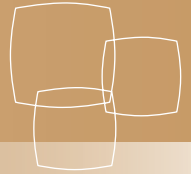




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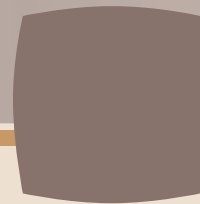
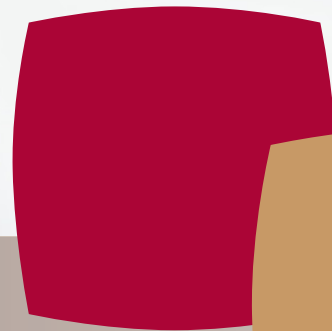
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Report



Merger Review Performance Report

April 2012



Canada 

This publication is not a legal document. It contains general information and is provided for convenience and guidance related to the Competition Bureau's *Fee and Service Standards Handbook and Policy*.

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Cat. No. lu54-30/2012E-PDF
ISBN 978-1-100-20574-8
60999

2012-04-12

Aussi offert en français sous le titre Rapport sur le rendement de l'examen des fusions — Avril 2012.

TABLE OF CONTENTS

- 1. INTRODUCTION..... 1
- 2. PUBLICATIONS 1
- 3. WORKLOAD & RESOURCES 5
- 4. MERGER REVIEW EXPENDITURES & REVENUES 9
- 5. COMPLEXITY & SERVICE STANDARDS 10
- 6. CONCLUSION 12
- 7. HOW TO CONTACT THE COMPETITION BUREAU 13



I. INTRODUCTION

The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the “Commissioner”), the Bureau is responsible for the administration and enforcement of the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. The basic operating assumption of the Bureau is that competition is good for both businesses and consumers.

Under the Act, mergers of all sizes and in all sectors of the economy are subject to review by the Commissioner to determine whether they will likely result in a substantial lessening or prevention of competition.

In general, mergers can be a means to increase competitiveness, allowing Canadians to benefit from lower prices, greater product choice and higher quality services. However, the Bureau pays close attention to the small portion of mergers that could substantially prevent or lessen competition in particular markets.

Performance Report

This *Merger Review Performance Report* (the “Report”) provides an update on the performance of the Bureau’s Mergers Branch since the last report published in May 2010 (the “2010 Report”). The Report will be discussed during the Merger Fee Forum in Toronto on April 13, 2012.



2. PUBLICATIONS

Since the 2010 Report, the Mergers Branch has published a large number of new and revised publications as part of an ongoing initiative to realign its processes, and to develop and revise its guidance documents to ensure the successful implementation of the 2009 amendments to the merger provisions of the Act and the *Notifiable Transactions Regulations* (the “Regulations”) (collectively, the “Amendments”). These publications, which are outlined below, provide stakeholders with improved transparency and predictability regarding the merger review process.

Merger Fee Policy, Merger Handbook & Procedures Guide

In October 2010, the Bureau simultaneously published updated versions of three key merger guidance documents:

Competition Bureau Fees and Service Standards Policy for Mergers and Merger-Related Matters (“*Merger Fee Policy*”)¹: The revised Merger Fee Policy sets out updated service

¹ [Competition Bureau Fees and Service Standards Policy for Mergers and Merger-Related Matters](#)

standards that are better aligned with the two-stage merger review process established by the Amendments. The fee charged for a pre-merger notification (“Notification”) filing and a request for an Advance Ruling Certificate (“ARCs”) remains unchanged since April 1, 2003. The Merger Fee Policy now provides that where a Notification is withdrawn and re-filed for the same proposed transaction, no additional filing fee will be required for a subsequent Notification provided certain conditions are satisfied.

*Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters (“Merger Handbook”)*²: The revised Merger Handbook and the Procedures Guide (below) incorporate changes required as a result of the Amendments and the updated Merger Fee Policy. These changes are also responsive to feedback solicited during consultations regarding fees and service standards, held during 2010. The Merger Handbook incorporates service standards that reflect greater consistency with the statutory waiting periods associated with the two-stage merger review process.

*Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act (“Procedures Guide”)*³: The revised Procedures Guide sets out updated policies and procedures relating to the submission, whether in paper form or electronically, of Notification and ARC request filings. In particular, procedures for submitting electronic and paper filings have been harmonized, such that electronic filings will only be received during business hours (9 a.m. to 5 p.m. Eastern Time) and any Notification or ARC request submitted after 5 p.m. Eastern Time will be acknowledged on the next business day.

Updated Guidance on Merger Review “No Action” Letters

In August 2011, the Bureau published revised standard language for a “no action” letter (“NAL”) issued by the Bureau. The revised language is better aligned with subsection 123(2) of the Act and more accurately reflects the distinction between the discretionary issuance of an ARC under section 102 of the Act, and a NAL. In circumstances where the Commissioner uses her discretion to issue a NAL with respect to proposed transactions entered into after September 1, 2011, the standard language will be as follows: “...the Commissioner does not, at this time, intend to make an application under section 92 in respect of the proposed transaction.”

Mergers Remedy Study Summary⁴

In August 2011, the Bureau published a summary of its study regarding the effectiveness of remedies obtained between 1995 and 2005 under the merger provisions of the Act (the “Study”). The summary outlines the Study’s key observations and findings while maintaining the confidentiality of information provided by Study participants. The results of the Study will

2 [Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters](#)

3 [Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act](#)

4 [Competition Bureau Merger Remedies Study Summary](#)

be used to update the Bureau's Information Bulletin on Merger Remedies in Canada that the Bureau expects to publish in the coming months.

Interpretation Guidelines⁵

Since the publication of the 2010 Report, the Bureau has published two interpretation guidelines ("IGs") regarding hostile transactions and one IG regarding Notification. At the time of publication, three additional Notification IGs regarding "Amendments to Transactions", "Assets in Canada" and "Duplication Between Affiliates" were in the process of being published for consultation. A third hostile transaction IG regarding subsection 114(2) of the Act and the issuance of a supplementary information request ("SIR") to a target company will also be published later in 2012.

Hostile Transactions Interpretation Guideline Number 1: Bureau Policy on Disclosure of Information: This IG addresses the Bureau's policy regarding the equitable disclosure of 'pertinent information' to both the bidder and target of a hostile transaction.

Hostile Transactions Interpretation Guideline Number 2: Bureau Policy on Running of Subsection 123(1) Waiting Periods: This IG addresses the commencement of statutory waiting periods in situations where a proposed transaction ceases to be an unsolicited bid within the initial 30-day waiting period; where a proposed transaction ceases to be an unsolicited bid after the issuance of a SIR, but prior to the bidder having certified completeness of its response to the SIR; and where a proposed transaction ceases to be an unsolicited bid within the second 30-day waiting period (i.e., following the receipt of certified complete responses from all parties subject to a SIR).

Pre-Merger Notification Interpretation Guideline Number 13: Satisfying the Information Requirements set out in Section 16 of the Notifiable Transactions Regulations and Completeness of Notification: This IG addresses various information requirements set out in section 16 of the Regulations that are often misinterpreted, and discusses how parties can best satisfy these requirements to avoid a determination by the Merger Notification Unit ("MNU") that their Notification is incomplete.

Merger Enforcement Guidelines ("MEGs")⁶

In October 2011, the Bureau published revised MEGs following extensive consultations with stakeholders across Canada in 2010 and 2011, as well as consultations with foreign competition agencies and a focused internal review. The MEGs have been revised to reflect current Bureau practice and current legal and economic thinking. The revised MEGs describe, to the extent possible, how the Bureau will approach its analysis of merger transactions.

5 [Hostile Transactions Interpretation Guidelines](#)
[Pre-Merger Notification Interpretation Guideline Number 13: Satisfying the Information Requirements set out in Section 16 of the Notifiable Transactions Regulations and Completeness of Notification](#)

6 [Merger Enforcement Guidelines](#)

Merger Review Process Guidelines (“MRPGs”)⁷

In January 2012, the Bureau published revised MRPGs that describe the Bureau’s general approach to administering the two-stage merger review process under the Act, which is applicable to proposed transactions that are the subject of a Notification filing. Since the first publication of the MRPGs in September 2009, the Bureau has benefited from considerable experience with the two-stage merger review process and has updated the guidelines to reflect current Bureau practices. The updated MRPGs provide stakeholders with, among other things, increased guidance on the SIR issuance process, including pre and post-issuance dialogue and the identification of custodians; sample SIR instructions; and the use of timing agreements.

Position Statements

In an effort to further enhance its communication and transparency with stakeholders, the Bureau will, where possible, publicly communicate the results of certain merger reviews by way of a Position Statement. A Position Statement briefly describes the Bureau’s analysis of a particular proposed merger and summarizes its main findings to provide transparency to the antitrust community and industry stakeholders.

In determining whether the review of a proposed transaction merits the publication of a Position Statement, the Bureau will consider a number of factors including: whether the review involved issues that were sufficiently important or complex; the level of interest in the case; and whether the review involved novel analytical tools, findings and/or outcomes. The Bureau is also guided by section 29 and subsection 10(3) of the Act during the selection, development and publication of a Position Statement.

In the period since the last Report was published, the Bureau has issued four Position Statements⁸:

- Transcontinental Inc. / Quad Graphics Canada Inc. (2012)
- Canadian Tire Corporation, Ltd. / The Forzani Group Ltd. (2011)
- XM Canada / Sirius Canada (2011)
- BCE Inc. / CTVglobemedia Inc. (2011)

7 [Merger Review Process Guidelines](#)

8 [Competition Bureau Statement Regarding Transcontinental’s Acquisition of Quad/Graphics Canada](#)
[Canadian Tire/Forzani Position Statement](#)
[XM Canada and Sirius Canada](#)
[Competition Bureau Statement Regarding BCE’s Acquisition of CTV](#)

Merger Register⁹

As part of the Bureau's transparency initiative, the Mergers Branch commenced publishing a monthly report of concluded merger reviews in March 2012 (the "Merger Register"). The Merger Register contains a list of merger reviews concluded in the previous month where a Notification filing was made under section 114 of the Act, and/or where a request was made for an ARC under section 102 of the Act, provided that the review has resulted in the issuance of an ARC, NAL, entry into a consent agreement or the issuance of a judicial decision. The monthly report provides the names of the parties to the transaction, the industry sector involved (using a NAICS code) and the outcome of the Bureau's review.



3. WORKLOAD AND RESOURCES

Figure 1: Caseload¹⁰ (Matters Commenced¹¹)

Fiscal Year		PMNs ¹²	ARCs	ARCs & PMNs	Total PMNs	Other	Total Matters	SIRs Issued
2011-12 (Q1-Q3) ¹³	#	6	121	31	37	16	174	5 ¹⁴
	%	3.45%	69.54%	17.82%	21.26%	9.20%	100.00%	2.87%
2010-11	#	5	181	32	37	18	236	5
	%	2.12%	76.69%	13.56%	15.68%	7.63%	100.00%	2.12%
2009-10	#	10	155	35	45	16	216	5
	%	4.63%	71.76%	16.20%	20.83%	7.41%	100.00%	2.31%
2008-09	#	12	161	34	46	32	239	n/a
	%	5.02%	67.36%	14.23%	19.25%	13.39%	100.00%	-
2007-08	#	15	234	59	74	29 ¹⁵	337	n/a
	%	4.45%	69.44%	17.51%	21.96%	8.61%	100.00%	-

9 [Monthly Report of Concluded Merger Reviews](#)

10 Totals include Notifications, ARCs and examinations commenced for other reasons (e.g., Investment Canada Notices, Heritage Canada Notices, complaints, or otherwise)("Other"), during the April 1 to March 31 period of each fiscal year (with the exception of the current fiscal year, which incorporates the period of April 1, 2011, to December 31, 2011).

11 "Matters commenced" refers to the opening of a file for the purposes of a merger review. Matters are commenced for Notifications, ARCs and Other examinations (or a combination of these "matter types").

12 Refers to a pre-merger notification ("PMN") filing.

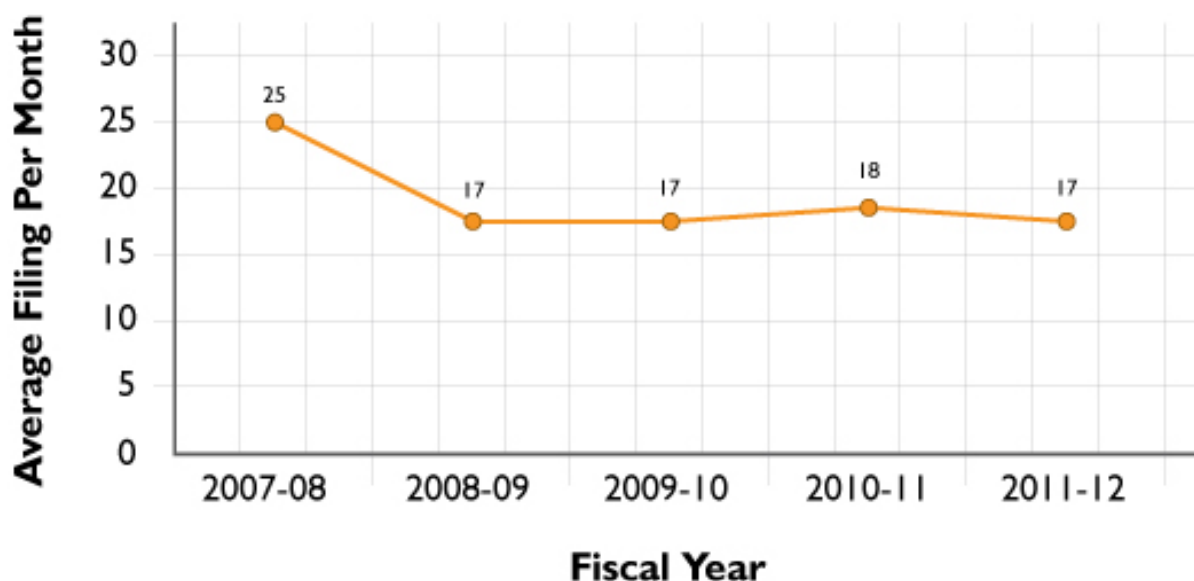
13 Complete statistics for FY2011-2012 were unavailable at the time of publication.

14 A total of 8 SIRs were issued during FY2011-2012.

15 This statistic has been amended since the 2010 Report. It was previously reported as 28 matters.

As is captured in Figure 1, the number of reviews commenced by the Bureau has dropped significantly since the beginning of the economic downturn in FY2008-2009. The decrease of nearly 100 matters between FY2007-2008 and FY2008-2009, represents the biggest decline in a single fiscal year since the introduction of filing fees in 1997; however, since the drop experienced in FY2007-2008, the number of merger reviews commenced has been relatively stable. A small decline in transactions was experienced in FY2009-2010, which was likely the result of the lingering impact of the economic downturn and the increase in the transaction-size threshold in March 2009 from \$50 million to \$70 million, following implementation of the Amendments. Final statistics for the current fiscal year (2011-2012) were unavailable at the time of publication. However, based on year-to-date statistics, average filings for Notifications and ARC requests appear to track the trend of 17-18 filings per month observed over the previous three fiscal years (see Figure 2 below).

Figure 2: Average Notification & ARC Request Filings per Month¹⁶



As was initially noted in the 2010 Report, the Bureau’s workload and resources have continued to be strained by a steady influx of highly complex transactions raising serious competition concerns. The Bureau’s workload resulting from these transactions is best demonstrated by examining the types of transactions requiring highly technical analysis, the number of SIRs issued, the number of matters requiring the negotiation of a consent agreement, and the number of litigated matters.

Complex Reviews – The Bureau has undertaken a significant number of highly complex reviews since the publication of the 2010 Report. These reviews, examples of which are provided below, consume a large portion of the Mergers Branch resources:

¹⁶ Year-to-date statistics used for FY2011-2012.

- **BHP/Potash:** In late 2010, the Bureau reviewed BHP Billiton’s hostile and widely publicized bid to acquire Potash Corporation of Saskatchewan. This highly complex review involved the issuance of SIRs in the context of a hostile transaction.
- **LSE/TMX:** In the late spring of 2011, the Bureau reviewed the proposed merger between the London and Toronto stock exchanges. This transaction was ultimately unsuccessful owing to a competing, and initially hostile, bid to acquire TMX by the Maple Group, a consortium of Canadian banks and other financial institutions.
- **TMX/Maple Group:** The Maple Group’s bid to acquire TMX and eventually merge it with Alpha and CDS, has involved some of the most complex and challenging competition analyses ever undertaken by the Bureau.
- **Google/Motorola:** In-depth analysis was also required in the multi-jurisdictional review of the Google/Motorola merger, which examined the competitive effects of patents in the wireless industry.
- **BCE-Rogers/MLSE:** The Bureau is currently in the process of reviewing the proposed acquisition of Maple Leaf Sports and Entertainment (“MLSE”) by two of the largest broadcasting conglomerates in Canada, BCE and Rogers. In addition to involving a strategic alliance between two long-standing competitors, this proposed merger represents one of the largest transactions in the history of sports entertainment in Canada.

SIRs – Since the publication of the 2010 Report, the Bureau has issued 13 SIRs while a total of 18 SIRs have been issued since the introduction of the two-stage merger review process in March 2009. For FY2011-2012, the Bureau issued 8 SIRs, while 5 SIRs were issued in each of FY2009-2010 and FY2010-2011.

Consent Agreements – Four consent agreements have been registered with the Competition Tribunal (“Tribunal”) since the 2010 Report was published. These negotiated settlements involve a diverse range of industries including waste disposal services, pharmaceutical products, and soft drink bottling and distribution.

Litigation – Since the 2010 Report, the Bureau has been very active litigating unresolved merger matters before the Tribunal. In January 2011, the Bureau filed an application with the Tribunal to dissolve CCS Corporation’s acquisition of Complete Environmental Inc., the owner of a proposed hazardous waste landfill in Northeastern British Columbia. This application represented the first merger challenge filed by the Bureau since 2005. In June 2011, the Bureau filed an application with the Tribunal to prohibit a proposed joint venture between Air Canada and United Continental Holdings Inc. (“United”). The joint venture proposes that Air Canada and United be permitted to coordinate air travel operations on transborder routes. In addition to challenging the proposed joint venture under the merger provisions of the Act, the Bureau is seeking to undo certain provisions contained within three existing “coordination agreements” between the airlines under section 90.1 of the Act.¹⁷

¹⁷ Section 90.1 is a new civil provision that came into force on March 12, 2010, enabling the Commissioner to challenge anti-competitive agreements between competitors.

Review of Non-Notifiable Mergers

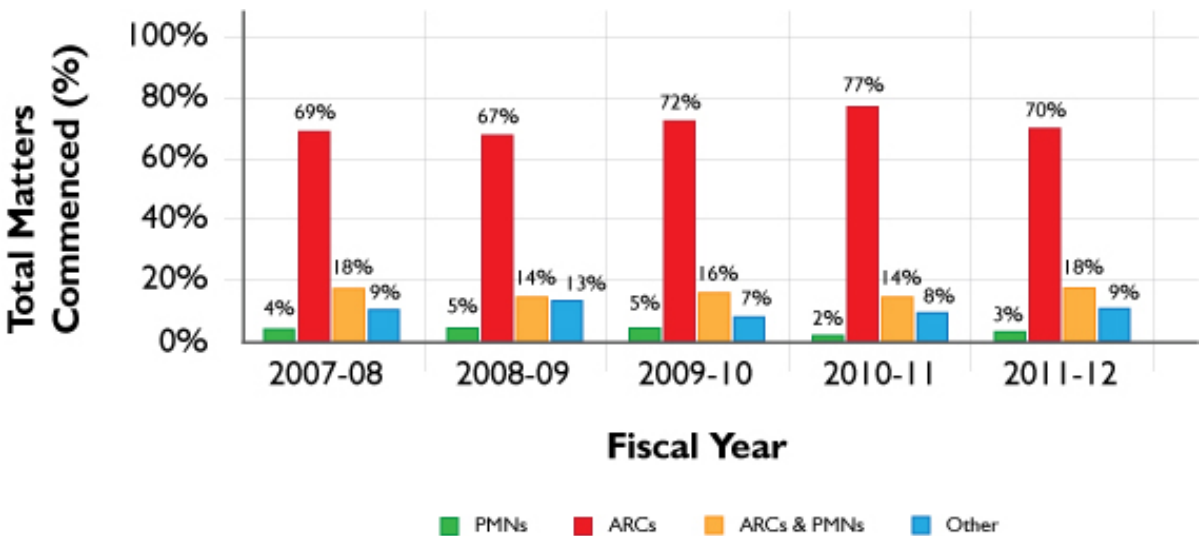
The Mergers Branch recently implemented a new initiative to actively monitor transactions in the Canadian marketplace. This initiative was largely driven by the direct and indirect impacts of the Amendments, including the reduced timeframe (from three years to one year) for the Bureau to review or challenge a merger following substantial completion under section 97 of the Act, and the indexation of the transaction size threshold pursuant to section 110 of the Act.

Regarding the reduced timeframe to review consummated mergers, the objective of the new monitoring process is to identify completed transactions that may raise serious competition issues before the one-year period expires and take appropriate action, where necessary.

The transaction size threshold for Notification has increased significantly in Canada in the past few years. The threshold increased from \$50 million to \$70 million in 2009 following implementation of the Amendments. In the period since the Amendments, the threshold has further increased to \$77 million pursuant to an annual indexing formula set out in the Act. The immediate effect of the increasing threshold is that fewer transactions are subject to mandatory Notification, which could potentially increase the likelihood of non-notifiable mergers raising substantive competition issues. The increased transaction size threshold has also had a direct impact on the operating costs of the Mergers Branch through decreased revenues (i.e., fewer notifiable transactions) and increased costs associated with reviewing more non-notifiable transactions, as well as complaints related to such transactions.

The monitoring process involves regular scanning of various media sources and mergers and acquisition databases, as well as the review of relevant marketplace complaints received by the Bureau. Where issues are identified, the Bureau will take appropriate action in a timely and responsive manner.

Figure 3: Merger Review by Matter Type (as a percentage of total matters commenced)



As highlighted in Figure 3 above, while year-to-year fluctuations exist within each matter-type category, the proportional distribution of merger reviews by matter type has remained relatively consistent for an extended period of time.



4. MERGER REVIEW EXPENDITURES & REVENUES

Figure 4: Cost of Merger Review ¹⁸

Fiscal Year ¹⁹	Full-Time Staff ²⁰	Direct Bureau Costs (millions)	Indirect Bureau Costs (millions)	Total Bureau Cost (millions)	Major Expenditures
2010-11	51	\$14.3	\$0.1	\$14.4	IESI-BFC Ltd. /Waste Services Inc.; Yellow Media/Canpages; Air Canada/ United Continental Holdings, Inc.
2009-10	52	\$14.4	\$0.2	\$14.6	Suncor/Petro-Canada; Ticketmaster/ Live Nation; Agrium/CF Industries Holdings Inc.
2008-09	54	\$12.6	\$0.6	\$13.2	Labatt/Lakeport; Google Inc./Yahoo Inc.; XL Foods Inc./Tyson Foods Inc.
2007-08	44	\$13.6	\$0.7	\$14.3	Labatt/Lakeport; Abitibi-Consolidated Inc./Bowater Inc.

As observed earlier, the steady influx of highly complex transactions raising serious competition concerns has put a strain on the resources of the Mergers Branch. The associated complexity and compressed timeframe of these reviews require the Bureau to retain industry and economic experts to assist it in completing its reviews. Where necessary, outside counsel are also retained to supplement the legal support provided by Competition Bureau Legal Services (“CBLS”). Additionally, the Mergers Branch has continued its practice of hiring top-tier graduates, enabling it to provide high-quality merger reviews.

The direct costs of merger review include the salaries for staff in the Bureau whose work relates to merger review. The major non-salary direct costs include expenditures associated with hiring economic and industry experts, lawyers assigned to merger review from CBLS as well as, external legal support. The indirect costs associated with merger review include Bureau overhead expenditures, such as informatics and administration.

¹⁸ Figure 4 includes costs to the Bureau. It does not include the full costs to the Government of Canada related to merger review. These costs would include, for example, a portion of other government department services (e.g., Department of Public Works and Government Services), and a portion of human resource and financial services provided by Industry Canada.

¹⁹ Final expenditure figures for FY2011-2012 were not available at the time of publication.

²⁰ This includes the total number of staff working within the Mergers Branch, and does not include staff working in the Bureau to support Mergers Branch operations.

Revenue

For the period FY2007-2008 to FY2010-2011, revenues collected by the Mergers Branch have fallen short of costs expended by an average of \$2.5 million per year. For the period FY2010-2011, revenues fell short of costs expended by approximately \$3.5 million. As part of a Government-wide initiative to reduce public spending, and as part of the Bureau's on-going efforts to minimize costs, the Mergers Branch continually seeks innovative ways in which to provide the same or an improved level of service in a more cost efficient manner. Examples of these efforts include reduced travel, increased use of in-house legal services (i.e., CBLS) in complex reviews and significantly reduced spending for non-enforcement activities and related travel.

Figure 5: Revenue Generated Through Notification and ARC Request Filings²¹

Fiscal Year	Revenue (millions)
2010-11	\$10.9
2009-10	\$10.1
2008-09	\$10.2
2007-08	\$15.3



5. COMPLEXITY & SERVICE STANDARDS

Figure 6: Key Performance Metrics Regarding Complexity and Service Standards²²

Measurement	Complexity	2011/12 ²³ (Q1-Q3)	2010/11	2009/10
Matters Concluded²⁴ (#)	Non-Complex	111	175	173
	Complex	34	34	33
	Total	145	209	206
Matters Concluded (%)	Non-Complex	76.55%	83.73%	83.98%
	Complex	23.45%	16.27%	16.02%
	Total	100.00%	100.00%	100.00%

²¹ Final revenue and expenditure figures for FY2011-2012 were not available at the time of publication.

²² Totals include the number of Notifications and ARC requests completed between April 1 and March 31 of each year. For FY2009-2010 and FY2010-2011, statistics for very complex and complex matters have been combined with the exception of average review time calculations. The implementation of the new service standard regime for complex matters and the elimination of the very complex category are further explained in footnote 26.

²³ Complete statistics are not available for FY2011-2012. Figures provided are for the period Q1-Q3 (April 1, 2011, to December 31, 2011).

²⁴ Includes only Notification and/or ARC request filings for which a service standard was attached.

Measurement	Complexity	2011/12 ²³ (Q1-Q3)	2010/11	2009/10
Service Standard Met (#)	Non-Complex	103	162	162
	Complex	31	31	29
	Total	134	193	191
Service Standard Met (%)	Non-Complex	92.79%	92.57%	93.64%
	Complex	91.18%	91.18%	87.88%
	Total	92.41%	92.34%	92.72%
Avg. Review Time (days)	Non-Complex	11.1	11.08	9.75
	Complex ²⁵	32.43	31.83	39.62

The data contained above in Figure 6 supports the observations made throughout this Report regarding the increasing complexity of merger reviews conducted by the Bureau. For the first three quarters of FY2011-2012, the percentage of matters designated as ‘complex’ increased by approximately 7% over the previous fiscal year. The percentage of matters designated as ‘non-complex’ decreased by the same amount.

Since the 2010 Report, the average time required to review a non-complex matter has increased by approximately 1.3 days; however, the average time required to review a complex matter decreased significantly by approximately 7 days. This decrease follows the implementation of a considerably shorter service standard for complex reviews, introduced through the Merger Fee Policy and revised Merger Handbook in November 2010. This change was implemented to better align service standards with the statutory waiting periods brought about under the Amendments.

Regarding service standards, Figure 6 indicates that the Mergers Branch continues to maintain its well-established practice of meeting the service standard in more than 90% of its reviews, regardless of complexity. It remains a priority of the Bureau to meet all service standards where possible, and to ensure that the necessary resources are available and processes are in place to ensure effective and timely merger reviews. At the same time, as always, the ability of the Bureau to meet service standards is premised on cooperation from the parties to a merger.

²⁵ These statistics do not include very complex matters for FY2009-2010 and FY2010-2011. FY2009-2010 figures refer to the old service standard for complex matters (70 days). FY2010-2011 statistics combine the old and new (45 days) service standards for complex matters.



6. CONCLUSION

The Mergers Branch continues to focus on providing efficient and high quality service. Service standards provide one measure to respond to stakeholders' requirements for predictability, and represent one measure of timeliness, albeit dependent to a considerable extent upon cooperation from the parties to a merger. The Mergers Branch continues to meet its service standards in well over ninety percent of cases notwithstanding the increasing complexity of transactions reviewed and the resulting pressures on Mergers Branch resources.

Stakeholders are invited to provide comments during the Merger Fee Forum on April 13, 2012 in Toronto. Comments or suggestions are also welcome by phone or e-mail to:

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7. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

[www.competitionbureau.gc.ca]

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50 Victoria Street
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