



Competition Bureau  
Canada

Bureau de la concurrence  
Canada

## Meet the Competition Bureau Workshop



# On Ramps and Off Ramps in the Bureau's Review of Mergers

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Canada



# Outline

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- Overview of the Competition Bureau, the *Competition Act*, and the Competition Tribunal
- Introduction to Merger Review
- Case allocation and non-complex reviews
- Complex reviews



# Introduction to the Bureau: “Fair Play” video



<https://www.youtube.com/user/competitionbureau>



# Competition Bureau

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- 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, John Pecman, the Bureau is responsible for the administration and enforcement of the *Competition Act* and three other federal acts.
- Approximately 370 employees.





# Competition Act

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- A federal law governing most business in Canada.
- Contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace.
- Its purpose is to maintain and encourage competition in Canada in order to:
  - promote the efficiency and adaptability of the Canadian economy;
  - expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
  - ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and
  - provide consumers with competitive prices and product choices.



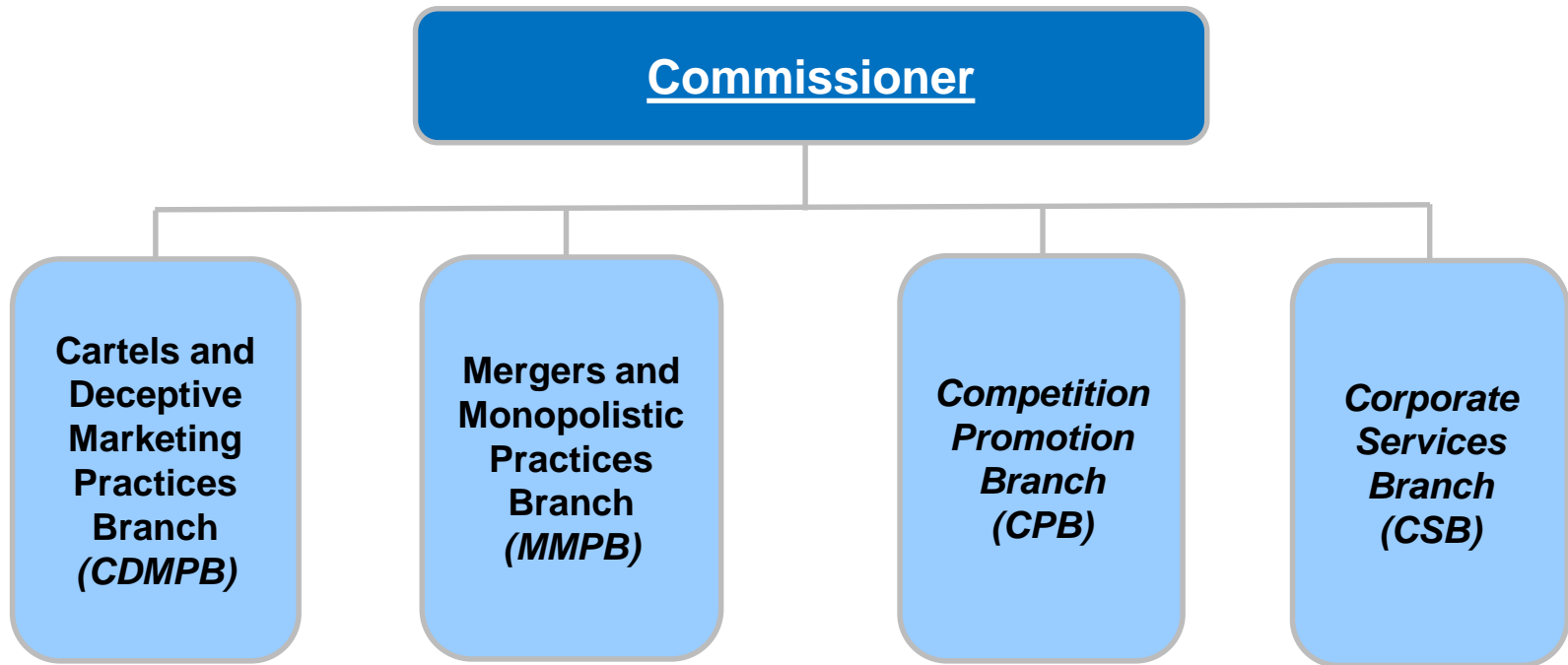
# Competition Tribunal

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- In enforcing the *Competition Act*, the Commissioner does not have adjudicative power to issue orders.
- Commissioner can resolve competition concerns through:
  - Negotiated Settlement/Remedies
    - Consent Agreement between the Commissioner and the parties registered with the Competition Tribunal (has the effect of a Tribunal order)
    - Alternative case resolution
  - Litigation: filing an application with the Competition Tribunal
    - Specialized federal court that exclusively hears competition matters
    - In the case of mergers, the Competition Tribunal can issue an order to disallow or dissolve the merger, or require divestitures



# Organizational Chart - Branches





## Branches - Enforcement

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- Two enforcement branches:
  - Mergers and Monopolistic Practices Branch (formerly Mergers Branch and Civil Matters Branch)
    - Mergers Directorate: responsible for merger reviews
    - Monopolistic Practices Directorate: responsible for civil (i.e., non-criminal) anti-competitive conduct investigations
  - Cartels and Deceptive Marketing Practices Branch (formerly Criminal Matters Branch and Fair Business Practices Branch)
    - Responsible for criminal investigations into cartels
    - Responsible for civil or criminal investigations into deceptive marketing







## Branches - Non-enforcement

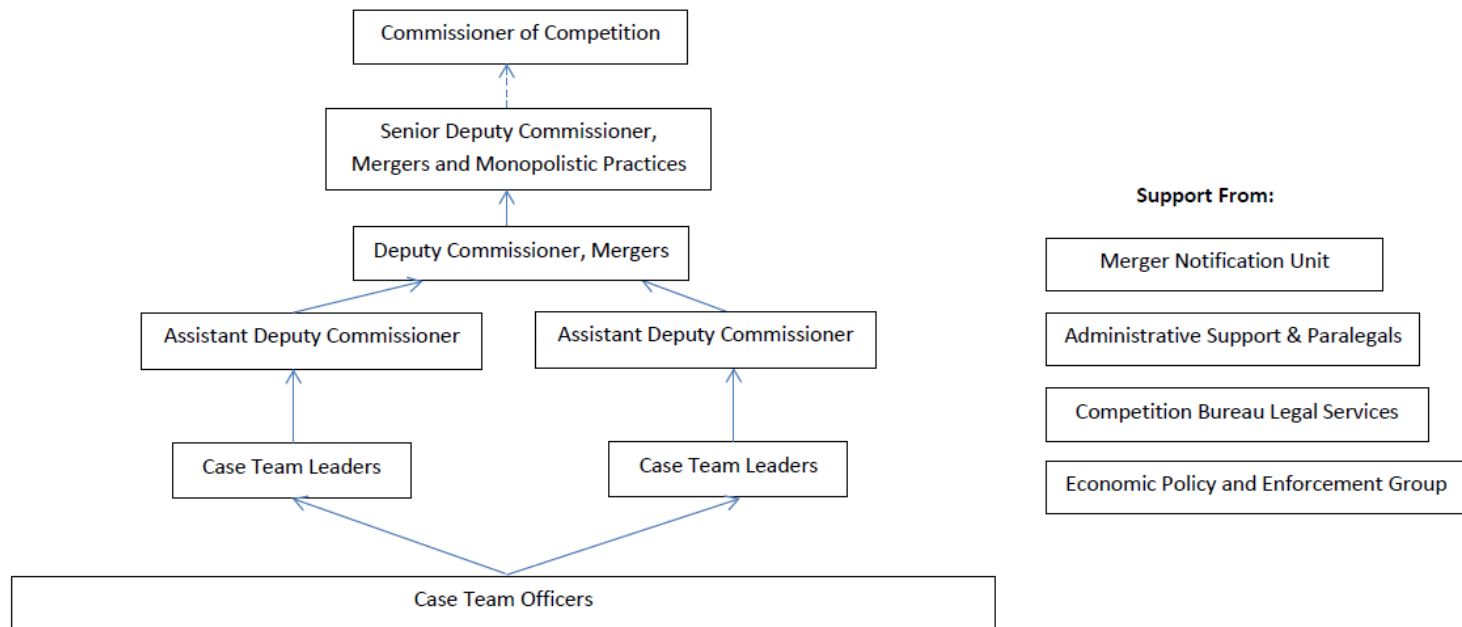
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- Two non-enforcement Branches:
  - Competition Promotion Branch
    - Responsible for advocacy and competition promotion
    - Responsible for supporting enforcement branches with economic analysis
  - Corporate Services Branch
    - Administration, finance, and corporate compliance
- Competition Bureau Legal Services
  - Department of Justice lawyers responsible for providing legal support on civil enforcement matters



# Mergers Directorate

- Approximately 50 employees
  - Mixture of lawyers, economists, and support staff
  - Head office in Gatineau, Quebec; Regional office in Toronto, Ontario





# Merger Review

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- **Scope:** All mergers in Canada are subject to review by the Commissioner. Those that exceed certain thresholds must be notified for review prior to closing.
  - Combined assets or sales > \$400 million *and* target assets or sales >\$86 million.
  - Note that even if the threshold for notification is not met, the Bureau may still review the transaction.
- **Analytical Approach:** Outlined in the Merger Enforcement Guidelines (“MEGs”)
- **Legislation:** Part IX of the Competition Act





# Legal Test

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- **Section 92**
  - “Where, on application by the Commissioner the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially... ”
    - “SLPC” analysis
- **Section 93**
  - Factors to consider in SLPC analysis
- **MEGs, 2.1**
  - “...likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power”





# Case Processing

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- Merger Notification Unit (MNU) receives and processes all pre-merger notifications (usually all electronic)
  - Officially opens file, checks for completeness and provides confirmation to merging parties' counsel
  - Preliminary case triage for complexity and assignment
  - Summary note sent to management (ADCs) for assignment to Officers





# Case Processing

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- ARC Requests vs. Pre-merger Notification (PMN)
  - Act provides that in lieu of, or in addition to, submitting a PMN, the parties may request an Advance Ruling Certificate
  - ARC requests, including a competition brief, usually submitted in place of PMN where transaction does not potentially raise serious competition issues





## Case Allocation

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- Management reviews MNU summary and considers it, along with Officer experience and availability, to assign a case team
- Case team consists of:
  - One Senior Officer
  - One or more Junior Officers
  - On complex transactions, Senior Officer will generally request a CBLS lawyer and an economist from EP&E to join the team



# Complexity

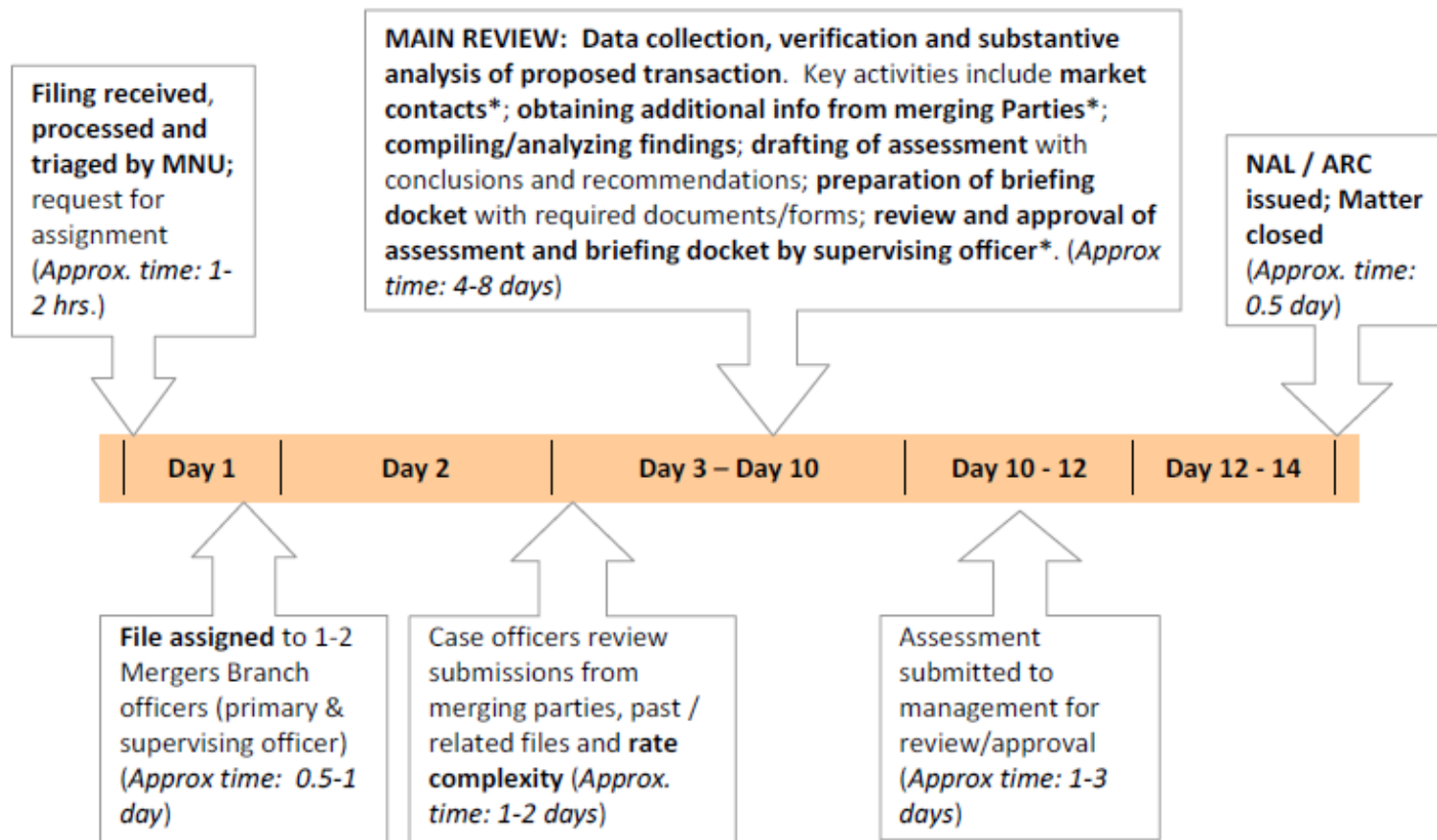
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- **Two complexity categories:**
  - **Non-complex**
    - Absence of competition issues
    - No/minimal overlap between merging parties
    - Comprise between 80-85% of annual reviews (historically)
  - **Complex**
    - Transactions between competitors, or between customers and suppliers, where there are indications that the transaction may, or is likely to, create, maintain, or enhance market power
    - Indicator: Market share generally > 35% or more
    - Other factors: market definition challenges, industry concentration, barriers
    - Comprise between 15-20% of annual reviews (historically)





# Investigation: Non-complex Transaction





## Investigation: Non-complex Transaction

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- General information requirements on non-complex transaction with no or minimal overlap
  - From merging parties:
    - Basic information on merging parties
    - Description of the transaction
    - Submission on relevant product and geographic markets explaining why the parties believe there is no or minimal overlap
      - Any relevant minority interest (10% or greater interest threshold)
    - May need customer contact information
  - From third parties:
    - May need to confirm lack of overlap by speaking to a small number of customers and/or competitors of the merging parties





# Investigation: Non-complex Transaction

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- General information requirements on non-complex transaction with overlap
  - From merging parties:
    - Information listed on previous slide
    - More detailed submission on relevant product and geographic markets, market shares, and section 93 factors (particularly remaining competitors and barriers to entry)
    - Customer contact information
  - From third parties:
    - Market calls to customers required to confirm the parties' submissions and assess whether there are concerns
    - May make market calls to competitors or other stakeholders





## Investigation: Non-complex Transaction

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- Relevant background and analytical findings summarized in a briefing memo or “assessment” and submitted to management (ADC) for review
- Assessment includes a recommendation on course of action: generally, whether to issue an Advance Ruling Certificate (ARC) or a No-Action Letter (NAL)
  - ARC (s. 102): Commissioner is satisfied that he would not have sufficient grounds to challenge the transaction
  - NAL: The Commissioner does not intend at this time to file an application under section 92
- After management approval, decision communicated to parties and ARC or NAL issued



## Other Notes on Non-complex Reviews

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- Trying to obtain information necessary to conclude no likely SLPC in timely manner in order to focus resources on matters that may raise competition concerns
- Not always necessary to come to firm conclusions
  - e.g., not necessary to always land on precise market definition; approximate market shares may be sufficient
  - If merger unlikely to raise issues under a worst case scenario (or a scenario worse than the merger), usually sufficient to conclude the review
- Conduct all reviews in private/confidentially (s. 29)
  - Coordination with other antitrust agencies, when necessary for enforcement purposes, falls under “administration and enforcement of the Act” exception (do not need waivers)





# Merger Enforcement: Case Management

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- Merger Review Process: Two-stage system
  - Introduced in 2009, similar to U.S. system
- Initial Waiting Period: Once complete filing received, transaction cannot close for 30 days
  - Unless NAL provided by the Commissioner
- Supplementary Information Request (“SIR”): During initial 30 day period, Bureau can issue a request for additional information



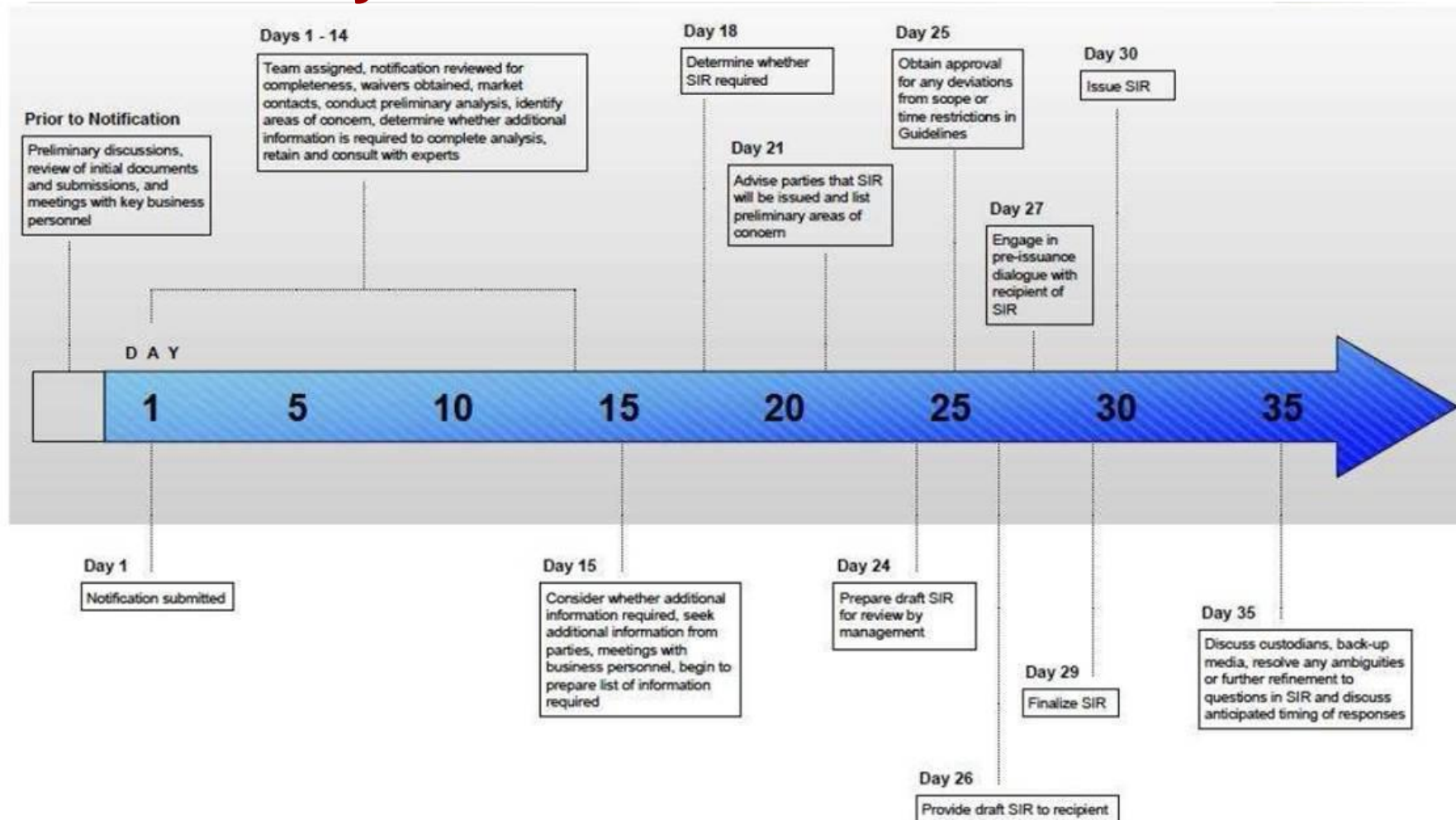
# Case Management

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- Second Waiting Period: If SIR issued, transaction cannot close until 30 days after Bureau has received complete responses and certified.
- If a transaction closes before statutory waiting periods expire, merging parties may be subject to penalties under *Competition Act*



# Initial 30 Day Period





# Deep Dive – Complex Merger Reviews

## • Initial 30-day Period

- Commissioner may decide to issue supplementary information request (“SIR”) via s.114(2) if:
  - Potential competition issues have been identified AND
  - Additional information is required to complete the review
- SIR must be issued **prior** to expiry of Initial Waiting Period
- If no SIR is issued, parties can legally close on day 31 (or before if ARC or NAL is issued)





## **Interim Period (between 1<sup>st</sup> / 2<sup>nd</sup> 30 Day Periods)**

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- Few weeks to a few months (refresh obligation)
- Post-issuance discussion
- Rolling production and narrowing of questions/scope
- Third party data/documents
- Data work (if possible)
- 2<sup>nd</sup> round of market contacts



# Second 30 Day Period

Day	Task
0	<b>Certified SIR responses received and sent for processing</b>
0	Data specs loaded onto computer systems
0	Data specs reviewed to ensure that all requested data were received
0	Determination as to whether the data need significant cleaning, reshaping or reformatting
2	(If necessary) Data cleaning completed
2	Data sent to Economic Expert (if hired)
3	<b>Document review begins</b>
8	Economic Expert progress report
8	<b>First round document review completed</b>
14	<b>Second round document review/evidence summary completed</b>
14	<b>Completion of empirical analysis and DWL estimate (if there are price effects)/Presentation of final results</b>
14	Economic Expert final results
14 to 18	<b>Drafting of case assessment</b>
17	EP&E technical memo to case team
18	Final assessment with appended EP&E memo provided to ADC
20	Recommendation to SDC
22	<b>Recommendation to CofC</b>



# End of the Review

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- **NAL – “No-action” Letter**
  - The Commissioner does not intend at this time to file an application under section 92
  - The Commissioner still has a year to challenge (s. 97)
- **Remedy Negotiations**
- **Section 92 applications**





# Key Takeaways and Questions

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# Appendix

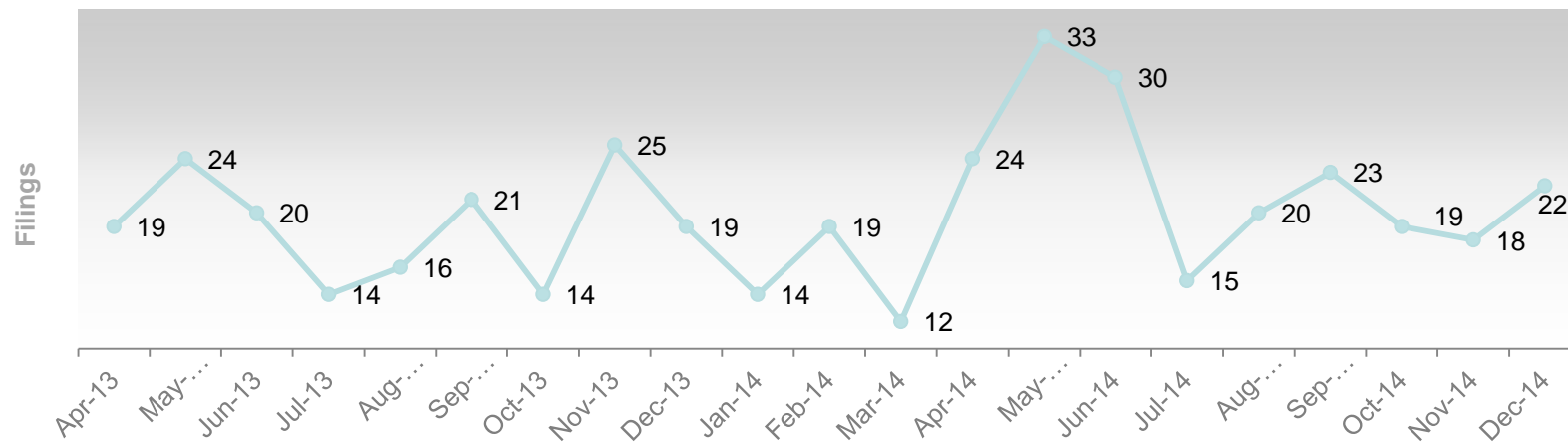
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# Workload

- 230 examinations commenced in FY2013/2014
  - 218 notifiable reviews; 12 other reviews
- 204 merger filings YTD2014/2015 (Q1-Q3)
  - Projected approx. 250 filings for FY2014/2015

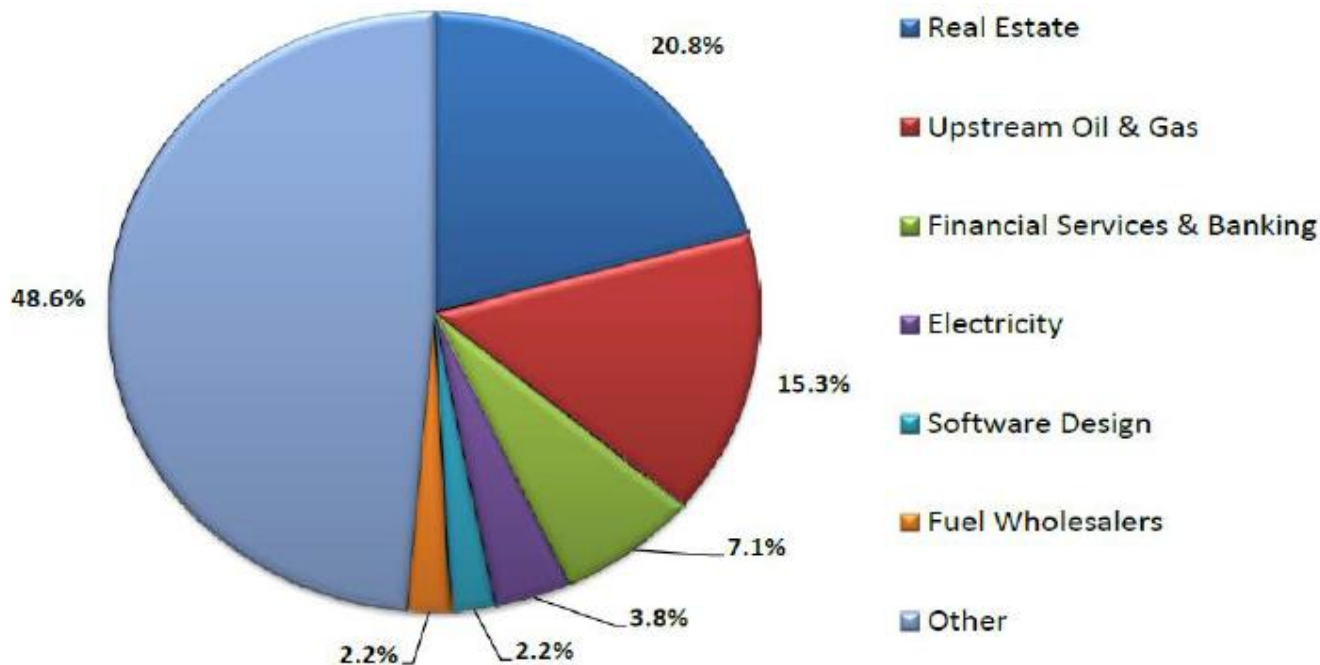






# Sector Breakdown

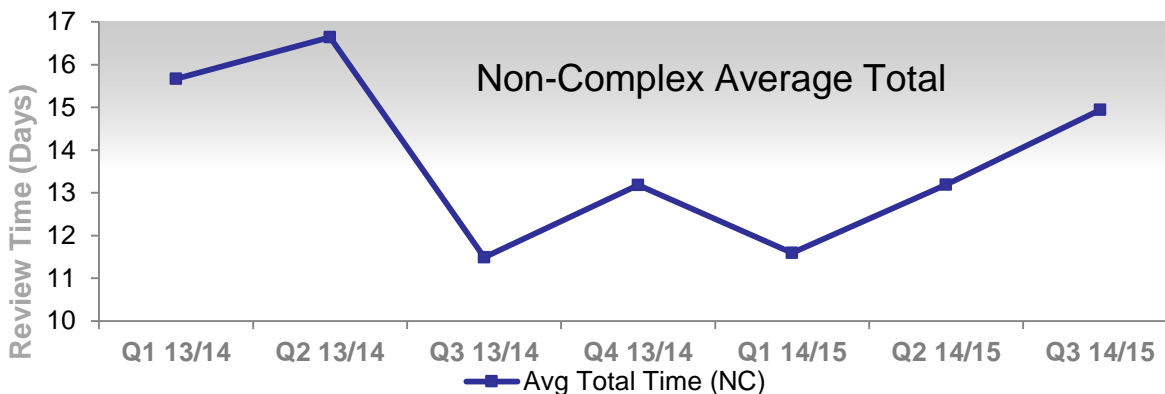
- In 2013/2014, 7 sectors had more than 3 merger reviews
- Real Estate and Upstream Oil & Gas had the most reviews



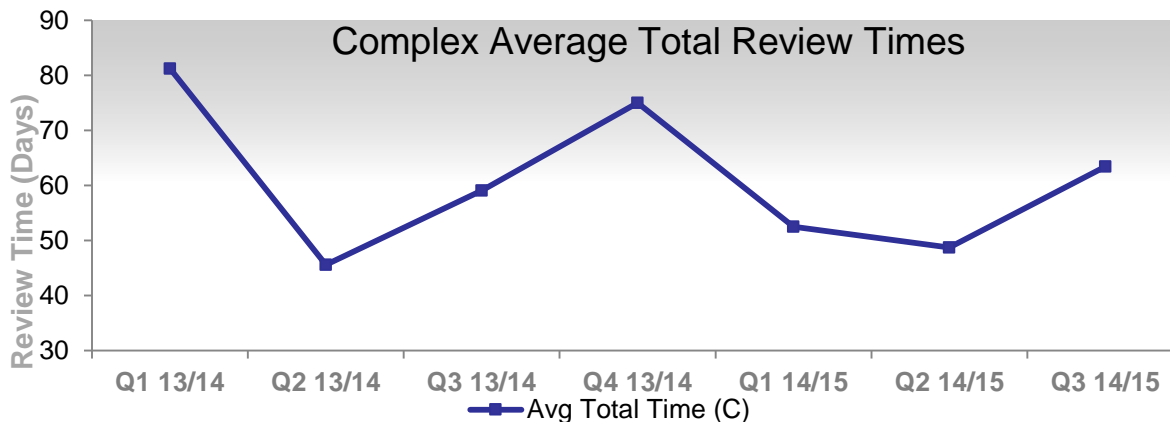


# Average review times (FY2014/2015 Q1-Q3)

- Non-complex: 13.98 days



- Complex: 60.73 days



# Complex Reviews

- Issued same number of SIRs as previous year
  - Approx. 4.5% of total annual merger reviews
- Remedies up over last year
  - 4 Consent Agreements, 3 undertakings
- Continue to publish a Position Statement in nearly 25% of complex reviews

Statistic	2013/14	2012/13
SIRs Issued	10	10
Remedies	7	3
Position Statements	11	14

