Minister of Finance’s authority to override competition issues is incorporated in section 94(b) of the Competition Act, which specifically provides that a bank merger cannot be blocked, regardless of its effect on competition, if the Minister certifies that it is “in the public interest.” Alternatively, the Minister of Finance also has the ability to block a merger that is not in the public interest even if it does not raise competition concerns (or if those concerns could be resolved).

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In 1998, the Minister of Finance’s power was exercised when two proposed mergers between four of Canada’s five leading banks (that would have seen their overall numbers reduced to three) were vetoed. At the time, the banks took the position that it was necessary for them to become larger in order to compete more efficiently internationally and in Canada. Specifically, the large banks contended that larger foreign institutions had significant cost advantages and that these foreign financial institutions, as well as those using electronic technology to deliver financial services, were becoming an increasing threat to the competitiveness of Canadian financial institutions. The merging banks also contended that significant cost savings and efficiencies would arise out of the proposed mergers.

While the Competition Bureau independently reviewed the proposed mergers and issued letters to the parties indicating several areas of concern,¹⁰ the Minister of Finance at that time, Paul Martin, placed a particular emphasis on broader competition and prudential policy concerns in his decision to disallow the proposed mergers.¹¹ In particular, he referred to the need for Canadian businesses and consumers to have sufficient choice and access to a variety of lending facilities, access which he felt could be compromised if the financial sector were allowed to consolidate further. In what now appears to be an almost prescient statement, Martin expressed the following concern: “If circumstances were to lead to large dominant institutions having to restrain lending, the resulting withdrawal of bank credit could lead to a ‘credit crunch,’ with adverse consequences on the economy as a whole.”

As a result of Minister Martin’s decision, the 1998 mergers were abandoned. Indeed, he imposed a temporary moratorium on major bank mergers, stating that the government would not consider any merger among major banks until a “new policy framework” to assess large bank

¹⁰ Specifically, the Bureau performed a detailed analysis of the areas of overlap between the merging parties and concluded that the proposed mergers would “lead to a substantial lessening or prevention of competition that would cause higher prices and lower levels of service and choice for several key banking services in Canada.” See Letter from the Competition Bureau to the Royal Bank and the Bank of Montreal (Dec. 11, 1998), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01612.html>; Letter from the Competition Bureau to the CIBC and TD Bank (Dec. 11, 1998), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01601.html>.

¹¹ Statement by the Honourable Paul Martin, Minister of Finance, on the Bank Merger Proposals (Dec. 14, 1998), available at <http://www.collectionscanada.gc.ca/webarchives/20071122063125/http://www.fin.gc.ca/news98/98-124e.html>.

mergers was in place.¹² Even then, Martin explained, merging parties would have to “demonstrate, in the light of the circumstances of the day, that [the proposed mergers] do not unduly concentrate economic power, significantly reduce competition or restrict our flexibility to address prudential concerns.”¹³

The policy framework referred to by Minister Martin took a number of years to develop and, in fact, has never been formally finalized. In June 2000, the government released guidelines setting out a merger review process for any proposed merger of banks with equity of more than CDN \$5 billion (large banks). In February 2001, Minister Martin released revised guidelines that clarified that the Standing Senate Committee on Banking, Trade and Commerce, in addition to the Standing House Committee on Finance, would be asked to review the public interest impact assessments and hold public hearings on proposed bank mergers. In October 2002, following a request from stakeholders for clarification of the public interest tests, then-Minister of Finance John Manley asked the two Committees for their views on the considerations that should apply in determining whether major bank mergers were in the public interest. In June 2003, the Department of Finance released its response to the recommendations of the House of Commons Standing Committee on Finance and the Standing Senate Committee on Banking, Trade and Commerce on the public interest considerations in reviewing merger proposals between large banks.¹⁴ The response laid out a set of suggested public interest considerations for large bank mergers.¹⁵ The criteria were initially intended to be subject to public commentary and further refined or developed based on responses received.¹⁶ However, a revised set of guidelines was delayed on a number of occasions and a “finalized” set of criteria or revised guidelines on large bank mergers has not yet been issued.¹⁷

Based on the 2003 government response, the criteria that the Minister would consider in assessing the “public interest” under the foregoing process are: (1) access to financial services by Canadian consumers; (2) continued access to sufficient choice by Canadian consumers; (3) impact of the merger upon international competitiveness and long-term growth prospects for the merging parties; (4) contribution of the merger to the “deepening and broadening” of Canadian

¹² *Id.* That said, the Minister did approve the merger of TD and Canada Trust in January 2000, even though the requisite policy framework was not in place at that time. Press Release, Dep’t of Finance, Federal Government Approves Acquisition of Canada Trust by The Toronto-Dominion Bank (Jan. 31, 2000), available at <http://www.collectionscanada.gc.ca/webarchives/20071122055018/http://www.fin.gc.ca/news00/00-006e.html>.

¹³ Statement by the Honourable Paul Martin, *supra* note 11.

¹⁴ DEPARTMENT OF FINANCE, RESPONSE OF THE GOVERNMENT TO LARGE BANK MERGERS IN CANADA: SAFEGUARDING THE PUBLIC INTEREST FOR CANADIANS AND CANADIAN BUSINESSES AND COMPETITION IN THE PUBLIC INTEREST: LARGE BANK MERGERS IN CANADA 5–12 (Jun. 23, 2003), available at http://www.fin.gc.ca/activty/pubs/mergers_e.pdf. No separate guidelines have been released for mergers involving banks with less than CDN \$5 billion in equity. Accordingly, it is unknown whether mergers involving these “smaller” banks would be subject to the same “public interest” review process and criteria as “large banks.”

¹⁵ *Id.*

¹⁶ In a press release announcing the government’s response, Minister Manley stated that the government would accept comments on its approach until December 31, 2003, and would release its policies on these issues and revised merger review guidelines by June 2004. In this same press release, Minister Manley also stated that the government would not accept or consider mergers involving large banks until after the revised guidelines had been released and a three month transition period had expired. See Press Release, Dep’t of Finance, Minister Manley Releases Response to Commons and Senate Committee Reports on Bank Mergers and the Public Interest (Jun. 23, 2003), available at <http://www.collectionscanada.gc.ca/webarchives/20071120132726/http://www.fin.gc.ca/news03/03-031e.html>.

¹⁷ After a number of delays, in September 2005, then-Minister of Finance Ralph Goodale issued a press release stating that it was not an appropriate time to bring forward revised guidelines on large bank mergers. See Statement by the Minister of Finance on Guidelines for Large Bank Mergers (Sept. 26, 2005), available at http://www.fin.gc.ca/n05/05-061_2-eng.asp.

capital markets; and (5) transition of employees displaced by the merger.

Certain of these criteria, such as the impact of the merger upon the overall competitiveness of the merging entities, are clearly aligned with the goals of any antitrust assessment. However, other public interest considerations, such as the impact of the merger upon employees and access to financial services, would clearly diverge from Canadian antitrust law goals. Canadian antitrust law purposely disregards the impact of mergers upon employment levels, and, furthermore, shutting down branches may be part of the merging parties' plan to achieve significant efficiencies.

Another example of the tension between public interest and antitrust goals could be seen where a merger of two large banks were proposed to ensure the ongoing stability of Canada's financial sector, or the overall economy. Although ensuring the stability of the economy does not fit squarely within any of the listed criteria, presumably it would nonetheless qualify a merger as being in the "public interest." Here, the tension between public interest and antitrust considerations and, indeed, differing public interest considerations is especially acute given the previously expressed concerns regarding the negative impact of increased concentration upon consumer choice and access to financial services.

While there has been continued debate about whether major bank mergers might or should be approved, there has been little political momentum to raise the issue of large bank mergers anew.¹⁸ Despite the fact that Canada's banks are currently heralded as some of the world's most stable financial institutions, it is clear that the full scope of the current financial crisis is still unknown. Furthermore, there have been repeated calls for Canada's banks to be allowed to merge to realize significant economies of scale.¹⁹ These facts, together with the consolidation that is rapidly occurring in other jurisdictions, suggest it is within the realm of possibility that two or more of Canada's leading banks will again float the possibility of a merger. A major merger in this area could crystallize the potential conflict between competition and other public interest considerations.

TRANSPORTATION SECTOR MERGERS. Public interest considerations are also part of the review of certain mergers in the transportation industry. In June 2007, the Canada Transportation Act (CTA) was amended to allow the federal Minister of Transport to review mergers "involving trans-

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¹⁸ See, e.g., Jeffrey S. Graham, *Did Paul Martin Really Ban Bank Mergers?*, FIN. POST, Jul. 22, 2008, available at <http://network.nationalpost.com/np/blogs/fpcomment/archive/2008/07/22/what-bank-ban.aspx>; *Lift Canada bank, insurance merger limits: Manulife*, EDMONTON J., Jan. 28, 2008, available at <http://www2.canada.com/edmontonjournal/news/business/story.html?id=2ebd7c67-bca4-4034-8279-9d46bbb8fd1a&k=95054>.

¹⁹ In June 2008, a panel assembled by the federal government to conduct an independent review of Canada's competition policy and legislation recommended that the de facto prohibition on bank mergers be lifted. The reason cited was the need for Canada's banks to become more competitive in the global arena. COMPETITION POLICY REVIEW PANEL, *COMPETE TO WIN: FINAL REPORT 50-52* (June 2008), available at [http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf). On the other hand, some individuals (most notably Canada's former Prime Minister, Jean Chrétien) have credited the relative strength and stability of Canada's financial institutions to the moratorium on bank mergers. See Sinclair Stewart, *Lucky or Prescient? Chrétien Takes Credit for Stronger Banks*, GLOBE & MAIL, Oct. 8, 2008, available at <http://business.theglobeandmail.com/servlet/story/RTGAM.20081008.wrbankschretien08/BNStory/Business>. Supporters of the moratorium argue that this decision prevented Canadian institutions from playing a more significant international role and, consequently, becoming more intertwined with their international peers. This relative independence, it is argued, decreased the exposure of Canadian financial institutions to the U.S. sub-prime mortgage meltdown. *Id.*

portation undertakings” that fall under federal jurisdiction.²⁰ Pursuant to the amended CTA, any such mergers that are subject to the Competition Act’s merger notification requirements must also be notified to the Minister of Transport, who will determine whether the proposed transaction should be subject to review on public interest grounds (i.e., whether it affects the public interest as it relates to national transportation). The Competition Bureau will report to the Minister any concerns it has regarding any potential prevention or lessening of competition that may occur as a result of the transaction. Ultimate approval, however, rests with the federal Cabinet, acting on the Minister of Transport’s advice, including with respect to public interest considerations.

The Minister of Transport released draft guidelines in July 2008, which set out a list of public interest factors relevant to determining whether a proposed transaction raises public interest issues relating to national transportation.²¹ These include economic (e.g., the transaction’s impact on prices and employment), social (e.g., the transaction’s impact on low-income workers and Canadian sovereignty), environmental, security, and safety factors. Many of the economic factors overlap with the Competition Act (e.g., impact on prices, service quality, and Canadian competitiveness). However, the draft guidelines do not clarify whether the Minister of Transport will refrain from reviewing a proposed merger where it raises only public interest issues that relate to competition.²²

As with bank mergers, the public interest review process under the CTA opens the possibility that the Minister of Transport may recommend approval for mergers even if they raise competition issues. This authority may turn out to be of particular importance in the current economic downturn. In gauging potential attitudes in this regard, it is worth noting that when Canadian Airlines initially sought to acquire Air Canada in 1999, section 47 of the CTA, which allows the federal Cabinet to address extraordinary disruptions to the national transportation system, was invoked by the Cabinet to suspend application of the Competition Act for ninety days.²³

Exceptions/Defenses.

FAILING FIRM. While there may not be a “public interest” override for most industries, Canadian competition law itself incorporates other forms of exceptions or defenses that may be relevant in difficult economic times.

²⁰ The predecessor to the CTA, the National Transportation Act, 1987, also contained a public interest review provision, requiring the then-National Transportation Agency to review the acquisition of a transportation undertaking if any person objected to it. National Transportation Act, R.S.C., ch. 28 (Supp. III 1985), §§ 251–58. When the National Transportation Act, 1987 was replaced by the CTA in 1996, the public interest review provisions were omitted. Canada Transportation Act, 1996 S.C., ch. 10 (Can.). Following Air Canada’s acquisition of Canadian Airlines in 1999, the CTA was amended to allow public interest review of mergers involving “air transportation undertakings.” S.C. 2000, c. 15, § 2 (Can.). The 2007 amendments extend this review process to all mergers involving federally regulated transportation undertakings. S.C. 2007, c. 19, § 13 (Can.).

²¹ See Transport Canada, Guidelines for Mergers & Acquisitions Involving Transportation Undertakings (June 2008), available at <http://www.tc.gc.ca/pol/en/acg/acgb/mergers/guidelines-draft.htm>.

²² See *id.* While there have been a number of mergers “involving transportation undertakings,” we are not aware of any transaction to date having been subjected to a full public interest review under the CTA, let alone having been turned down or re-structured because of these concerns.

²³ Konrad von Finckenstein, Commissioner of Competition, Opening Remarks, Press Conference Regarding the Restructuring of Canada’s Airline Industry (Dec. 19, 1999), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00901.html>. The section was invoked to allow parties to discuss and consider restructuring options for the airline industry. Although the initial proposal for Canadian to acquire Air Canada did not succeed, as discussed in greater detail below, Air Canada’s acquisition of Canadian was later reviewed (once the ninety-day period had expired) and ultimately cleared by the Competition Bureau. See also, Letter from Konrad von Finckenstein to David Collette (Oct. 22, 1999), <http://strategis.ic.gc.ca/pics/ct/coll-e.pdf>.

For example, one potential argument of obvious relevance is set out in section 92 of the Competition Act, which provides that it is appropriate to consider whether the target of a merger “has failed or is likely to fail” when assessing a transaction’s effect on competition. In other words, if it is likely that the target of a merger will exit the market even in the absence of the merger (due to extreme financial difficulties), any reduction in competition as a result of the “failing firm’s” acquisition is not attributed to the merger.

According to the Bureau’s Merger Enforcement Guidelines, a firm will be considered to be “failing” for these purposes if: (1) it is insolvent or is likely to become insolvent; (2) it has initiated or is likely to initiate voluntary bankruptcy proceedings; or (3) it has been or is likely to be petitioned into bankruptcy or receivership. The Competition Bureau will typically require financial information from the firm (such as projected cash flows and credit information) to support its claims that it is failing or is likely to fail.²⁴

Before the Competition Bureau accepts a failing firm argument, it also will consider whether any preferable alternatives to the merger exist and are likely to result in a materially greater level of competition. In particular, the Bureau will consider whether there are any “competitively preferable purchasers” that are willing to pay a price for the failing firm that, net of transaction costs, is greater than the net proceeds that would be received in a liquidation. A purchaser is considered “competitively preferable” if an acquisition by it would be likely to result in a materially higher level of competition in a substantial part of the market. In assessing the availability of competitively preferable purchasers, the Bureau must be satisfied that a thorough search has been conducted (referred to as a “shop” of the failing firm). If not, the Bureau will require an independent third party (such as an investment dealer, trustee, or broker) to conduct the shop.²⁵

The Competition Bureau also will consider whether the retrenchment or restructuring of the failing firm (e.g., restructuring with more focused or narrower operations) or liquidation would lead to a materially greater level of competition than if the proposed merger proceeds. For example, liquidation may facilitate entry or expansion in certain cases by enabling (potential) competitors to compete for the failing firm’s assets to a greater degree than if that firm merged with another.

The “failing firm” criteria are quite onerous on their face. However, it remains to be seen whether, given the significant time pressures to clear such transactions, the Competition Bureau will show greater flexibility in the current environment, particularly with respect to the “shop” requirement.²⁶

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²⁴ Merger Enforcement Guidelines, *supra* note 9, at 38–41.

²⁵ *Id.* The U.S. Merger Guidelines contain a similar failing firm defense. Dep’t of Justice and Fed. Trade Comm’n, Horizontal Merger Guidelines (1992, revised 1997), available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html. Specifically, Part 5.1 states:

A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.

²⁶ It may be noted in this regard that the OFT recently published a restatement of its position regarding acquisitions of failing firms in order to ensure that businesses in financial difficulty because of the current economic downturn understand their options and how the OFT will assess acquisitions of failing firms. The OFT also stated that it will take into account prevailing economic and market conditions when assessing the merging parties’ evidence with respect to issues such as the likelihood of exit and the realistic availability of alternative purchasers. The OFT also expressed its willingness to allow “meritorious ‘failing firm’ cases . . . to proceed relatively swiftly through clearance . . .” See Office of Fair Trading, Restatement of OFT’s Position Regarding Acquisitions of ‘Failing Firms’ (Dec. 2008), available at http://www.of.gov.uk/shared_of/business_leaflets/general/of1047.pdf.

There is some precedent to indicate that the Bureau will follow an expedited process when confronted with exigent circumstances. For example, in 1999 the Bureau relied on failing firm grounds when it decided not to challenge Air Canada's acquisition of Canadian Airlines (which was in dire economic straits at the time), notwithstanding that the merged airline would account for 90 percent of domestic passenger revenues. Following only a month-long formal review under the prior merger review process, which was much shorter than normal for mergers raising "complex issues,"²⁷ the Bureau determined that there was not likely to be a competitively preferable purchaser and that the acquisition as proposed (which included a set of significant undertakings for the acquirer) was preferable to the liquidation of Canadian Airlines.²⁸

EFFICIENCIES. In addition to the "failing firm" argument, Canadian competition law explicitly provides for an "efficiency defense," which allows anticompetitive mergers to be cleared if they are likely to generate gains in efficiency that "will be greater than, and will offset the effects of any prevention or lessening of competition" and if they would not likely be attained in the absence of the merger.²⁹ The Competition Bureau does not take efficiencies into account as part of its competitive assessment of a transaction. Instead the defense is considered separately after the competitive assessment.³⁰ This differs from other jurisdictions, such as the United States, where efficiency gains form part of the calculus of whether a transaction is likely to lessen competition.

The Competition Act's efficiencies defense has not been relied upon very frequently. The only case to have successfully invoked the defense, *Superior Propane*, was litigated extensively.³¹ The major issues in *Superior Propane* focused on which cost savings were efficiency gains and which were not; how deadweight losses to producers should be addressed; and, perhaps most controversially, how wealth transfers (that are neither gains nor losses) from consumers to producers should affect the analysis.

Given the current economic climate, and the likely consolidation that will result, it can be expected that parties will seek to increase their reliance on the efficiencies defense in appropri-

²⁷ The parties' merger pre-notification filing was made on November 19, 1999, and approved on December 21, 1999. See Letter from the Commissioner of Competition to Lawson A.W. Hunter (Dec. 21, 1999), Proposed Acquisition by Air Canada and 853350 Alberta Ltd. (the "Offeror") of Canadian Airlines Corporation, available at <http://strategis.ic.gc.ca/pics/ct/ac2199e.pdf>. As noted previously, under the prior merger review regime, the Bureau aimed to complete its substantive review of "complex" transactions within ten weeks (and of "very complex" transactions within five months). See *Fee and Service Standards Handbook*, *supra* note 7.

²⁸ See Letter from the Commissioner of Competition to Lawson A.W. Hunter (Dec. 21, 1999), available at <http://strategis.ic.gc.ca/pics/ct/ac2199e.pdf>. There are only a few additional examples on the public record of mergers being approved on failing firm grounds. See News Release, Director of Investigation and Research, CCAC No. 189 10234 E 89-04, Information Document on the Proposed Acquisition of Wardair Inc. by PWA Corporation (Apr. 14, 1989) (on file with author); COMPETITION BUREAU, ANNUAL REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH FOR THE YEAR ENDED MARCH 31, 1989, at 14 (on file with author) (discussing the acquisition of substantially all the assets of Noranda Metal Industries Ltd. by Wolverine Tube (Canada) Inc.).

²⁹ Competition Act, R.S.C., ch. C-34 (1985).

³⁰ The Bureau's approach has been criticized by the Canadian Bar Association, among others. The Association believes that consideration of efficiencies should not be foreclosed at the competitive assessment stage. See Canadian Bar Ass'n, Submission on Draft Bulletin on Efficiencies in Merger Review 3 (Sept. 2008), available at http://www.cba.org/CBA/sections_competition/pdf/bulletin.pdf.

³¹ The Competition Tribunal initially upheld the efficiencies defense and allowed the transaction in question to proceed. The Tribunal's decision was subsequently reversed by the Federal Court of Appeal, on the basis that the Tribunal had incorrectly applied the test and the matter was remanded to the Tribunal for re-determination. The Tribunal then re-confirmed its decision, using the test mandated by the Federal Court of Appeal. The Commissioner again appealed to the Federal Court of Appeal on the basis that the Tribunal had not followed the directions given by the Federal Court of Appeal in its first decision. The Commissioner's second appeal was dismissed. See *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 16 (2002), *aff'd*, 3 F.C. 529. See also *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185, *rev'g* 2000 Comp. Trib. 15 (2000), *leave to appeal to S.C.C. refused*, [2001] 2 S.C.R. xiii.

ate cases. Unfortunately, the exact scope of the defense, as well as the Bureau's approach to a number of critical factors, remains unclear.³² Recently, the Bureau issued an "information bulletin" on the efficiencies defense in an attempt to address these issues.³³ However, the general reaction is that the bulletin still does not provide sufficient clarification.³⁴

POST-CLOSING INTERVENTION. There are also several avenues in Canadian competition law whereby the Competition Bureau can bring proceedings following an acquisition, if necessary. These "safety valves" may give the Bureau the comfort it needs to allow a questionable merger to proceed, knowing that it could bring proceedings at a later stage if competition problems crystallize.

For example, section 97 of the Competition Act authorizes the Bureau to challenge a transaction up to one year following closing (recently decreased from three years following closing).³⁵ Although the Bureau has almost never sought to challenge a transaction post-closing³⁶—and it is clearly the Bureau's preference to deal with potential problems up front—difficult economic times may persuade the Bureau to rely on this option as a matter of practical expediency rather than seek to prevent a merger from closing.

More generally, the Competition Bureau also has the authority to bring applications against dominant parties for abuse of that dominant position.³⁷ While the Bureau has not brought an abuse of dominance case to the Competition Tribunal in over six years, it has in the past commenced proceedings in industries that have undergone significant restructuring. For instance, although Air Canada's acquisition of Canadian Airlines was allowed in 1999, the Competition Bureau subsequently brought an abuse of dominance case against Air Canada in 2000 for predatory pricing on certain routes.³⁸

Given the current economic climate, and the likely consolidation that will result, it can be expected that parties will seek to increase their reliance on the efficiencies defense in appropriate cases.

³² For instance, in its Bulletin on Efficiencies in Merger Review, the Bureau has stated that it will "generally follow the direction given by the Competition Tribunal in *Superior Propane* by applying the balancing weights standard when considering the trade-off analysis" required for application of the efficiencies defense. COMPETITION BUREAU, BULLETIN ON EFFICIENCIES IN MERGER REVIEW (Mar. 2, 2009), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00170.html. However, the Bureau has also stated that "a different approach to weighing efficiency gains against the anti-competitive effects may be appropriate in a specific case." Thus, it remains unclear what other approaches the Bureau would view as acceptable methods to complete this analysis. See Competition Bureau, Draft Bulletin on Efficiencies in Merger Review (Aug. 7, 2008), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Draft_Efficiencies_Bulletin_Eng.pdf/\\$FILE/Draft_Efficiencies_Bulletin_Eng.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Draft_Efficiencies_Bulletin_Eng.pdf/$FILE/Draft_Efficiencies_Bulletin_Eng.pdf).

³³ COMPETITION BUREAU, BULLETIN ON EFFICIENCIES IN MERGER REVIEW, *supra* note 32.

³⁴ See Canadian Bar Association, *supra* note 30. The Association's submission was made on the Competition Bureau's draft version of the Bulletin; however, the final Bulletin is substantially similar to the draft version and only addresses a limited number of the Association's concerns.

³⁵ The recent Competition Act amendments reduced this *ex post* review period from three years following closing to one year. Bill C-10, *supra* note 7, § 430.

³⁶ Circumstances in which this authority may be exercised include where the competitive environment has changed after the issuance of a "no-action" letter to the merging parties by the Bureau (or where the information in a no-action letter changes or is incorrect). See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1991] 38 C.P.R. 68 (Competition Trib.). Additionally, the Bureau must commence an inquiry upon an application by six persons resident in Canada under § 9(1) of the *Competition Act*, *supra* note 5. See Director of Investigation and Research, Annual Report of the Director of Investigation and Research for the Year Ended March 31, 1992 at 11 (Ottawa: Min. of Supp. and Svcs. Canada, 1989) (discussing the opening of an inquiry into the previously consummated acquisition of substantially all the assets of Noranda Metal Industries Ltd. by Wolverine Tube (Canada) Inc. Following its inquiry, the Bureau did not make any application to the Competition Tribunal.) It is also possible that the Bureau could exercise this authority where a merger had not been previously notified to the Bureau because it did not meet the notification thresholds.

³⁷ Competition Act, R.S.C., ch. C-34 (1985).

³⁸ *Canada (Commissioner of Competition) v. Air Canada*, [2003] 26 C.P.R. (4th) 476 (Comp. Trib.).

Implications for Review Under the *Investment Canada Act*

In addition to the Competition Bureau's merger review, it is appropriate to consider the possible impact of the economic crisis on merger review under the Investment Canada Act (ICA).

Foreign investors whose acquisitions of Canadian businesses are subject to review under the ICA must satisfy the Minister of Industry (or the Minister of Canadian Heritage in acquisitions of "cultural businesses") that the acquisition is likely to be of "net benefit to Canada."³⁹ Although transactions rarely have been refused approval under the ICA, foreign investors are usually obliged to provide binding undertakings to the responsible Minister in order to obtain approval. These can involve commitments to undertake capital expenditures, maintain employment levels and ensure Canadian participation in management of the business, among other things.

In terms of potential impact, the declining economy may make it difficult to require the same types of undertakings that have been demanded of foreign acquirers in the past to meet the "net benefit to Canada" test, such as maintaining jobs and investment expenditures in Canada. If the alternative is downsizing or bankruptcy, acquisitions of Canadian businesses in financial distress by foreign investors may be afforded more generous and flexible undertakings than could be negotiated in better economic times.⁴⁰

Additionally, it is very likely that the current economic situation will make it more difficult for acquirers to satisfy their obligations in existing undertakings. It would not be at all surprising, therefore, if there were a noticeable increase in the number of requests to renegotiate undertakings in light of the drastic changes to the economy.

Industry Canada, the government department responsible for foreign investment review, already recognizes that circumstances beyond the control of foreign investors may make it difficult to comply with undertakings. In this regard, procedural guidelines issued by Industry Canada note that "plans and undertakings are based to some extent on projected circumstances and the monitoring of an investor's performance will recognize this factor. Where inability to fulfill a commitment is clearly the result of factors beyond the control of the investor, the investor will not be held accountable."⁴¹ Even where the inability to perform an undertaking is the result of factors beyond the investor's control, the Minister may require the investor to provide new undertakings in place of the original undertakings. Indeed, the changes to the ICA specifically authorize the Minister to ask for new undertakings where the investor has failed to comply with its original undertakings.⁴²

³⁹ There are a variety of different thresholds that apply to determine if a transaction is reviewable under the ICA. Broadly speaking, most transactions that are reviewable involve direct acquisitions of businesses in Canada whose value exceeds the prescribed limit. According to the ICA provisions now in force, the most commonly applied threshold is CDN \$312 million, based on the book value of the business's assets in its most recent fiscal year. Pursuant to the amending legislation discussed above (Bill C-10), this review threshold will be increased to CDN \$600 million based on the "enterprise value" of the business, with the threshold to increase to CDN \$1 billion within five years of enactment and increases thereafter tied to a prescribed formula. See Industry Canada, *Investment Canada Act—Thresholds for Review*, available at http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html; Bill C-10, *supra* note 7, § 448. The increase will come into effect at a date to be determined by the federal Cabinet, which is expected to be sometime in summer 2009. The apparent objective of the increase in threshold is to make fewer foreign acquisitions subject to review. Unfortunately, guidance has yet to be provided with respect to the definition or calculation of "enterprise value." As such, the full implications of the increased threshold remain to be seen.

⁴⁰ An alternative view is that the responsible minister may seek to impose even tougher undertakings so as not to be accused of accelerating unemployment and the outflow of investment.

⁴¹ Industry Canada, *Guidelines—Administrative Procedures*, available at <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html>.

⁴² Bill C-10, *supra* note 7, § 461.

In addition to the “net benefit” test and its associated review process, the recent legislative amendments have introduced a new “national security” review process.⁴³ Under this process, the Minister of Industry may review any acquisition by a non-Canadian of an interest in a Canadian business (regardless of whether it would be otherwise reviewable under the ICA) where he has reasonable grounds to believe that the acquisition “could be injurious to national security.” If the Minister is satisfied that the acquisition could be injurious to national security, the federal Cabinet, on the recommendation of the Minister, then may refuse to allow the acquisition to proceed or may approve the acquisition conditionally, subject to undertakings by the foreign acquirer or terms imposed by Cabinet.

At this point, very little guidance has been provided with respect to the scope of the new “national security” review process. For instance, no definition of “national security” has been issued and the standard of review (“could be injurious to national security”) seems to place a great deal of discretion in the hands of government officials. Although government officials have indicated in conversations with the bar that the intention is to limit the circumstances in which the national security review process will be invoked, it is quite possible that pressures to protect Canadian businesses in the current economic climate will persuade the Canadian government to exercise this authority more robustly than originally intended.

Conclusion

The credit crunch and associated economic downturn have created new challenges for economic policy around the world. As governments struggle to fashion remedies to prime the global economic pump, they may also be tempted to ignore or downplay antitrust concerns in favor of mergers that offer a “fast fix.”

Canadian competition law already contains elements that could smooth the way for more lenient application. However, one also expects that if today’s resolutions truly raise significant antitrust issues (such as excessive concentration), then it will only be a matter of time before antitrust concerns (in one form or another) rise to the forefront again, albeit perhaps at odds with macroeconomic recovery imperatives.

Apart from the possible antitrust/macroeconomic trade-off and the specific merger review factors discussed in this article, the Canadian situation may be influenced by the fact that a new Commissioner of Competition will be appointed at some point in the next few months. Since the previous Commissioner was criticized for a lack of enforcement initiatives, absent other circumstances, it would be expected that the new Commissioner would face pressure to reverse this course and bring more proceedings. One possible indicator of the mindsets of the government and Competition Bureau is the fact that the government recently has passed significant amendments to the Competition Act that enhance the Bureau’s enforcement powers.⁴⁴ The passage of these amendments may suggest that there is no intention to relax enforcement standards even during these hard economic times. ●

⁴³ *Id.* § 453.

⁴⁴ Bill C-10, *supra* note 7. For example, apart from introducing the new (and arguably more enforcement friendly) merger review process, the amendments replace the existing conspiracy provisions in the Competition Act with a per se criminal offense for cartel-like agreements between competitors; increase the penalties for violations of the cartel prohibition; broaden the scope of the bid-rigging offense; grant the Competition Tribunal the power to order significant administrative monetary penalties for contravention of the abuse of dominance provisions of the Competition Act; and increase the penalties for various other offenses.