

Unclassified

English - Or. English

21 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**Cross-border Mergers – Contribution from Canada**

**- Session II -**

2-3 December 2024

This contribution is submitted by Canada under Session II of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: [oe.cd/gfc24](https://oe.cd/gfc24).

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**JT03556027**

## *Cross-border Mergers*

### *- Contribution from Canada -*

#### **1. Introduction**

1. Canada's Competition Bureau ("Bureau") is pleased to provide this submission to the Organisation for Economic Co-operation and Development ("OECD") Global Forum of Competition on the "Challenges and Sources of Divergence in Cross-Border Merger Review".

2. The Bureau is an independent law enforcement agency headed by the Commissioner of Competition ("Commissioner"). We administer and enforce the *Competition Act* ("Act") and other laws. Through our investigations, we determine whether a merger is likely to harm competition. In cases where our investigation shows a merger will likely substantially lessen or prevent competition, the Commissioner may either:

- agree with the merging parties on a remedy, or
- apply to the Competition Tribunal ("Tribunal") for an order to remedy the harmful effects of the merger.

3. International cooperation supports effective, timely and consistent merger reviews and remedies. These outcomes benefit merging parties, competition agencies and market participants. This submission describes the ways we cooperate with international partners when we review mergers. This submission also describes our experience in recent merger reviews involving international cooperation, and led to important remedies to preserve competition in Canada and other countries.

4. This submission also talks about digital markets as digital transformations and new technologies mean that mergers can impact competition in new and different ways. Digital markets are dynamic and move rapidly. They can be opaque. Merger investigations in digital markets involve growing amounts of records and data, and new and evolving business models and technology. They also require timely international cooperation to:

- identify relevant geographic and product markets
- design and implement remedies, and
- share digital expertise

#### **2. Confidentiality Provisions of the *Competition Act***

5. In the course of reviewing merger transactions, the Bureau obtains confidential information from multiple sources, such as the merging parties or third parties, or through cooperation with foreign jurisdictions.

6. The Bureau handles confidential information in accordance with section 29 of the Act. This section also guides how we interact with foreign competition agencies. It requires that all information provided to, or obtained by, the Bureau remains confidential. As explained in the [\*Information Bulletin on the Communication of Information Under the\*](#)

Competition Act, this confidentiality extends to the identity of anyone who has provided information.

7. The Act contains exceptions that allow the Bureau to communicate information, including “for the purposes of the administration or enforcement of the Act.” This exception covers communicating confidential information to a foreign counterpart if it advances a specific investigation in Canada, since this is for the purpose of the administration or enforcement of the Act.

8. In all cases, the Bureau must be confident that the receiving agency has appropriate safeguards to protect the confidential information. The Bureau also requires that use of the confidential information by the foreign authority be limited to the specific purposes for which it is provided. Any information communicated to a foreign authority under the provisions of a bilateral or multilateral cooperation instrument will be subject to specific confidentiality safeguards contained in that instrument, as well as those in the Act and in other domestic legislation. Generally, where there is no bilateral or multilateral cooperation instrument in force, the Bureau does not communicate information protected by section 29 unless it is fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put.

### 3. Framework for International Cooperation in Reviewing Mergers

9. The framework for cooperation in competition law enforcement is made up of international agreements and arrangements. For merger reviews in Canada, these cooperation instruments with international partners include free trade agreements, and competition cooperation agreements, arrangements, and memoranda of understanding (“MOUs”).

10. The competition policy provisions of Canada’s free trade agreements ensure that competition authorities enforce competition laws in line with principles of transparency, non-discrimination and procedural fairness. They also promote cooperation, including through encouraging the development of competition cooperation instruments to govern the day-to-day cooperation by competition authorities on competition enforcement matters.

11. The Bureau has 19 cooperation instruments in place with counterparts in 16 jurisdictions around the world that help the Bureau investigate and address cross-border anti-competitive conduct and mergers. Information sharing is a key component of these cooperation instruments. Whether they are legally binding state-to-state agreements or non-binding agency-to-agency-arrangements or MOUs, they typically provide for notifications, consultations, meetings and exchange of information.

12. In 2020, the Commissioner signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities - Memorandum of Understanding (“MMAC”) with five other competition authorities, including:

- the Australian Competition and Consumer Commission (“ACCC”)
- the New Zealand Commerce Commission (“NZCC”)
- the United Kingdom Competition and Markets Authority (“U.K. CMA”)
- the United States Department of Justice (“U.S. DOJ”), and
- the United States Federal Trade Commission (“U.S. FTC”)

13. The MMAC not only supports more effective cooperation on investigations, joint projects and inter-agency training, but it also includes a template that agencies or governments can use to establish bilateral or multilateral cooperation instruments focused on investigative assistance, like cross-border evidence gathering and sharing confidential information.

14. For cooperation with agencies in OECD countries that do not have an active cooperation instrument with the Bureau or Canada, the Bureau follows the [OECD's Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings](#) ("OECD Recommendation"). For example, the Bureau currently uses the OECD Recommendation to guide its cooperation with the U.K. CMA and the Swiss Competition Commission ("COMCO"), including by providing notifications about merger reviews that may affect them.

15. The Bureau's experience is that international cooperation is most effective when confidential information is shared both ways between agencies, yet there may be laws that restrict our counterparts from sharing confidential information with the Bureau. To do this, foreign agencies often need merging parties and affected third parties to provide a waiver to share confidential information with the Bureau. Most of the time, parties provide waivers upon request to facilitate international cooperation.

16. International cooperation can help all competition authorities better understand issues, facts, timing and processes. This benefits merging parties who want to close their transaction and avoid conflicting outcomes. Challenges can arise if waivers are not provided in a timely manner or if the waiver has limits on the information that can be shared.

17. The Bureau cooperates with foreign agencies during multi-jurisdictional merger reviews. The types of cooperation include:

- participating in joint conference calls with the merging parties or joint interviews of third party market participants
- holding regular calls with the foreign counterpart team(s)
- discussing industry background and dynamics, approaches to market definition and competitive effects analyses
- sharing and discussing documents and other information obtained from merging parties and third parties
- identifying key documents during merger review, especially when dealing with a large volume of documents
- aligning methodologies where a remedy is going to affect multiple jurisdictions, and
- coordinating on litigation strategies or implementing merger remedies, including discussions at the senior management level

18. The Bureau coordinates with other authorities on remedies when a merger is likely to have anti-competitive effects in Canada that are similar or related to those in other jurisdictions. Consistent and coordinated remedies help avoid friction that occurs when a remedy in one jurisdiction is not acceptable in another. They can also lead to a more efficient and effective resolution than by acting independently.

19. To resolve competition concerns in Canada, we may take action, or we may determine that a foreign jurisdiction’s action resolves any Canadian competition concerns. Examples of cases in each of these categories are discussed later in this submission.

20. Recent [changes to the Act](#) increased the Bureau’s ability to coordinate with foreign agencies. These changes include:

- the requirement to include revenues from sales “into” Canada. This change means that more mergers (most likely multi-jurisdictional) are now subject to pre-merger notification requirements
- rebuttable structural presumptions and the repeal of the efficiency defence, which aligns Canada’s law with other jurisdictions including the U.S.
- a prohibition on closing a merger if the Commissioner has applied for an injunction until it is heard and decided, and
- a stronger remedy standard, that requires that remedies preserve or restore competition

#### 4. Information Provided by Merging Parties About Other Jurisdictions

21. When submitting pre-merger notification filings under the Act, the merging parties are required to list other jurisdictions where the transaction has been, or must be, notified.

22. Parties generally start the merger review process in Canada at the same time as in other jurisdictions, in particular the U.S. This helps the agencies collaborate more throughout the merger review process.

23. From a process perspective, the Bureau formally notifies foreign counterpart agencies about third party market outreach that we intend to make in their jurisdiction. This provides an opportunity to coordinate on interviewing the third party, if necessary, or exchange information about the third party.

#### 5. Informal and Formal International Cooperation in Merger Review

24. International cooperation is essential to assess market power and effects that come from mergers in digital markets. That is because these markets are complex, opaque, fast-moving, and dynamic, and have a less predictable future.

25. A great deal of valuable cooperation can and does take place informally, without the exchange of confidential information. The Bureau engages in informal cooperation through participation in case-handler meetings with many of its foreign counterparts to discuss case-related issues such as potential theories of harm, investigative steps, timing, and settlement approaches, as well as strategic discussions with senior management.

26. Further, the Bureau has developed strong working relationships with other competition agencies through multilateral bodies like the International Competition Network (“ICN”) and the OECD. This has had a positive impact on our ability to cooperate when cases of mutual interest arise. The Bureau is also a member of the [Steering Group of the ICN Framework for Competition Agency Procedures \(“CAP”\)](#), a non-binding framework designed to strengthen procedural fairness in competition law enforcement. The CAP is open to all ICN member and non-member agencies. By joining the CAP, participants agree that they intend in good faith to adhere to the framework to the extent consistent with applicable laws.

27. Given Canada’s close and integrated economic relationship with the U.S., the Bureau often consults with the U.S. agencies where there appear to be similar, if not the same, competition issues in a merger. For this reason, our relationships with the U.S. FTC and the U.S. DOJ are well established.

28. In 2011, the Bureau, U.S. FTC and U.S. DOJ established a mergers working group made up of case team leaders. The goals of the group include enhancing working relationships, and improving mutual understanding of each country’s merger review process.

29. The mergers working group typically meets on an annual basis to discuss agency processes, lessons learned from past cases, and strategies for addressing common challenges and novel issues. The Mexican Comisión Federal de Competencia Económica (COFECE) joined the working group in 2016. Topics of discussion are set by the team leaders and have included:

- reviewing specific cases
- challenges/lessons learned
- supplementary information requests and second requests
- timing agreements
- document review strategies, and
- economic and industry experts

30. In 2014, to further deepen relationships between the mergers staff at the three agencies, the Bureau, U.S. FTC and U.S. DOJ developed [Best Practices on Cooperation in Merger Investigations](#), which recognized that:

- Effective coordination between the U.S. agencies [U.S. FTC and U.S. DOJ] and the CCB [the Bureau] depends to a considerable extent on the cooperation and goodwill of the merging parties and of third parties. Agency cooperation is more effective when the merging parties and third parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, cooperation is more effective when the parties take full advantage of the similar investigation timetables of the CCB and the U.S. agencies, allowing the staff of each agency to engage with one another and with the merging parties and third parties on substantive issues at key stages of their respective investigations.

31. The Bureau undertook similar initiatives over the past few years to deepen relationships with colleagues at the European Commission’s Directorate-General for Competition (“DG Comp”), the U.K. CMA, the ACCC, the Japan Fair Trade Commission, and Brazil’s Administrative Council for Economic Defense. We have also had staff exchanges with foreign jurisdictions, including the U.S. FTC, ACCC and the Korea Fair Trade Commission. These exchanges allowed us to deepen our understanding of merger review in foreign jurisdictions. Recently, merger officers observed oral examinations in another jurisdiction that related to an ongoing merger review in Canada. This type of exchange is a great way to learn new techniques and best practices from foreign counterparts.

32. Much of the Bureau’s recent dialogue and collaboration with international stakeholders has focused on competition enforcement in the digital era. We host a series of annual summits with participation from international agencies and non-governmental experts, which began in 2020 with the “Digital Enforcement Summit”. More recently, the 2024 summit on “Market Dynamics in the AI Era”, took a deep dive into the unique nature

of AI markets and competition. These Summits create opportunities for open and frank dialogue on competition issues in the digital era, and provide the participants with a chance to engage with international counterparts to understand digital markets in a broader context.

33. These efforts to enhance relationships with colleagues around the world have a tangible and positive impact on cross border and multi-jurisdictional cases. They facilitate more efficient and stronger merger reviews.

## 6. Important Merger Reviews Involving Cross border Remedies

34. Below is a discussion of the Bureau’s experiences on a number of important merger cases where the Bureau collaborated closely with its foreign counterparts to resolve competition concerns through remedies. In most instances where a merger is likely to harm competition and the Bureau and merging parties can negotiate a consensual resolution, the Bureau will enter into a consent agreement to address competition concerns in Canada. Sometimes, however, the Bureau has not required a consent agreement in Canada as long as the parties implement remedies they agreed to in another jurisdiction.

### 6.1. Linde/Praxair (2018)

35. In this case, the Bureau determined that the proposed merger between Praxair, Inc. (“Praxair”) and Linde AG (“Linde”) would likely result in a substantial lessening of competition for the supply of various industrial gas products in Canada. As a remedy, the Bureau and the parties entered into a [consent agreement](#) that required Linde to divest its entire Canadian business.

36. The Bureau cooperated closely with the U.S. FTC and DG Comp throughout the review. Merging parties provided waivers which made this cooperation easier. Geographic markets for industrial gases varied depending on the specific gas:

- Rare gases, requiring more resource-intensive separation, traveled to customers worldwide, and
- Abundant and easily separated gases traveled more locally or regionally

37. Competitive conditions differed across industrial gases and jurisdictions, however many of the parties’ assets supplied industrial gases to both customers in Canada and the U.S. By exchanging information with other agencies, the Bureau better understood the competitive dynamics outside of Canada that impacted Canadian customers.

38. The Bureau worked closely with the U.S. FTC to secure an effective remedy that resolved competition concerns. The remedy included Linde’s Canadian business as part of an Americas divestiture package. The package also included some of the parties’ assets in the U.S. and South America, and some industrial gas sourcing contracts for assets outside the Americas.<sup>1</sup>

39. Although the parties offered separate divestiture packages for the Americas (Canada, U.S. and South America) and the European Economic Area (“EEA”),

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<sup>1</sup> Press Release, Federal Trade Commission, [FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger | Federal Trade Commission](#) (Oct. 22, 2018); Press Release, European Commission, [Commission conditionally clears Praxair and Linde merger](#) (Aug. 19, 2018).

international cooperation was critical to addressing competition concerns for industrial gases supplied globally.

## 6.2. UTC/Rockwell (2018) and UTC/Raytheon (2020)

40. In September 2017, United Technologies Corporation (“UTC”) and Rockwell Collins Inc., (“Rockwell”) announced the proposed merger. UTC and Rockwell both supplied aerospace systems to customers around the world. The Bureau determined that the transaction would likely result in a substantial lessening of competition for some aircraft systems. We determined that if the parties implemented a [settlement agreement](#) reached with the U.S. DOJ, this would resolve our competition concerns.

41. The Bureau worked closely with the U.S. DOJ and the DG Comp throughout the review, and waivers were provided by the merging parties. The agencies determined that aerospace systems had global markets, and worked together to reduce the burden on market participants during the investigation by conducting interviews together. The cooperation also allowed us to engage with market participants outside of Canada more effectively than we otherwise could.

42. The U.S. settlement agreement required UTC to divest two of Rockwell’s aircraft system businesses, which were mainly located in the U.S. and Mexico. The global nature of the markets and the lack of Canadian assets were important considerations for the Bureau’s determination that we did not require a consent agreement.

43. In June 2019, UTC and defence contractor Raytheon Company (“Raytheon”) announced their intention to combine in a merger of equals. Raytheon was a defence contractor that overlapped with UTC in the global supply of military systems. The Bureau again collaborated with the U.S. DOJ and DG Comp as we reviewed the proposed transaction. In view of the global supply of military systems and the parties’ relevant assets being located outside of Canada, the Bureau determined that the [remedies](#) obtained by the U.S DOJ and DG Comp would resolve the Bureau’s competition concerns.

## 6.3. Evonik/PeroxyChem (2020)

44. The Bureau determined that the proposed merger between PeroxyChem Holding Company LLC (“PeroxyChem”) and Evonik AG (“Evonik”) would likely result in a substantial lessening of competition for the supply of hydrogen peroxide in Western Canada. To remedy these concerns, the Bureau entered into a [consent agreement](#) with Evonik, which required Evonik to divest PeroxyChem’s Prince George facility.

45. The Bureau learned of the merger through a customer complaint. Evonik and PeroxyChem’s production facilities in Western Canada supplied hydrogen peroxide to customers in Western Canada and the Pacific Northwest U.S., however the proposed transaction was not notifiable in Canada. Given the nature of this cross-border business, the merging parties provided waivers that made the Bureau’s extensive coordination with the U.S. FTC possible throughout its review. Waivers are especially helpful to assess non-notifiable mergers where there are no statutory waiting periods and there is no requirement on the parties to provide the prescribed information that is typically provided by them if the transaction is notifiable under the Act.

46. The Bureau identified competition concerns with the supply of hydrogen peroxide in Western Canada. The U.S. FTC identified similar concerns in the Pacific Northwest and other areas of the U.S. In August 2019, the U.S. FTC started an administrative proceeding to block the proposed transaction, and in January 2020 the Bureau entered into a consent agreement to remedy concerns in Western Canada. Throughout this period, the Bureau and

the U.S. FTC teams and managers were engaging in discussions. Although the agencies took different actions, cooperation was needed to review a merger that concerned a common product in at least one overlapping region.

#### 6.4. Elanco/Bayer (2020)

47. The Bureau determined that the proposed merger between Bayer Animal Health and Elanco Animal Health Incorporated (“Elanco”) was likely to result in a substantial lessening of competition for the supply of select types of animal health products in Canada. To remedy these concerns, the Bureau entered into a [consent agreement](#) with Elanco, requiring it to divest two animal health products and give up acquiring certain distribution rights which were retained by Bayer’s CropScience division.

48. The Bureau worked closely with the U.S. FTC, the DG Comp and the ACCC throughout its review. The Bureau determined that the geographic markets for the products of concern were national in scope and found that regulatory requirements and competitive dynamics varied across jurisdictions. The U.S. FTC and the DG Comp came to similar conclusions.

49. While geographic markets were separate, the Bureau and other agencies benefitted from their cooperation in analyzing the proposed transaction, including market definition and barriers to entry, as well as potential remedies. The agencies found competition concerns with respect to some of the same products, as well as competition concerns unique to their jurisdictions.<sup>2</sup> For one product, Elanco divested its global rights and assets to a single purchaser. For another product, Elanco divested Bayer Animal Health’s rights separately for each relevant jurisdiction, although ultimately one purchaser acquired the rights for each relevant jurisdiction.

#### 6.5. Sika/Master Builders (2023)

50. In November 2021, Sika AG (“Sika”) entered into an agreement to acquire MBCC Group (“MBCC”). The Bureau determined that the proposed merger would likely result in a substantial lessening of competition for the supply of admixture systems in Canada. Admixture systems are products that improve and protect buildings and structures. Generally, they are added to concrete to alter technical properties and performance during the application process or to the final product.

51. To remedy these concerns, the Bureau entered into a [consent agreement](#) with Sika <https://www.canada.ca/en/competition-bureau/news/2020/07/competition-bureau-resolves-concerns-related-to-elancos-acquisition-of-bayer-animal-health.html> in February 2023 to divest a number of assets that supply admixture systems in Canada and a research and development centre in Germany.

52. Over the course of the review, the Bureau collaborated with the U.S. DOJ, the DG Comp, the U.K. CMA, NZCC and the ACCC, which was helped by waivers provided by

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<sup>2</sup> Press Release, Competition Bureau, [Competition Bureau resolves concerns related to Elanco’s acquisition of Bayer Animal Health](#) (Jul. 14, 2020); Press Release, Federal Trade Commission, [FTC Requires Global Suppliers of Animal Health Products Elanco Animal Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets, as a Condition of Merger | Federal Trade Commission](#) (Jul. 15, 2020); European Commission, [Mergers: Bayer’s animal health division - Elanco](#) (Jun 7, 2020); Competition and Consumer Commission, [Elanco’s acquisition of Bayer’s animal health business not opposed | ACCC](#) (Jul. 9, 2020).

the merging parties. The agencies, including the Bureau, determined that innovation was a key factor of competition for the supply of these products.<sup>3</sup>

53. The agencies worked closely to review appropriate remedies. Given the significance of research and development assets to any potential divestiture package, the scope of the remedy that would resolve competition concerns in the relevant jurisdictions was an important consideration. Ultimately, Sika offered a global remedy package including MBCC's chemical admixture business in Canada, the U.S. and Europe (EEA, U.K. and Switzerland) and MBCC's entire business in New Zealand and Australia.

54. Following the investigation, the agencies continued to liaise to assess a suitable purchaser for this global set of assets, which would not raise competition concerns in the relevant jurisdictions. They continue to work closely to ensure compliance with consent agreement provisions.

## 7. Conclusion

55. This submission provides an overview of the Bureau's experience in designing and implementing remedies together with its foreign counterparts on recent cross-border merger reviews. Collaboration is often critical to conducting efficient reviews and achieving effective remedies, particularly in the digital era, and the Bureau is open to working with other jurisdictions to address challenges raised at this roundtable.

56. The Bureau's framework for international cooperation continues to evolve to allow stronger multi-jurisdictional reviews. Recent amendments in legislation brought the Bureau into more close alignment with its major trading partners, and ongoing informal cooperation on concurrent merger reviews will continue to deepen our understanding of the practices of foreign agencies and strengthen staff relationships.

57. Effective collaboration between agencies facilitates more efficient and stronger merger reviews, which creates greater transparency, predictability and trust in the review process. This in turn leads to consistent and better-aligned outcomes and remedies, which benefits the parties involved in the merger transaction as well as other market participants.

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<sup>3</sup> Press Release, European Commission, [Mergers: Commission clears the acquisition of MBCC by Sika](#) (Feb. 7, 2023); Press Release, Competition Markets Authority, [CMA accepts fast-track remedy in chemicals deal - GOV.UK](#) (Dec 15, 2022); Press Release, Commerce Commission, [Commerce Commission - Sika cleared to acquire MBCC Group subject to divestment](#) (Apr. 4, 2023); Press Release, Competition and Consumer Commission, [Sika's proposed acquisition of MBCC Group not opposed, subject to global divestiture | ACCC](#) (Apr. 20, 2023).