



Competition Bureau
Canada

Bureau de la concurrence
Canada

Competition Bureau Merger Review Performance Report

October 2004

Canada 

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Introduction

The Competition Bureau (Bureau) is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*. The Bureau promotes and maintains fair competition so that Canadians can benefit from competitive prices, product choice and quality services. The Bureau's approach to the administration and enforcement of the Acts is based on five principles: confidentiality, fairness, predictability, timeliness, and transparency.

In November 1997, the Bureau introduced fees and service standards for certain services and merger notification under the *Competition Act* (Act) (refer to Table 1). At that time, the Bureau committed to ongoing consultations and stakeholder feedback. The merger notification filing and advance ruling certificate (ARC) request fees are currently at \$50,000.

Table 1: Merger Review Service Standards

Merger Notification Filings and ARC requests	Service Standard ¹
non-complex	2 weeks
complex	10 weeks
very complex	5 months

More recently, on April 1, 2003, and after extensive consultations, the Bureau revised its *Fee and Service Standards Policy* (Policy) and its *Fee and Service Standards Handbook*² (Handbook) to better reflect the cost of merger review and providing binding written opinions. The Handbook was further revised in December 2003 to reflect the Bureau's first six months experience with the revised Policy and further stakeholder feedback.

This report is intended to provide an update on the performance of the Bureau's Mergers Branch since the last *Merger Review Performance Report*³ which was published in June 2001. This report

¹A Service Standard represents the maximum time within which the Bureau will endeavour to provide a response.

²The *Fee and Service Standards Policy* and the *Fee and Service Standards Handbook* can be found on the Bureau's Web site (www.cb-bc.gc.ca) under Business Services, Fees and Service Standards.

³The June 2001 Merger Review Performance Report can be found on the Bureau's Web site under Business Services, Fees and Service Standards.

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will also form the basis of part of the consultations to be held at a Forum scheduled for November 2, 2004.

Workload and Resources

Table 2: Caseload⁴

	1998-1999		1999-2000		2000-2001		2001-2002		2002-2003		2003-2004	
	#	%	#	%	#	%	#	%	#	%	#	%
Merger Notification Filings	109	30	92	22	73	20	59	18	28	10	22	11
Advance Ruling Certificate Requests	174	48	209	49	255	68	243	74	224	80	159	79
Other Examinations	26	7	60	14	45	12	26	8	27	10	21	10
Subtotal	309	85	361	85	373	100	328	100	279	100	202	100
Securitized	52	15	64	15	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total	361	100	425	100	373	100	328	100	279	100	202	100

It is difficult to predict the volume and complexity of merger notifications the Mergers Branch will receive in a given year since it depends on external factors; the Branch must be able to handle any sudden influx of work. To a certain extent, it may be able to draw on resources elsewhere in the Bureau as it did in 1997-1998, for example, with respect to the proposed Bank merger transaction. However, one cannot rely on this as a solution.

Since 2000-2001, there has been a decline in the number of merger notification filings. However, the ratio of ARC requests has increased from approximately 3 : 1 in 2000-2001 to 7 : 1 in 2003-2004.

As a result, the Bureau managed the downturn in the number of notifications in the fall of 2001 in three ways. First, a certain amount of time of Mergers Branch staff was temporarily provided to help out other branches in the Bureau. Second, some positions were left unfilled when employees left the Branch or obtained promotions elsewhere in the Bureau. Third, the opportunity was used

⁴The totals include the number of notifications or ARC requests received during April 1 and March 31 of each year.

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to carry out work which could not have been done when the Bureau was too busy. Notably, this included the review of the Merger Enforcement Guidelines⁵ (MEGs).

Once it became clear that there was a sustained upturn in merger transactions, the Branch began pulling back resources. In this manner, the Mergers Branch is able to respond to either large numbers of notifications and/or large cases efficiently and effectively.

Table 3: Cost of Merger Review

	Full Time Staff	Direct Costs (millions)	Indirect Bureau Costs (millions)	Comments
1998-1999	59	\$12.2	Not available	Major expenditures: Banks, and the Grocery files, and accommodation expenditures
1999-2000	54	\$12.2	Not available	Major expenditures: Propane litigation, and the Airlines file
2000-2001	57	\$9.5	Not available	Major expenditures: Chapters/Indigo, and Waste litigation
2001-2002	58	\$11.3	\$0.9	Major expenditures: Propane, Abitibi/Donohue, and the Astral/Telemedia files
2002-2003	57	\$9.7	\$0.3	Major expenditures: UGG/Agricore, Propane, Abitibi/Donohue, and the Astral/Telemedia files
2003-2004	58	\$6.5	\$0.3	Major expenditures: Waste, ONR, and the BC Rail files

*Note: Table 3 does not include substantial costs incurred by the Government but not paid by the Bureau budget. These expenditures include a portion of other government department services (such as the Department of Public Works and Government Services and the Department of Finance), and a portion of human resource and communications services provided by Industry Canada.

Table 3 indicates the resources that were expended for merger review over the last number of

⁵The Merger Enforcement Guidelines can be found on the Bureau's Web site under Merger Info, Publications.

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years and the number of full-time staff that were approved in each year. As a result of the downturn in economic activity and merger filings, the Bureau's expenditures for 2003-2004 were lower compared to previous years. However, although filings were substantially reduced, there were significant costs associated with other activities and complex and very complex cases.

The direct costs of merger review include the salaries for the staff in the Bureau whose work relates to the review of merger notifications and ARC requests and also include a portion of the salaries for lawyers assigned to the work of merger review at the Department of Justice. The major non-salary direct costs include the expenditures associated to hiring experts and legal services and other professional services. The indirect costs associated to merger review include non-salary Bureau overhead expenditures.

In accordance with Treasury Board policy⁶, the Bureau uses revenue generated through merger notification and ARC requests both to fund and improve those services. Treasury Board also guides Departments through its *Guide to the Costing of Outputs* (also available on its Web site) on how to calculate the full costs of providing a service or regulatory process in order to set fees. In its Guide, Treasury Board calculates the full cost of providing a service by including a portion of other government department services (such as the Department of Public Works and Government Services and the Department of Finance), and a portion of human resource and communications services provided by Industry Canada. These costs have not been included in Table 3 above as they are not tracked specifically by branch each year.

Since 1997 when fees were first introduced and up until 2002-2003, the costs associated with merger review have been higher than the revenues generated through fees. The Bureau historically covered these additional costs with a portion of its base budget. Although the Mergers Branch cannot accurately predict how many filings, nor the complexity of those filings being notified, and therefore the associated costs, it is expected that with the current upturn in economic activity, future revenues and associated costs to the Bureau should balance out.

The Bureau benefited from the decrease in merger filings by having the opportunity to begin to update the MEGs. Since their first release in 1991, the MEGs have been a useful tool in outlining the basic analytical framework for merger review in Canada. Given legal and economic developments since then, reviewing the MEGs ensures that they remain up to date and useful to merging parties. In March 2004, the Bureau released the draft revised MEGs for public consultation. The Bureau held public consultations with interested stakeholders including members of the Bar, academic community, and foreign competition authorities and published the revised MEGs in September 2004.

⁶Treasury Board's *External Charging Policy* can be found at: www.tbs-sct.gc.ca under Policies.

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In addition, in June 2003, the Government asked the Bureau to review the Bank Merger Enforcement Guidelines (BMEGs) following a House of Commons and Senate Committee report. BMEGs apply the MEGs in the context of a bank merger. The Bureau sought public comment on its BMEGS in February 2004 and plans to publish the revised BMEGs the same time the Department of Finance issues its bank merger review document or very shortly thereafter.

During fiscal year 2002-2003, the Bureau held cross-Canada consultation meetings to discuss its proposal to increase fees for merger notification, increase the size-of-transaction threshold for merger notification from \$35 million to \$50 million and amend the fees and service standards for binding written opinions.

On April 1, 2003 the revised *Fee and Service Standards Policy and Handbook* came into force, written opinions became binding, the fees and service standards for written opinions were revised, the size of transaction threshold for merger notification was raised to \$50 million, and fees for merger notification and ARC requests increased to \$50,000.

Before increasing the size-of-transaction threshold for merger notification, the Bureau estimated that this would result approximately in a 10% decrease in the number of filings. Although we do not have data on the number of transactions in the \$35 million to \$50 million range that were completed during fiscal year 2003-2004, available information suggests that the decrease in the number of filings due to the increase in the size-of-transaction threshold was in fact greater than 10%.⁷

Among the cases that have consumed very large amounts of time and money in the period starting with fiscal year 2001-2002 are Superior Propane, Astral Media, Abitibi Consolidated, Canadian Waste, and UGG/Agricore.

⁷For fiscal year 2003-2004, the Bureau examined 24% of all publicly announced mergers, as reported by Crosbie & Company Inc. in *Mergers and Acquisitions in Canada*. For the three previous fiscal years, this proportion was approximately 32%. This implies a 25% decrease in 2003-2004 in the number of mergers examined by the Bureau compared to the Crosbie data. This may not be an exact measure of the decrease in the number of merger filings due to the increase in the size-of-transaction threshold, however, the Bureau does not have any other available estimation method.

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Table 4: Revenue Generated through Merger Notification

	Revenue generated through merger notification and ARC requests (millions)
1998-1999	\$6.9
1999-2000	\$7.5
2000-2001	\$8.4
2001-2002	\$7.5
2002-2003	\$6.3
2003-2004	\$8.8

Filing Complexity and Service Standards

Table 5: Volume of Cases by Level of Complexity⁸

	1998-1999		1999-2000		2000-2001		2001-2002		2002-2003		2003-2004	
	#	%	#	%	#	%	#	%	#	%	#	%
Non-complex	212	77	232	80	282	81	271	86	215	90	165	89
Complex	56	20	49	17	52	15	41	13	21	9	18	10
Very Complex	6	2	8	3	14	4	2	1	2	1	2	1
Total	274	100	289	100	348	100	314	100	238	100	185	100

Table 5 shows that since 1998-1999, there has been an increase in the proportion of non-complex filings (from 77% to 89%). In 1997, when the *Fee and Service Standards Policy* was developed, the Bureau expected that about 85% of filings would fall into the non-complex category, 10% in the complex category and 5% in the very complex category. In the last two years, approximately 90% of filings have been non-complex. Since 1999-2000, the percentage of complex cases has declined from 20% to the level originally expected (10%).

⁸The totals include the number of notifications and ARC requests completed between April 1 and March 31 of each year.

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In the high number of cases filed in 2000-2001, there were 4% classified as very complex. The Bureau predicted in 1997 that 5% of filings would be classified as very complex. Experience has shown that this estimate was high; during the last three fiscal years, there has consistently been 1% of filings categorized as very complex. While this number may appear low, the complex and very complex filings account for the bulk of the Mergers Branch's expenditures. Complex and very complex filings are the cases that raise competition concerns and where remedial action and/or court proceedings are necessary. Resolving these cases requires expert witnesses, economists and legal counsel and costs the Bureau significant resources.

Table 6: Percentage of Filings Where the Service Standard Was Met

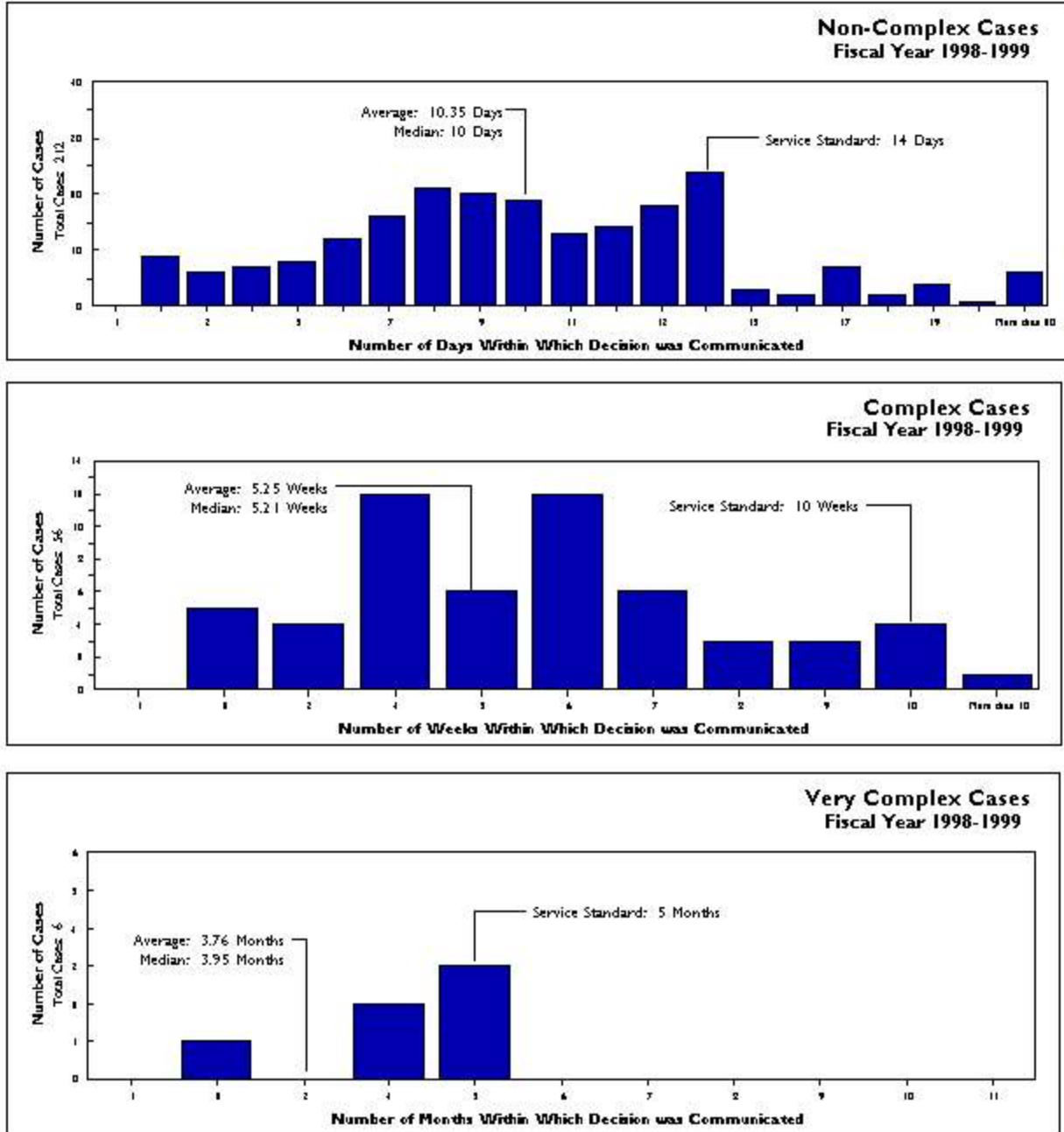
	Service Standard	98-99	99-00	00-01	01-02	02-03	03-04
Non-complex	2 weeks	187 88.2%	218 94.0%	270 95.7%	258 95.2%	213 99.1%	164 99.4%
Complex	10 weeks	54 96.4%	43 87.6%	48 92.3%	36 87.8%	20 95.2%	17 94.4%
Very Complex	5 months	6 100%	7 87.5%	14 100%	2 100%	2 100%	2 100%
Total		247 90.1%	268 92.7%	332 95.4%	296 94.3%	235 98.7%	183 98.9%

The Mergers Branch has been getting better at meeting service standards. Every year, the branch improves processes, training, and procedures to better meet stakeholder's needs.

There is one case during the year 2003/2004 where the clock was suspended; it was suspended for less than one day.

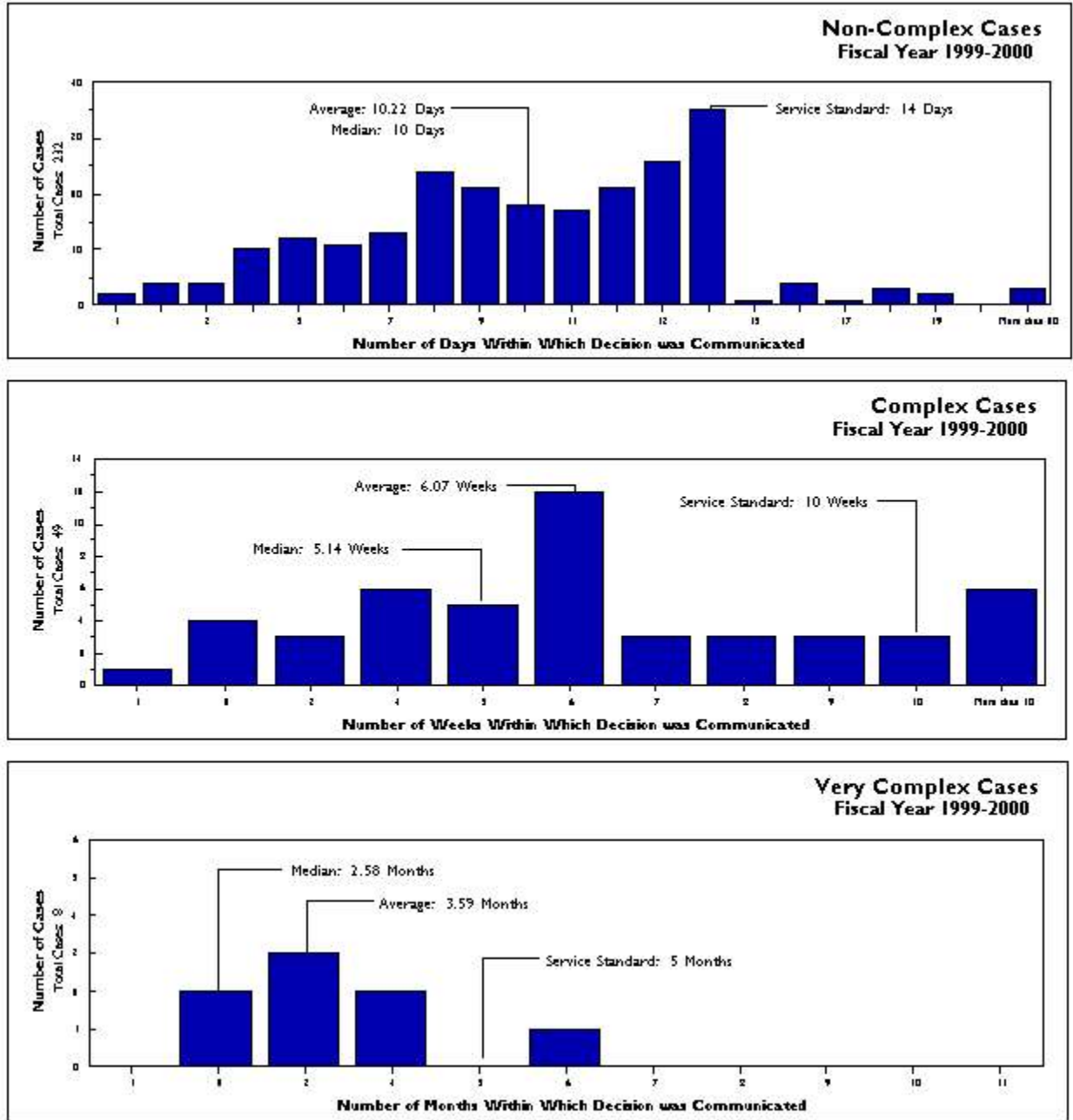
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Figure 1: Meeting the Service Standard



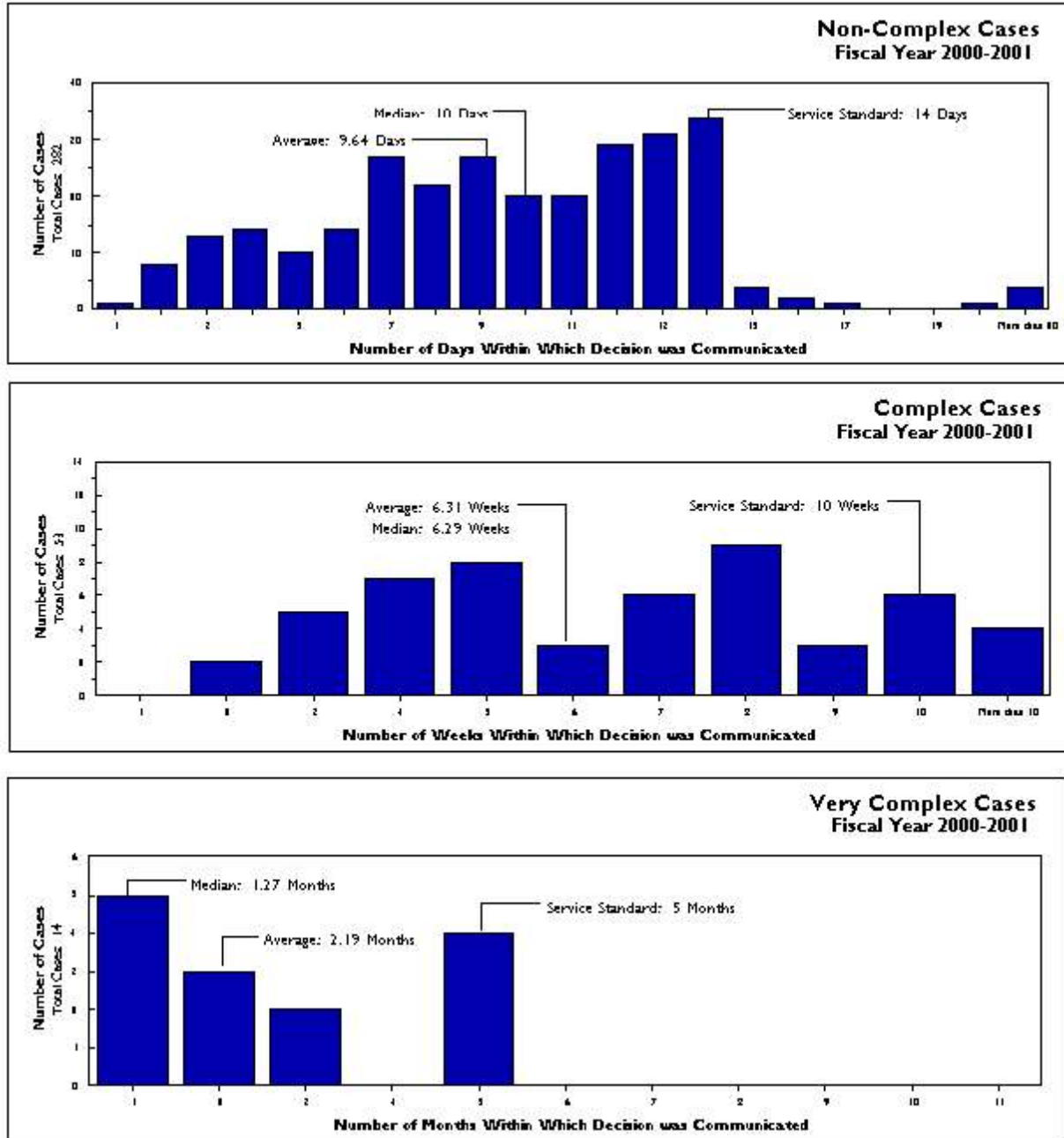
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Figure 2:



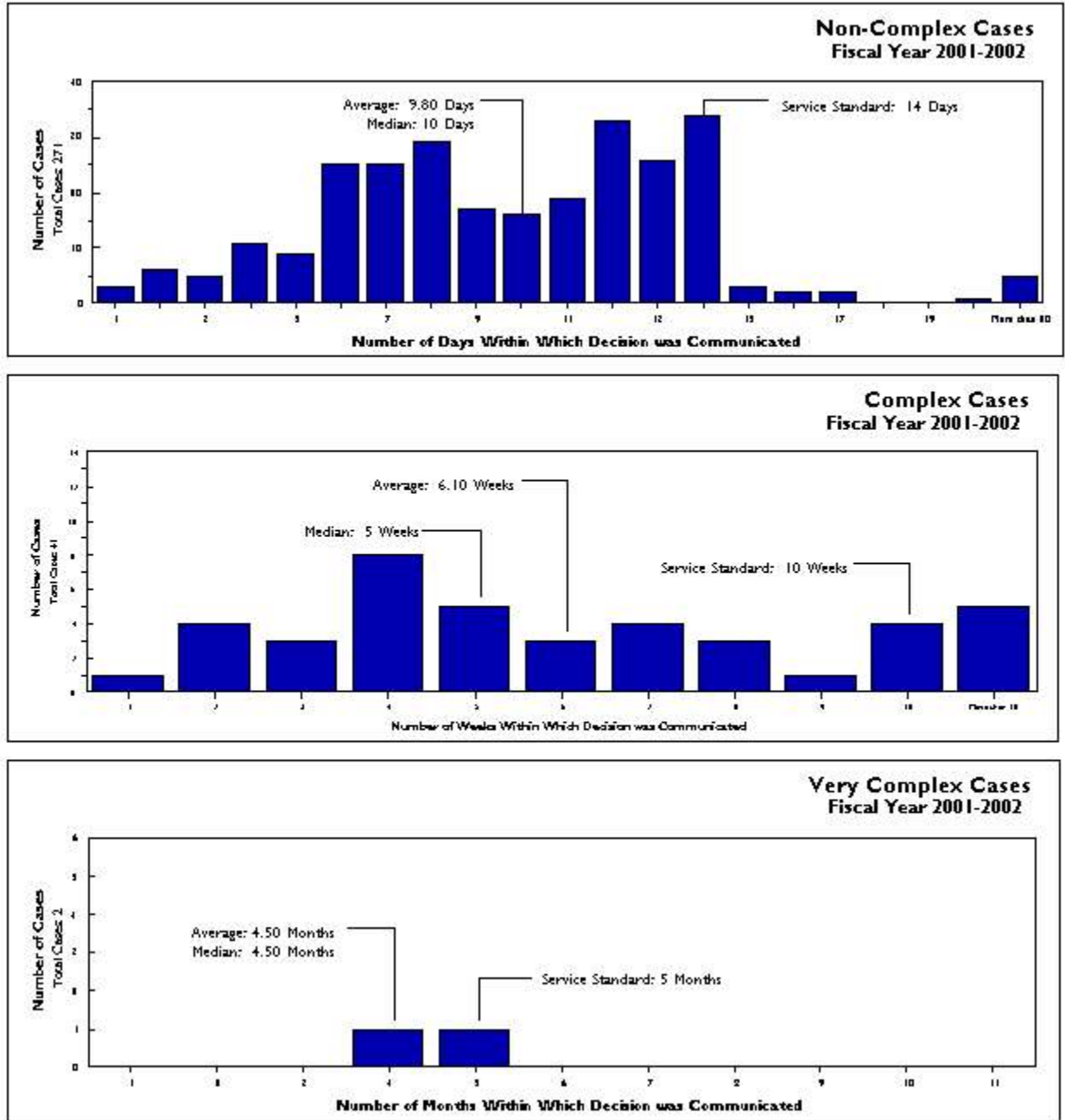
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Figure 3:



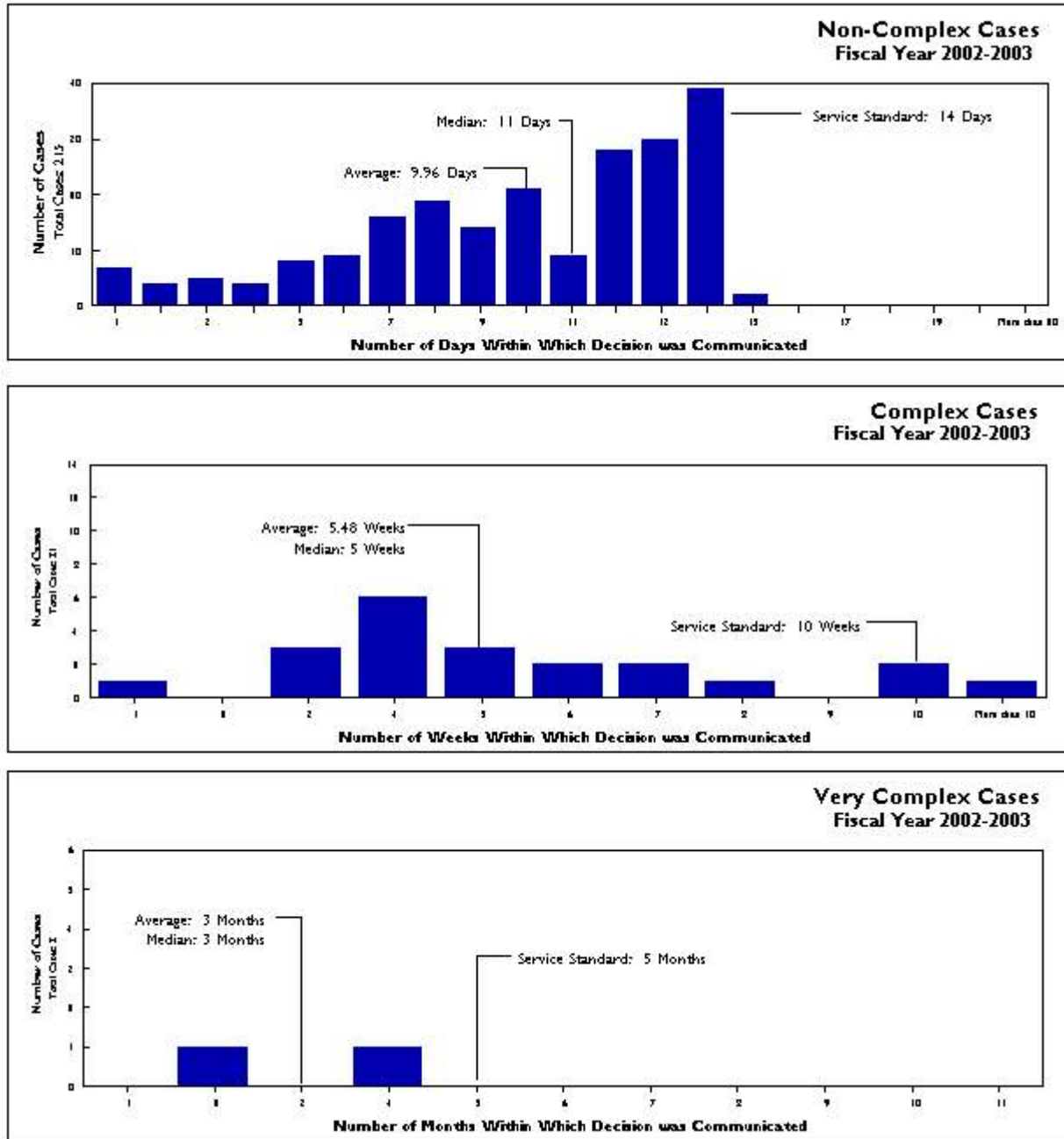
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Figure 4:



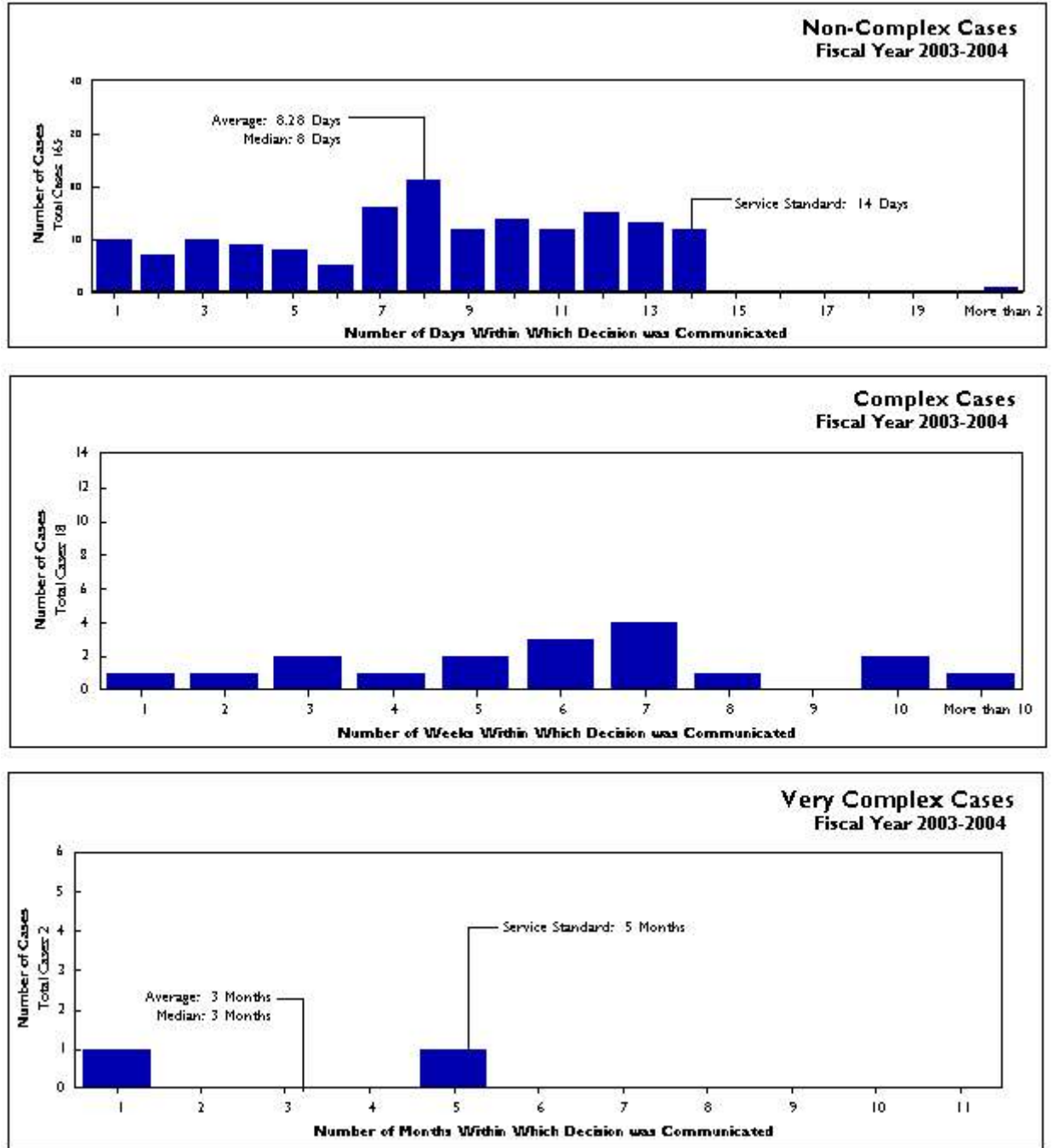
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Figure 5:



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Figure 6:



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Filing Fees in Other Jurisdictions

Most of Canada's major trading partners also charge fees for merger review. Table 7 provides an overview of the fees charged in certain other jurisdictions.

Table 7: Filing Fees in Other Jurisdictions

	Fees
United States	Fees range between US\$45,000 (approximately C\$58,000) and US\$280,000 (approximately C\$364,000)
Japan	There are no fees charged for merger review
United Kingdom	Fees range between £5,000 (approximately C\$12,000) and £15,000 (approximately C\$35,000)
China	There are no fees charged for merger review
Germany	Fees range between EUR 5,000 (approximately C\$8,000) and EUR 100,000 (approximately C\$157,000)
Mexico	MXP 110,554 (approximately C\$12,000)
France	There are no fees charged for merger review
Australia	A\$15,000 (approximately C\$14,000)
Norway	N/A Notification is voluntary
Sweden	There are currently no fees charged for merger review however a fee of SEK 75,000 (approximately C\$13,000) has been proposed by the Competition Authority.
European Union	There are no fees charged for merger review
Brazil	BRL 45,000 (approximately C\$20,000)

More information on filing fees in various jurisdictions can also be found on the International Competition Network (ICN) Web site at www.internationalcompetitionnetwork.org. The Bureau is currently participating in the Filing Fees Project conducted by the Notification & Procedures

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Subgroup of the ICN Merger Working Group. The purpose of the project is to conduct a comparative analysis of merger notification filing fee provisions in approximately seventy jurisdictions. The results of this Filing Fee Project will be presented at the ICN Conference in Bonn, Germany in June 2005.

Feedback Leaflets

When the *Fee and Service Standards Policy* was developed in 1997, the Bureau also included feedback mechanisms to ensure that those who sought services or were bound by regulatory processes to which a fee applied, had timely and systematic opportunities to provide ongoing input about service levels and quality of service. Feedback Leaflets were developed to allow stakeholders to provide written feedback on specific Bureau services.

Between 1997 and 2003, generic Feedback Leaflets were used to capture service level feedback on both Advisory Opinions and Merger Notification. In January 2004, the Leaflet was revised and two new Feedback Leaflets were developed, one for merger review and one for Written Opinions. Starting in January 2004, every response to a merger notification and/or ARC request has been accompanied by a blank revised Feedback Leaflet. The Leaflet was revised to capture more detailed information on the quality of service and provide more precise feedback to managers on which to base decisions related to process improvement.

In response to concerns raised during the Merger Review Benchmarking Study⁹, the Bureau assigned the Compliance and Operations Branch the task of receiving the Feedback Leaflets and compiling the data received. This way, a respondent's anonymity is preserved. Quarterly and year-end reports are prepared by the Compliance and Operations Branch and are provided to the enforcement branches.

⁹The *Merger Review Benchmarking Report* was published by the Bureau's Compliance and Operations Branch in June 2001 after it conducted a thorough study of the Bureau's merger review process. The report is available on the Bureau's Web site under Merger Info, Publications.

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Table 8: Monitoring Merger Review through Feedback Leaflets 2001-2002 to 2003-2004

	Service Rendered within Specified Time		Quality of Service				
	Total	Yes	No	Excellent	Good	Fair	Poor
ARC	134	131*	2	110**	19	2	1
Merger Notification	47	42	5	28	17	2	-
ARC and Merger Notification	31	25*	5	22	7	1	1
Percentage	100%	93%	6%	75%	20%	2%	1%
Total	212	198	12	160	43	5	1

*One Leaflet did not include a Yes or No response.

**One Leaflet did not include a rating for Quality of Service.

During fiscal years 2003-2004 and 2002-2003, there was a return rate of 22%. During fiscal year 2001-2002, there was a high return rate of 34%. The Bureau assumes that the high return rate is due to the ongoing consultations of the Competition Law Section of the Canadian Bar Association during the Merger Review Benchmarking Study and the subsequent publication of its findings in June 2001.

The Bureau has consistently received positive feedback through the leaflets during the last three fiscal years. Stakeholders are consistently very pleased with the way in which non-complex cases are handled by the MNU and the Mergers Branch.

The Bureau believes that the revised Feedback Leaflets will provide more detailed information on how and where the Bureau can focus its energy in improving service to stakeholders.

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Government On-Line

Government On-Line ("GOL") is the Government of Canada's multi-year drive to deliver key information, products and services to Canadian citizens and businesses and to non-Canadians, electronically over the Internet. By 2005, Canada's goal is to be known around the world as the government most connected to its citizens, with Canadians able to access all government information and services on-line at the time and place of their choosing. The Competition Bureau is playing a leadership role in GOL, along with Industry Canada, by accelerating our GOL target date by a full two years - from 2005 to 2003. To that end, the Bureau, having consulted with stakeholders, began an on-line initiative which manifests itself today through our web-page and web-based services.

At this time, the Bureau accepts merger notification filings and ARC requests sent via e-mail with attachments, with the security risk borne by the sender and any sworn document with a signature visible in .pdf format (or similar format) or with the signed document sent by follow-up fax. The filing of merger notifications and ARC requests in a dedicated and secure electronic format has been under consideration for some time now, and is one of the more complex GOL initiatives due to significant security requirements.

In December 2003, members of the Canadian Bar Association Merger Notification Group were consulted on a proposal that would have allowed users to complete and submit a web-based, encrypted on-line e-form. Based on the comments received from stakeholders, the Bureau decided to simplify the original proposal and develop only a secure transmission mechanism that will allow users to submit electronically encrypted documents. This new system is currently being tested and should be implemented by the end of the year. It should be stressed that this will not replace other means of submitting merger notification filings and ARC requests currently accepted by the Bureau, but will provide users with another alternative.

In addition, as a result of a suggestion by members of the CBA Merger Notification Group, the Bureau equipped MNU computers with Microsoft Word and Excel softwares to improve computer program compatibility.

Conclusion

The Mergers Branch has succeeded in improving its success at meeting service standards once again over the last two fiscal years. The data shows that the Branch takes providing an efficient and effective merger notification and review process very seriously.

Comments will be sought from stakeholders at the consultation forum on November 2, 2004 in

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Toronto. The Mergers Branch will also present its views and seek stakeholder feedback on different fee structures, including a discussion of the merits of other fee structures including the sliding scale fee structure. Comments and suggestions are also welcome via Feedback Leaflets and/or direct telephone calls and/or emails to Rachel Laurin, Service Improvement Officer, Compliance and Operations Branch, Competition Bureau, (819) 994-0390, laurin.rachel@cb-bc.gc.ca.