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Canada 2011 Year in Review

BY ANTHONY BALDANZA, ANTONIO DI DOMENICO, LESLIE MILTON AND DOUGLAS NEW (FASKEN MARTINEAU DUMOULIN LLP)

2011 was all about enforcement. Among other things, the Competition Bureau (the "Bureau") issued updated Merger Enforcement Guidelines and updated Merger Review Process Guidelines. It also instituted a challenge in respect of the CCS-Complete Environmental merger and the Air Canada-United Continental joint venture under the merger provisions of the Competition Act (the "Act"), and also challenged the Air Canada-United and Air Canada-Continental alliance agreements under the new civil competitor collaboration provisions of the Act. An abuse of dominance proceeding was initiated against the Toronto Real Estate Board and the Bureau continued its price maintenance proceeding against Visa and MasterCard. Cartel enforcement continued apace and 2011 was also noteworthy for developments in relation to cartel-related class actions. And the Investment Canada Act (the "ICA") continued to make front-page headlines. This article reports on these and other developments.

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A New Chapter in European Data Protection:

Commissioner Reding Publishes Long-Awaited Draft Data Protection Regulation

BY KARIN RETZER AND JOANNA LOPATOWSKA (MORRISON & FOERSTER LLP)

On January 25, 2012, Vice-President of the European Commission for Justice, Viviane Reding, officially presented the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)[1] (the "Regulation"). The long-awaited legislative proposal sets out new standards and requirements for the protection of personal data in the European Economic Area ("EEA").[2] Once adopted, the Regulation will replace the existing Data Protection Directive 95/46/EC and will directly apply not only to organizations established in the EU/EEA, but also to other organizations that collect and process EU/EEA residents' personal data. The aim of the Regulation is to update the EU's 15-year-old data protection framework and to harmonize privacy laws across the Member States.

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Mergers

Enforcement Policy

(a) Updated Merger Enforcement Guidelines

In the wake of the issuance in 2010 of updated U.S. Merger Enforcement Guidelines, and after conducting an extensive consultation process, in October 2011 the Canadian Competition Bureau published updated *Merger Enforcement Guidelines* (hereafter, the "2011 MEGs") that replace the pre-existing guidelines that were published in 2004 (hereafter, the "2004 MEGs"). The Bureau's stated objective in updating the 2004 MEGs was not to do a full rewrite, but to "address certain discrete areas where the [2004] MEGs do not fully reflect current Bureau practice and current economic and legal thinking."

The following are among the most noteworthy changes:

- The 2011 MEGs provide additional guidance as to how the Bureau assesses transactions in which minority interests or interlocking directorates are at issue and when they result in a "merger" for purposes of the substantive merger review jurisdiction under the *Competition Act*;
- While the 2011 MEGs state that examination of the competitive effects of a merger *generally* involves defining the relevant markets and assessing the competitive effects of the merger in those markets, the guidelines also state that "Market definition is not necessarily the initial step, or a required step,…" and that the Bureau may instead rely on other methods of assessing the likely competitive effects of a merger including "various economic tools";
- The 2011 MEGs have replaced the two-year time frame for effective entry (to constrain the exercise of market power arising from a merger) with a requirement that entry occur "quickly enough to deter or counteract any material price increase owing to the merger ";
- The 2011 MEGs provide additional and useful guidance on how the Bureau assesses the unilateral and coordinated effects of a merger, on countervailing market power and monopsony issues, and on how the Bureau assesses vertical and conglomerate mergers;
- The 2011 MEGs now incorporate the Bureau's guidance in relation to the efficiencies defense, superseding the 2009 Bureau bulletin on "Efficiencies in Merger Review."

(b) Merger Remedies Study Summary

In August 2011, the Bureau issued a bulletin respecting the results of its study of the effectiveness of remedies obtained under the merger provisions of the Act during the period 1995 to 2005. The results of the study will be used to update the Bureau's *Information Bulletin on Merger Remedies in Canada*, including the consent agreement outline template.

(c) Updated Guidance on Merger Review "No Action" letters

Effective September 1, 2011, the Bureau changed its practice with respect to no- action letters ("NALs"). Whereas prior to that date, NALs referred to the insufficiency of grounds to challenge a merger, NALs now state only that the Commissioner of Competi-

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European Commission Launches Green Paper Consultation

BY PHILIP WERNER (MCDERMOTT WILL & EMERY)

The European Commission has launched a Green Paper consultation on credit card, internet, and mobile payments with regard to card-fees and related matters of concern to the competition authorities. Interested stakeholders have until April 11, 2012 in which to submit their views. The consultation, which runs from January 11, 2012 to April 11, 2012, follows a decade of anti-trust enforcement, notably the Commission's decisions addressed to Visa and MasterCard.

The consultation addresses the new technological developments in this market, namely innovative card, internet, and mobile device payments. In particular, it addresses the issue of the fees levied for such payments. The consultation is in line with the broader objective of having a "cutting edge" payment system throughout Europe, which it is hoped will help drive the growth of the single market through e-commerce. The Vice-President of the Commission, Joaquín Almunia stressed that, "Inefficient payments systems within the European Union unduly raise transaction costs, undermine the global competitiveness of the European economy, and limit its potential for growth."

Fees

In relation to fees, the Green Paper indicates that the consultation will address issues such as card charges, interchange fee transparency, cross-border acquisition (merchants using foreign providers), and technical standards.

The aim of the consultation is to identify the obstacles that potentially prevent European integration in the card, internet and mobile payment markets. The questions asked concern market access and entry barriers faced by existing and new service providers, payment security and data protection, transparent and efficient pricing for payment services, technical standardization, and inter-operability between service providers. The Commission is also seeking stakeholders' views on what would be the best form of regulation to remedy the concerns identified.

Competition Concerns

The Green Paper suggests that competition concerns have not been addressed adequately. This is because there has been a somewhat sporadic approach of ad-hoc Commission decisions and judgments by the European Courts. At this stage, the Commission is seeking the views of interested parties on the obstacles that hinder development of this market; it is not certain that legislation will follow.

The European Commission has launched a Green Paper consultation on credit card, internet, and mobile payments with regard to card-fees and related matters of concern to the competition authorities.

The Commission's concerns arise primarily because the European card payments market is fragmented largely along national borders, with a small number of domestic schemes and only two main international players (Visa and MasterCard). In addition, the overall structure raises a number of competition concerns, as the payment-cards sector is dominated by inter-bank fees commonly agreed between payment service providers, also known as Multilateral Interchange Fees or MIFs. A further identified side effect of current practice is its potential hindrance to innovation. All these accusations have been challenged by the industry.

The Commission has already put into place the Single Euro Payments Area (SEPA) framework, which is based on the premise that there should be no distinction between cross-border and domestic electronic retail payments within the European Union. The framework covers credit transfers, direct debits, and payment cards.

Responses to the Green Paper are welcomed until April 11, 2012 and the Commission is expected to announce the next steps to be taken before the summer of 2012. Interested stakeholders should make sure to contribute if they want to have their views represented. ❏

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Don’t Believe the Hype: Brazil IPOs Face Hard Year

BY GUILLERMO PARRA-BERNAL (REUTERS)

Brazil’s once-hyped market for initial public offerings may not recover as swiftly as some bankers have been expecting, as an unpredictable economy and the risk of overpriced deals scare investors away.

Brazil’s once-hyped market for initial public offerings may not recover as swiftly as some bankers have been expecting, as an unpredictable economy and the risk of overpriced deals scare investors away.

The hurdles facing tourism company Brasil Travel Turismo, which withdrew its IPO plan this month, and the Brazilian unit of Norway’s Seadrill, which is reworking the terms of its offering, provide a chilling prelude to a market that many only recently thought was set for a hot year.

Seen for most of the last decade as a symbol of Brazil’s buoyant capital markets, IPOs have languished in the past two years as prices sank for many names that went public. While most markets have gradually recovered from the global financial crisis of 2008, IPOs remain out of favor.

The trend underscores how investors in Brazil are still reluctant to take on risky bets like IPOs, the mechanism that small and sometimes inexperienced companies use to raise capital. Instead, investors are more willing to pour money into existing equity and bonds, where it is easier to assess risks.

“Why bother betting on a company you have never heard of when you have so many other good names trading on the stock exchange?” said Frederico Misnik, who helps oversee more than $40 million in assets at Humaitá Investimentos in São Paulo.

Last year, investors drove the benchmark Bovespa index down 18 percent. Only 11 initial public offerings were completed in 2011, with eight pricing at the bottom or below the suggested price range, data by Ernst & Young showed.

That is a sharp drop from 2007, when more than 70 companies went public, and seven of every 10 deals priced within the suggested range. In fact, Brazilian companies raised more funds through IPOs between 2006 and 2008 than they did in the two preceding decades.

Foreigners on the Sidelines

Foreign investors, traditionally the biggest buyers of local IPOs because of their strong shareholding culture, snapped up more than three-fourths of such deals in 2006-2008, hoping the newly listed companies would deliver stellar profits.

But they are slowly moving to the sidelines as the perceived quality of stock market debutants slipped. Foreign investors’ take of local IPOs fell to 56 percent last year, and analysts expect that percentage to keep falling.

“A more conservative mood has overtaken markets, and you can be sure that many IPOs will be challenged,” said Paulo Dortas, an Ernst & Young partner who specializes in Brazilian IPOs. “Investors won’t abide by a price or a structure that doesn’t reflect the return they are aiming for.”

Investors have also balked at what they deem as timid government efforts to combat inflation, which reached seven-year highs during 2011. The central bank began cutting interest rates in August, after five consecutive increases.

Efforts to stem massive gains in Brazil’s currency, the real, led President Dilma Rousseff’s administration to raise taxes on some financial transactions, making it more expensive for foreigners invest in Brazil.

“The economic scenario has not been supportive of IPOs, either,” Dortas said.

Bond Bonanza

The lethargy afflicting IPOs in Brazil contrasts with record foreign inflows into the Bovespa and a frenzy of Brazilian corporate bond sales abroad this year.

A record $7.2 billion of foreign money flowed into the Bovespa in January. Investors bought $15 billion worth of corporate debt sales by Brazilian firms in the year through this month.

Yet, some industry leaders are still betting big on IPOs.

Edemir Pinto, chief executive officer of financial exchange operator BM&FBovespa, expects up to 40 Brazilian IPOs to price this year, almost double the combined 22 transactions of 2010 and 2011.

Ernst & Young’s Dortas, in contrast, sees no more than 20 IPOs this year. Investors will use their clout to push suggested price tags towards a level they consider “fair,” he said.

Bankers at Itaú BBA and BTG Pactual, the two largest Brazilian investment banks, remain hopeful that activity will bounce back as the year progresses.

“Bond sales are leading the recovery, but I am sure that equity follow-ons will resume soon, and eventually IPOs will get their chance,” Sandy Severino, the head of BTG Pactual’s global bond underwriting team, said in a phone interview from New York.

José Olympio Pereira, co-head of investment banking at Credit Suisse Group in São Paulo, said in December that companies could assuage investor concerns by scaling down their fundraising goals.

In the case of Brasil Travel, that strategy did not work. Credit Suisse was one of the four banks handling its IPO.

Nightlong Efforts

The collapse of the Brasil Travel deal, which originally was to raise 1.45 billion reais ($842 million), signals that investors will keep shunning companies with great ambitions but an insufficient track record, poor earnings visibility or vulnerability to a downturn, Humaitá's Misnik said.

Brasil Travel, the product of 35 mergers over the past year, remains an unknown for many investors.

Market sources told Reuters this month that bankers considered cutting the IPO's suggested price to 850 reais a share and allowing existing shareholders to buy up to 50 percent of the deal, up from an initial 15 percent threshold.

The company first cut the price to 1,000 reais from a range of 1,250 reais to 1,650 reais on the day the IPO was set to price. The next day, Brasil Travel asked regulators to cancel the request to become a publicly listed company.

"What people want right now are plain vanilla deals, and companies with stories they know instead of these obscure stories," a Brazil-based banker told International Financing Review on the condition of anonymity.

Seadrill's Seabras deal could attract a lot of interest, should the company resolve its contractual problems with state-run oil giant Petrobras, Misnik said. Unlike Brasil Travel, Seadrill is a well-known company with an established track record.

This month, Brazilian meatpacker JBS announced plans to list its Vigor dairy unit on the São Paulo Stock Exchange. The 95-year-old company might be more likely to entice investors like Misnik back to the IPO market. ❑

Reporting by Guillermo Parra-Bernal. Additional reporting by Joan Magee in New York; Editing by Todd Benson and Lisa Von Ahn.

Russia Drops Proposed Tax on Eurobonds—For Now

BY LIDIA KELLY (REUTERS)

Russia's finance ministry, pressured by borrowers and banks, said late on February 20 that it is scrapping plans to collect tax on corporate Eurobonds placed by January 1, 2013 and may apply only a partial levy to papers issued after that day.

Some of Russia's biggest corporate borrowers, including Russia's top gas producer Gazprom and its second largest state bank VTB, had been facing large bills in relation to existing bond programs.

Oil pipeline monopoly Transneft had threatened to redeem over $4 billion bonds at par in response to the proposals outlined by officials in recent months.

"First, as regards interest income paid on Eurobonds issued prior to January 1, 2013, we propose to fully release Russian borrowers from any obligations to withhold tax, i.e., from obligations to act as tax agents (including interest income that has already been paid to investors)," the ministry said in a statement.

Tax to Start in January, but Only for Some

Corporate Eurobonds issued after January 1 of the next year will be taxed only on interest income received by an intermediary located in an offshore jurisdiction that has no double tax treaty with Russia, the ministry said.

Deputy Finance Minister Sergei Shatalov in a letter to tax officials at the end of last year advised that, by Russian law, companies issuing Eurobonds were obliged to pay 20 percent profits on interest at source.

The finance ministry had also insisted that payments to foreign debt holders through offshore units called special purpose vehicles (SPV) are taxable under the existing Russian law, but this tax has not been collected in the past.

Russian corporates, which have over $100 billion in Eurobonds outstanding, could face a back-tax bill for $600 million, Shatalov said earlier in February. ❑

Some of Russia's biggest corporate borrowers had been facing large bills in relation to existing bond programs.

Foreign Exchange

Pacific Exchange Rate Services Exchange Rates for the Dollar as of March 11, 2012

The table below gives the rates of exchange for the U.S. dollar against various currencies as of March 11, 2012. All currencies are quoted in foreign currency units per U.S. dollar except in certain specified areas. All rates quoted are indicative. They are not intended to **be** used as a basis for particular transactions. Pacific Exchange Rate Services (http://pacific.commerce.ubc.ca) does not assume responsibility for errors.

	Currency	Value of U.S. Dollar	Country	Currency	Value of U.S. Dollar	Country	Currency	Value of U.S. Dollar
Afghanistan	Afghani	49.5	Georgia	Lari	1.653	Norfolk Islands	Aus. Dollar	0.9455
Albania	Lek	106.65	Germany	Euro*	1.3123	Norway	Krone	5.7007
Algeria	Dinar	75.02	Ghana	Cedi	1.719	Oman Sultanate	Rial	0.3851
Andorra	Euro*	1.3123	Gibraltar	Br. Pound*	1.5674	Pakistan	Rupee	90.767
Angola	Kwanza	93.19	Greece	Euro*	1.3123	Panama	Balboa	1.00
Antigua	E.Car. $	2.7	Greenland	Dan. Krone	5.6653	Papua N.G.	Kina	2.0555
Argentina	Peso	4.342	Grenada	E.Car. $	2.7	Paraguay	Guarani	4245.00
Armenia	Dram	390.92	Guadeloupe	Euro*	1.3123	Peru	Nuevo Sol	2.6687
Aruba	Guilder	1.79	Guam	US$	1.00	Philippines	Peso	42.642
Australia	Dollar	0.9455	Guatemala	Quetzal	7.72	Pitcairn Island	NZ Dollar	1.2174
Austria	Euro*	1.3123	Guinea Republic	Franc	7100.00	Poland	Zloty	3.1159
Azerbaijan (new)	Manat	0.76	Guinea Bissau	CFA Franc	501.11	Portugal	Euro*	1.3123
Azores	Euro*	1.3123	Guyana	Dollar	202.10	Puerto Rico	US$	1.00
Bahamas	Dollar	1.00	Haiti	Gourde	41.01	Qatar	Riyal	3.6412
Bahrain	Dinar	0.377	Heard/McDonald Is.	Aus. Dollar	0.9455	Rep. Yemen	Rial	209.86
Bangladesh	Taka	81.675	Honduras	Lempira	19.055	le de la Reunion	Euro*	1.3123
Barbados	Dollar	2.00	Hong Kong	Dollar	7.758	Romania	Leu	3.3188
Belarus	Ruble	8200.00	Hungary	Forint	222.58	Russia	Ruble	29.422
Belgium	Euro*	1.3123	Iceland	Krona	126.37	Rwanda	Franc	606.72
Belize	Dollar	1.9135	India	Rupee	49.855	Samoa (American)	US$	1.00
Benin	CFA Franc	501.11	Indonesia	Rupiah	9135.80	San Marino	Euro*	1.3123
Bermuda	Dollar	1.00	Iran	Rial	12303.00	Sao Tome/Principe	Dobra	18608.00
Bhutan	Nguitrum	49.855	Iraq	Dinar	1165.00	Saudi Arabia	Riyal	3.7502
Bolivia	Boliviano	6.910	Ireland	Euro*	1.3123	Senegal	CFA Franc	501.11
Bosnia Herzegovina	Konv. Marka	1.380	Israel	New Shekel	3.7941	Serbia/Montenegro	Yug. N. Dinar	78.00
Botswana	Pula	7.2124	Italy	Euro*	1.3123	Seychelles	Rupee	14
Bouvet Island	Krone	N/A	Jamaica	Dollar	86.900	Sierra Leone	Leone	4362.00
Brazil	Real	1.7912	Japan	Yen	82.462	Singapore	Dollar	1.2544
Brunei	Dollar	1.2546	Johnston Island	US$	1.00	Slovakia	Koruna	22.963
Bulgaria	Lev	1.4911	Jordan	Dinar	0.709	Slovenia	Tolar	N/A
Burkina Faso	CFA Franc	501.11	Kazakhstan	Tenge	148.01	Solomon Is.	Solomon$	7.0766
Burundi	Franc	1401.90	Kenya	Shilling	82.65	Somali Rep.	Shilling	1620.00
Cameroun	CFA Franc	501.11	Kiribati	Aus. Dollar	0.9455	South Africa	Rand	7.5692
Canada	Dollar	0.9905	Korea, North	Won	118.18	Spain	Euro*	1.3123
Cape Verde Islands	Escudo	84.025	Korea, South	Won	1117.90	Sir Lanka	Rupee	121.4
Cayman Islands	Dollar	0.82	Kuwait	Dinar	0.2781	St. Helena	Br. Pound*	1.5674
Cent. Af. Republic	CFA Franc	501.11	Kyrgyzstan	Som	46.571	St. Kitts	E. Car. $	2.7
Chad	CFA Franc	501.11	Laos	Kip	7994.00	St. Lucia	E. Car. $	2.7
Channel Islands	Br. Pound*	1.5674	Latvia	Lat	0.5312	St. Pierre/Miq'lon	Euro*	1.3123
Chile	Peso	483.21	Lebanon	Pound	1503.50	St. Vincent	E. Car. $	2.7
China	Renminbi	6.3113	Lesotho	Maloti	7.5692	Sate of Cambodia	Riel	4012.50
Christmas Islands	Aus. Dollar	0.9455	Liberia	Dollar	73.50	Sudan	Dinar	N/A
Cocos Islands	Aus. Dollar	0.9455	Libya	Dinar	1.2585	Suriname	Dollar	3.3
Colombia	Peso	1762.30	Liechtenstein	Sw. Franc	0.9188	Swaziland	Lilangeni	7.5692
Comoros Rep.	Franc	375.08	Lithuania	Litas	2.6315	Sweden	Krone	6.8027
Congo Republic	CFA Franc	501.11	Luxembourg	Euro*	1.3123	Switzerland	Franc	0.9188
Congo Dem Rep.	Franc	N/A	Macau	Pataca	7.9906	Syria	Pound	57.459
Costa Rica	Colon	509.25	Macedonia	Dinar	43.61	Taiwan	Dollar	29.492
Cote d'Ivoire	CFA Franc	501.11	Madagascar	Franc	8547.00	Tajikistan	Somoni	N/A
Croatia	Kuna	5.753	Madeira	Euro*	1.3123	Tanzania	Shilling	1590.00
Cuba	Peso	1.00	Malawi	Kwacha	167.00	Thailand	Baht	60.56
Cyprus	Pound	0.4462	Malaysia	Ringgit	3.0075	Togo Rep.	CFA Franc	501.11
Czech Repub.	Koruna	18.764	Maldive Is.	Rufiyan	15.310	Tokelau	NZ $	1.2174
Denmark	Krone	5.6653	Mali Republic	CFA Franc	501.11	Tonga Island	Pa'anga	1.55
Djibouti	Franc	177.72	Malta	Lira	0.3272	Trinidad/Tobago	Dollar	6.4
Dominica	E.Car. $	2.7	Martinique	Euro*	1.3123	Tunisia	Dinar	1.5148
Domi. Rep.	Peso	39.05	Mauretania	Ouguiya	295.00	Turkey	Lira	1.7873
Dronning Maud.	Nor. Krone	5.7007	Mauritius	Rupee	29.1	Turkmenistan (new)	Manat	2.78
East Timor	US$	1.00	Mexico	New Peso	12.643	Turks & Caicos	US$	1.00
Ecuador	US$	1.00	Moldova	Lei	11.82	Tuvalu	Aus. Dollar	0.9455
Egypt	Pound	6.0311	Monaco	Euro*	1.3123	Uganda	Shilling	2440.00
El Salvador	Colon	8.7475	Mongolia	Tugrik	1336.00	Ukraine	Hryvnia	8.0253
Eq'tl Guinea	CFA Franc	501.11	Montserrat	E.Car. $	2.7	United Kingdom	Br. Pound*	1.5674
Eritrea	Nafka	13.63	Morocco	Dirham	8.4937	Uruguay	Peso	19.612
Estonia	Kroon	11.926	Mozambique (new)	Metical	25.18	U.A.E.	Dirhan	3.673
Ethiopia	Birr	17.439	Myanmar	Kyat	6.436	Uzbekhistan	Som	1827.90
European EMU	Euro*	1.3123	Namibia	Dollar	6.97	Vanuatu	Vatu	92.85
Faeroe Islands	Dan. Krone	5.6653	Nauru Is.	Aus. Dollar	0.9455	Vatican City	Euro*	1.3123
Falkland Islands	Br. Pound*	1.5674	Nepal	Rupee	80.42	Venezuela	Bolivar	4.29
Fiji	Dollar	1.7731	Neth. Antilles	Guilder	1.79	Vietnam	Dong	20830.00
Finland	Euro*	1.3123	Netherlands	Euro*	1.3123	Virgin Islands BR	US$	1.00
Fr. Pacific Islands	Franc	90.978	New Zealand	Dollar	1.2174	Virgin Islands US	US$	1.00
France	Euro*	1.3123	Nicaragua	Cordoba	23.189	West Samoa	Tala	2.01
French Guiana	Euro*	1.3123	Nieue	NZ Dollar	1.2174	Zambia	Kwacha	5270.00
Gabon	CFA Franc	501.11	Niger Rep.	CFA Franc	501.11	Zimbabwe	Dollar	N/A
Gambia	Dalasi	31.495	Nigeria	Naira	157.34			

(N/A) Not Available * U.S. Dollar per national currency unit

Foreign Exchange Rates and Forecasts for North and Latin America

CURRENCY FORECASTS © AND THE ECONOMIST INTELLIGENCE UNIT

North America

Canada

The exchange rate was C$1.00:US$1 on February 6th. The Canadian dollar is still strong by historical standards. As Canada is an energy exporter, the rise in global oil prices last year served to push up the value of the loonie. The currency has also been bolstered since mid-2010 by the fact that the BOC's monetary stance is tighter than that of its US counterpart, the Federal Reserve. However, a decline in commodity prices, combined with risk aversion, has pushed down the value of the loonie from a peak of almost C$0.94:US$1 in late July. A rally over the last month has still left it well below that recent peak. In 2012 we expect oil and commodity prices to be weaker than in 2011, albeit remaining close to historically high levels. However, the BOC will continue to operate tighter monetary policy than the Fed, which will support the Canadian dollar. We expect the exchange rate to average C$1.02:US$1 in 2012. In the medium term, the Canadian economy compares favorably with the US economy in terms of growth prospects, and it does not have the latter's large fiscal and external deficits. Differences in productivity gains will also begin to narrow in the second half of the forecast period. These factors will keep the Canadian dollar strong during the remainder of the forecast period.

Mexico

Mexico's large external financing requirement and exposure to the US economy make the peso particularly vulnerable to shifts in market sentiment, as shown by a sharp currency depreciation in mid-September when the peso weakened from Ps12.8:US$1 to Ps13.9:US$1 in the space of a week. The peso has remained vulnerable since then, reaching Ps14.2:US$1 in late November before recovering to around Ps13.6:US$1 in mid-January, partly in view of better US data and consequent rosier prospects for Mexico's outlook. Further weakening in 2012 is possible given the gloomy global picture--which may deter investors from riskier asset classes such as emerging market currencies--but we do not expect the same extent of weakening as in 2008-09 (when the peso reached nearly Ps15:US$1 in February 2009). Banxico's decision to launch daily auctions of US$400m of reserves when the peso weakens by more than 2% will help to control currency volatility. Banxico's total foreign reserves stood at US$144 at the beginning of January, up from US$121bn at year-end 2010, and remain relatively stable given that the bank continues to accumulate them from transactions with Petróleos Mexicanos (Pemex, the state oil firm) and through purchases of foreign exchange with market participants. Moreover, the peso does not appear currently overvalued in real terms, and we expect stronger foreign direct investment (FDI) and portfolio inflows in the forecast period.

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Canada

	2011	2012	2013	2014	2015
C$:US$ (av)	0.99	1.03	1.00	0.99	0.98
Nominal appreciation of C$ (%)	4.2	-3.6	3.0	0.5	1.0
Real appreciation of C$ (%)	4.5	-4.1	2.3	0.0	0.5
C$:US$ (end period)	1.02	1.02	0.98	0.98	0.97
C$:€ (av)	1.38	1.31	1.23	1.22	1.21
Nominal appreciation of C$ (%)	-0.6	5.3	5.9	1.6	0.2
Real appreciation of C$ (%)	-0.3	5.1	6.2	1.8	0.5
C$:€ (end period)	1.35	1.26	1.20	1.22	1.22
C$:¥100 (av)	0.91	0.95	0.94	0.94	0.94
Nominal appreciation of C$ (%)	-2.3	-4.7	1.6	-0.4	0.1
Real appreciation of C$ (%)	0.7	-3.0	3.1	1.1	1.1
C$:¥100 (end period)	0.94	0.95	0.93	0.94	0.93
Real effective exchange rate (1997=100)	100.0	105.4	112.2	118.5	122.5

Mexico

	2011	2012	2013	2014	2015
Ps:US$ (av)	12.4	14.0	13.7	13.4	13.6
Nominal appreciation of Ps (%)	1.7	-11.4	2.2	2.1	-0.9
Real appreciation of Ps (%)	2.5	-10.1	3.2	2.7	-0.2
Ps:US$ (end period)	14.0	14.1	13.3	13.5	13.6
Ps:€ (av)	17.3	17.9	17.0	16.5	16.8
Nominal appreciation of Ps (%)	-3.0	-3.3	5.1	3.1	-1.7
Real appreciation of Ps (%)	-2.2	-1.5	7.1	4.6	-0.3
Ps:€ (end period)	18.5	17.6	16.4	16.7	17.1
Ps:¥100 (av)	11.4	13.0	12.9	12.8	13.0
Nominal appreciation of Ps (%)	-4.6	-12.4	0.8	1.1	-1.9
Real appreciation of Ps (%)	-1.3	-9.1	4.0	3.9	0.4
Ps:¥100 (end period)	12.9	13.3	12.6	12.9	13.1
Real effective exchange rate (1997=100)	116.3	109.8	114.3	114.5	112.6

United States

	2011	2012	2013	2014	2015
US$:US$ (av)	1.00	1.00	1.00	1.00	1.00
Nominal appreciation of US$ (%)	0.0	0.0	0.0	0.0	0.0
Real appreciation of US$ (%)	0.5	-0.3	-0.7	-0.8	-0.6
US$:US$ (end period)	1.00	1.00	1.00	1.00	1.00
US$:€ (av)	1.39	1.28	1.24	1.23	1.24
Nominal appreciation of US$ (%)	-4.6	9.2	2.8	1.0	-0.8
Real appreciation of US$ (%)	-4.1	9.2	3.1	1.0	-0.6
US$:€ (end period)	1.32	1.25	1.23	1.24	1.26
US$:¥100 (av)	0.92	0.93	0.94	0.95	0.96
Nominal appreciation of US$ (%)	-6.2	-1.1	-1.4	-0.9	-1.0
Real appreciation of US$ (%)	-3.2	0.8	0.1	0.3	0.0
US$:¥100 (end period)	0.92	0.94	0.95	0.96	0.96
Real effective exchange rate (1997=100)	108.1	103.0	101.6	101.0	96.3

Foreign Exchange Rates, from page 7

United States

The US dollar weakened significantly during the first four months of 2011, owing to a combination of quantitative easing and a general improvement in appetite for risk. However, investors have returned to US assets as a safe haven as it has become clear that the global economic recovery is faltering. The problems in the euro zone have been a major factor in this trend. On January 26th the dollar stood at US$1.31:€1, compared with US$1.33:€1 at the start of 2011, but down from a low of US$1.49:€1 in early May. We expect the dollar to average US$1.27:€1 in 2012, which implies continued strength of the US currency. The euro zone's sovereign debt crisis and high risk aversion will continue to support demand for US dollar assets over the forecast period, despite poor fundamentals.

Argentina

	2011	2012	2013	2014	2015
Ps:US$ (av)	4.1	4.6	4.8	5.0	5.2
Nominal appreciation of Ps (%)	-5.2	-10.1	-5.5	-3.3	-2.9
Real appreciation of Ps (%)	1.4	-3.3	0.4	2.1	2.4
Ps:US$ (end period)	4.3	4.8	4.9	5.1	5.2
Ps:€ (av)	5.7	5.8	6.0	6.1	6.4
Nominal appreciation of Ps (%)	-9.6	-1.9	-2.8	-2.3	-3.7
Real appreciation of Ps (%)	-3.3	5.9	4.2	4.0	2.4
Ps:€ (end period)	5.7	5.9	6.1	6.3	6.5
Ps:¥100 (av)	3.8	4.3	4.6	4.8	5.0
Nominal appreciation of Ps (%)	-11.1	-11.1	-6.8	-4.2	-3.8
Real appreciation of Ps (%)	-2.3	-2.3	1.1	3.3	3.1
Ps:¥100 (end period)	4.0	4.5	4.7	4.9	5.0
Real effective exchange rate (1997=100)	51.2	48.9	50.0	49.8	49.3

Brazil

	2011	2012	2013	2014	2015
R:US$ (av)	1.67	1.72	1.75	1.80	1.85
Nominal appreciation of R (%)	5.1	-2.5	-1.6	-2.8	-2.8
Real appreciation of R (%)	9.2	0.2	0.6	-1.0	-1.0
R:US$ (end period)	1.88	1.73	1.77	1.82	1.88
R:€ (av)	2.3	2.2	2.2	2.2	2.3
Nominal appreciation of R (%)	0.2	6.4	1.2	-1.9	-3.6
Real appreciation of R (%)	4.2	9.8	4.5	0.8	-1.1
R:€ (end period)	2.5	2.2	2.2	2.3	2.4
R:¥100 (av)	1.54	1.60	1.65	1.71	1.78
Nominal appreciation of R (%)	-1.5	-3.6	-3.0	-3.8	-3.8
Real appreciation of R (%)	5.2	1.3	1.4	0.2	-0.4
R:¥100 (end period)	1.73	1.63	1.68	1.74	1.80
Real effective exchange rate (1997=100)	53.4	55.8	68.8	77.4	83.7

Chile

	2011	2012	2013	2014	2015
Ps:US$ (av)	483.8	511.6	509.3	517.1	524.0
Nominal appreciation of Ps (%)	5.5	-5.4	0.5	-1.5	-1.3
Real appreciation of Ps (%)	6.2	-4.1	0.9	-1.1	-0.9
Ps:US$ (end period)	514.0	506.3	512.5	521.6	527.6
Ps:€ (av)	673.4	652.3	631.5	634.8	648.4
Nominal appreciation of Ps (%)	0.6	3.2	3.3	-0.5	-2.1
Real appreciation of Ps (%)	1.3	5.1	4.7	0.7	-0.9
Ps:€ (end period)	678.0	630.3	630.4	646.8	662.2
Ps:¥100 (av)	444.9	475.9	480.5	492.5	503.8
Nominal appreciation of Ps (%)	-1.1	-6.5	-1.0	-2.4	-2.2
Real appreciation of Ps (%)	2.3	-3.0	1.7	0.0	-0.3
Ps:¥100 (end period)	473.7	475.4	485.8	499.2	507.3
Real effective exchange rate (1997=100)	76.1	80.6	85.5	89.8	87.9

Latin America

Argentina

Pressure on the peso has eased in recent weeks, but the underlying competitiveness problems and continuing speculation of a peso devaluation persist. The monetary authorities appear determined to prevent substantial peso adjustment and seem likely to tighten controls and--as much as is possible--use the reserves to back the currency, in order to engineer a steady moderate nominal peso depreciation. We expect a fairly rapid nominal depreciation of the peso against the US dollar in 2012, of around 10%. However, in a high-inflation environment, real peso appreciation will continue, increasing the risk of a sudden, sharp adjustment at some point in the forecast period. Pressure on the peso is evident in the parallel market, where the rate breached the psychological Ps5:US$1 mark immediately after the imposition of foreign-exchange controls. Although it has since come down slightly from that level, the black-market premium is still high. A tightening of controls in the face of persistent depreciation pressure appears likely, shifting more transactions to the parallel market. There has been some local speculation about a shift to a dual exchange-rate system. On balance, given the distortions this would create, we do not expect that this will happen, but the risk cannot be discounted.

Brazil

After depreciating against the US dollar by 13% in September-December as global risk aversion rose and the BCB cut policy rates, the Real has strengthened in January by 5% as sentiment improved. Assuming that a full-blown euro zone debt crisis is avoided, the Real will strengthen, owing to sizeable capital inflows seeking investment opportunities, and healthier debt and GDP growth dynamics compared with advanced economies. The policy easing cycle is expected to come to an end in the second quarter, with rates at 10% or slightly below--keeping interest rate differentials structurally wide. Our forecast levels will remain around 20% stronger than the Real's average real trade-weighted value over the past 15 years, weighing on the competitiveness of manufactures and some agricultural exports. Beyond US and euro zone risks, a Chinese hard landing would hit Brazil's terms of trade and weaken the Real.

Chile

The peso continues to trade above Ps510:US$1 as of early January, a considerably weaker level compared with the levels seen before the August-September global sell-off of emerging market currencies. In the short term, risk aversion caused by euro zone financial woes will put a premium on US-dollar assets, making it unlikely that the peso will strengthen significantly--at Ps513:US$1 at end-2013 it will still be weaker than in mid-2011 when it hovered slightly above Ps460: US$1. As a result, we do not expect the BCC to renew its programme of US-dollar purchases, which was intended to weaken the peso-- this programme ended in mid-December after buying up its planned US$12bn in dollar reserves. In the longer term, our forecasts envision a weaker peso in nominal terms, reaching Ps526.5:US$1 by end-2016, as a result of a widening current-account deficit. However, with the prospects of weaker growth in the US and Europe, the modest nominal weakening envisioned by 2016 will not be sufficient to redress the peso's gradual strengthening in real terms--by 2016, we expect the peso to have appreciated by as much as 9% compared with the average for the previous decade.

Colombia

Following a wave of global risk aversion triggered by the deepening debt crisis in the euro zone, the peso fell sharply against the "safe-haven" US dollar in the latter stages of 2011. However, since the start of 2012, the peso has rebounded strongly, buoyed by some scaling back in global risk aversion but also a flow of positive domestic news--including the announcement that foreign direct investment (FDI) inflows reached a record US$14.8bn last year. With interest rates in Colombia above those in developed economies--coupled with continuing strong FDI inflows--we expect the strong underpinning of the peso to continue. The authorities are already starting to come under renewed pressure from exporters to tackle the problem of what they deem to be excessive peso strength. At the end of September last year, Banrep abandoned its programme of daily dollar purchases--amounting to US$20m each day--in favor of irregular auctions. However, if the appreciation continues, we believe that Banrep may re-instate the programme of daily dollar purchases. Against this backdrop, we expect the peso to average Ps1,841:US$1 in 2012 and Ps1,825:US$1 in 2013. As the Federal Reserve (the Fed, the US central bank) finally begins to raise interest rates later in the forecast period, the peso will then weaken slightly against the US dollar in 2014-16.

Venezuela

Since January 2011, in an effort to correct currency distortions, Venezuela has had two official rates, including a single BsF4.3:US$1 exchange rate for all imports and the parallel BsF5.4:US$1 Sistema de Transacciones con Títulos en Moneda Extranjera (SITME) rate overseen by the Banco Central de Venezuela (BCV, the Central Bank), which directs sales of government bonds. However, the current system is highly inefficient, with deep supply and demand imbalances producing sustained downward pressure on the bolívar and fuelling demand for US dollars. This has led to the implementation of burdensome currency control measures (which will remain in place as long as Mr Chávez is in power) and to ad hoc policymaking. With the authorities gearing up for a presidential election in October 2012, we do not expect a devaluation of the official exchange rate until late in 2012 (to BsF5.8:US$1), although in the event of an external shock, an earlier or larger devaluation is possible. The continued build-up of imbalances in the latter part of the outlook period, in line with a massive increase in local-currency liquidity, will eventually require more shifts in the exchange rate in 2013-16, with the primary rate expected to end the forecast period at BsF12:US$1. The black-market rate is expected to remain weaker (it currently stands at around BsF9:US$1), but the gap will narrow. ❑

Colombia

	2011	2012	2013	2014	2015
Ps:US$ (av)	1,848	1,921	1,904	1,930	1,983
Nominal appreciation of Ps (%)	2.8	-3.8	0.9	-1.3	-2.6
Real appreciation of Ps (%)	3.6	-3.2	1.2	-1.1	-2.4
Ps:US$ (end period)	1,934	1,911	1,899	1,957	2,005
Ps:€ (av)	2,572	2,449	2,361	2,370	2,454
Nominal appreciation of Ps (%)	-2.0	5.0	3.7	-0.3	-3.4
Real appreciation of Ps (%)	-1.2	6.1	5.0	0.7	-2.4
Ps:€ (end period)	2,551	2,379	2,336	2,427	2,516
Ps:¥100 (av)	1,700	1,787	1,797	1,838	1,907
Nominal appreciation of Ps (%)	-3.6	-4.9	-0.5	-2.3	-3.6
Real appreciation of Ps (%)	-0.2	-2.1	1.9	0.0	-1.8
Ps:¥100 (end period)	1,782	1,794	1,800	1,873	1,928
Real effective exchange rate (1997=100)	66.3	72.4	81.9	80.3	89.5

Venezuela

	2011	2012	2013	2014	2015
Bs:US$ (av)	4.3	4.5	5.8	7.3	9.2
Nominal appreciation of Bs (%)	-39.5	-5.5	-21.6	-20.4	-21.3
Real appreciation of Bs (%)	-25.7	16.4	-2.5	-2.1	-3.5
Bs:US$ (end period)	4.3	5.8	5.8	7.4	9.4
Bs:€ (av)	6.0	5.8	7.2	8.9	11.4
Nominal appreciation of Bs (%)	-42.3	3.2	-19.4	-19.5	-22.0
Real appreciation of Bs (%)	-29.1	27.6	1.2	-0.4	-3.6
Bs:€ (end period)	5.7	7.2	7.1	9.2	11.8
Bs:¥100 (av)	3.9	4.2	5.5	6.9	8.9
Nominal appreciation of Bs (%)	-43.3	-6.6	-22.7	-21.1	-22.1
Real appreciation of Bs (%)	-28.4	17.7	-1.8	-1.0	-3.0
Bs:¥100 (end period)	4.0	5.4	5.5	7.1	9.0
Real effective exchange rate (1997=100)	105.7	103.2	101.1	107.5	113.8

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tion ("Commissioner") does not at that time intend to make an application under the merger provisions in respect of the transaction.

(d) New Filing Thresholds

Pre-merger notification under the Act is required where both size-of-parties and size-of-transaction thresholds are exceeded. The size-of-parties threshold is exceeded where the parties, including their respective affiliates, together have assets in Canada or gross revenues from sales in, from or into Canada that exceed $400 million. The size-of-transaction threshold varies with the type of transaction involved (e.g., acquisition of assets, acquisition of shares, amalgamation, etc.), but generally includes a monetary threshold in terms of the gross book value of assets in Canada or the value of annual gross revenues from sales in or from Canada generated from those assets. The size-of-transaction threshold will increase to $77 million (up from $73 million), effective on or about February 11, 2012.

2011 was perhaps most notable for China's change in investment strategy and the Canadian government's reaction to that change.

(e) Proposed Merger Register

In October 2011, the Bureau announced that it would establish a merger register, being a list of all closed merger reviews, updated on a monthly basis. The first monthly register report, for the month of February 2012, will be published at the beginning of March 2012.

(f) Updated Merger Review Process Guidelines

In January 2012, the Bureau issued updated *Merger Review Process Guidelines* that replace its 2009 guidelines and that reflect the considerable experience the Bureau has gained with respect to the two-stage merger review process since its introduction in September 2009. The updated guidelines provide increased guidance on the supplementary information request process, including pre-and post-issuance dialogue and custodians, sample instructions and the use of timing agreements.

Investment Canada Act

(a) Foreign State Sponsored Investments

2011 was perhaps most notable for China's change in investment strategy and the Canadian government's reaction to that change.

China's state owned enterprises ("SOEs") and sovereign wealth funds ("SWFs") have increased their investment activities around the world, principally in the natural resource sector. Canada, a country rich in natural resources, has been and continues to be a focus of a significant portion of this increased investment activity. The Canadian press has reported that Chinese companies, including among them Sinopec Group and CNOOC, have purchased almost $30 billion of Canadian assets in the past five years.

With the increased focus of Chinese SOE/SWFs on Canada's natural resource sector, the question that was asked following the Canadian government's blocking of BHP's bid for Potash was what would Canada's reaction be to this increase in Chinese investment. To date the answer seems to have been "Welcome to Canada".

The United States can take partial credit for Canada's further opening of its door to Chinese investment. Canada is the largest foreign supplier of oil, natural gas, electricity and uranium to the United States and was supporting the construction of a new pipeline that would have had the capacity to move 700,000 barrels of crude produced from the Alberta tar sands to refineries in Texas. However, when President Obama announced that there would be a delay in the decision as to whether to approve that pipeline, Prime Minister Stephen Harper responded that Canada would have to step up efforts to supply energy to Asia.

"This [decision delay] does underscore the necessity of Canada making sure that we are able to access Asia markets for our energy products," Harper told reporters at a recent Asia-Pacific Economic Cooperation leaders' meeting in Hawaii. And since Canada wants to have China as a customer for its natural resources, it should be of no surprise to observers that Canada would have to put out the welcome mat for China as an investor in Canada's natural resource sector.

This is especially noteworthy given what appears to be a change in the investment strategy by the Chinese SOE/SWFs. Where previously Chinese investors had generally restricted their investments to taking minority positions in Canadian business operations, 2011 saw a number of transactions that resulted in China acquiring control of a number of significant Canadian operating businesses. Chinese National Offshore Oil Corporation acquired Opti Canada for $2.34 billion and Sinopec purchased Daylight Energy for $2.2 billion. Close on the heels of those two transactions, Petro-China, with a final investment $1.9 billion, took over sole ownership of the MacKay River oilsands project having acquired a 60% interest in that project in late 2009. Also, Enbridge's $5.5-billion Northern Gateway pipeline project which, when completed, will facilitate oil exports to Asia from Alberta is reported to have the backing of foreign business concerns which include China Petroleum & Chemical Corp. among other Asian businesses.

Yet the welcome offered to foreign investors is not unqualified. In a September, 2011 interview with Bloomberg Business, Prime Minister Harper is reported to have confirmed that, while Canada welcomes investment by China and other countries, it does so only as long as such acquisitions are "economic in nature and don't have other strategic or political objectives." This comment suggests that, where the review process under the Act applies to a transaction involving a foreign SWF or SOE, the investor will have to demonstrate to the satisfaction of the Canadian government that strategic and/or political objectives do not form all or part of the rationale for the investment.

(b) Stelco Suit Settlement

The Canadian government and U.S. Steel have settled their ongoing legal action that would have tested the Canadian government's ability to enforce undertakings given by foreign investors under the ICA.

The litigation arose out of allegations by the Industry Minister that U.S. Steel had failed to honour certain undertakings it had made in connection with its approval under the ICA for its 2007 acquisition of Stelco, a Canadian steel producer. Had it lost the case, U.S. Steel could have faced penalties of up to $10,000 for each day it was found to be in violation of the ICA although intervenors in the suit had argued that additional remedies should be ordered such as a forced divestiture.

On December 12, 2011, the Minister of Industry announced that the parties had settled their dispute. Among the terms of settlement disclosed by the Minister, U.S. Steel agreed to:

- continue to produce steel in Canada until 2015;
- operate both the Stelco Lake Erie and Hamilton plants until 2015; and
- make at least $50 million in capital investments by December 2015 to maintain the Canadian facilities, over and above its original undertaking to invest $200 million by October 31, 2012.

While the Canadian government has pointed out that its case against U.S. Steel demonstrates that foreign investors must take the commitments that they make to Canada as part of the ICA approval process seriously, foreign investors should ensure that any commitments given to obtain ICA approval are appropriately conditioned to excuse performance if events beyond their control prevent them from honouring their undertakings. U.S. Steel maintained throughout the litigation process that its failure to fulfill its undertakings had arisen from unexpected events beyond its control and, as such, it should be excused from performance. The Industry Minister did not agree with this position.

The Canadian government and U.S. Steel have settled their ongoing legal action that would have tested the Canadian government's ability to enforce undertakings given by foreign investors under the ICA.

(c) Reforming the Investment Canada Act

Following Canada's blocking of BHP's bid for Potash, then Industry Minister Tony Clement announced that he would be reviewing the ICA with respect to making changes that would, among other things, increase the transparency of the decision making process. Mr. Clement's successor, current Industry Minister Christian Paradis, is reported to have confirmed that Canada is open to changing its law governing foreign takeovers to provide more "certainty" to companies considering purchases of Canadian firms.

In late 2011, the C.D. Howe Institute issued a report, "Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick", which recommended that Ottawa should transform the ICA to create a broader, more transparent foreign investment review regime to encourage investment inflows while protecting Canadian national interests. In addition to increasing decision-making transparency, the Report argued that Canada should scrap the "net benefit test" that now restricts inbound foreign investment in an effort to reverse Canada's declining share of global foreign direct investment. The Report recommends using a national interest test which would reverse the onus by requiring the Canadian government to show why a foreign investment that it wanted to disallow is not in the national interest.

2012 may see the Conservatives introduce changes to the ICA but how far these changes will go remains to be seen.

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(d) Increase to Review Threshold

The monetary threshold below which direct investments in Canadian businesses by non-Canadians who qualify as WTO investors generally do not require Ministerial approval under the ICA is $330 million for 2011.

(e) Canadian Uranium Industry

2011 saw global miner Rio Tinto complete its acquisition of Canadian uranium junior Hathor Exploration. Hathor, prior to the acquisition, only carried on exploration activities near western Canada's Athabasca Basin which supplies about a fifth of the world's uranium.

Prior to 2009, the uranium mining sector had been considered a sensitive investment sector under the ICA and, as such, investments by qualified WTO investors did not get the benefit of the higher review threshold ($312 million in 2011). 2009 amendments to the Act removed uranium from the ICA's list of sensitive industry sectors. As such, the acquisition of Hathor Exploration which had an asset value below $312 million was not subject to the approval requirements under the statute.

Under current Canadian mining policies, foreign companies are generally barred from owning more than 49 percent of an operating uranium mine. While Hathor does not have an operating mine, presumably Rio Tinto's interest in that company relates ultimately to bringing its Roughrider uranium project into production which will bring Hathor's mining operations within the ambit of Canada's uranium policies.

Because of this, it appears that Rio Tinto will have to either look for a Canadian partner or wait for a change in Canada's mining policy. With respect to the latter option, the federal government's Competition Policy Review Panel which was mandated to review Canada's competition and foreign investment policies recommended in its June 2008 report that the foreign ownership laws in the uranium mining sector be liberalized. Subsequently, the Conservative government said in its throne speech in March 2010 that it wanted to "ensure that unnecessary regulation does not inhibit the growth of Canada's uranium mining industry by unduly restricting foreign investment." Most recently, a Saskatchewan MP introduced a bill in Parliament that would, if passed, allow foreign companies to purchase and own Canadian uranium mines. Based on the foregoing, it may be that Rio Tinto will not have long to wait for a change in policy. ❑

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Data Protection

A New Chapter, from page 1

Upon its publication, the Regulation will be sent to the Council of the European Union (an institution representing each of the national governments) and the European Parliament (composed of representatives elected by EU citizens). These two institutions must agree on a final text before the Regulation can be adopted as law; changes to the text are therefore very likely.

Although Regulations, unlike the Directives, are directly applicable to organizations and individuals, meaning there is no lengthy implementation period, it is unlikely that the final law will be adopted before the summer of 2014. The draft also provides for a transition period of two years before the Regulation becomes operational (Article 90). Thus, organizations still have some time to prepare for and work to influence the likely changes.

The Regulation sets out changes to the rules applicable to almost every area of data processing. Regrettably, the "promised" lessening of administrative burdens seems quite illusionary. Organizations will not only face additional administrative and operational obligations, but will be challenged with often disproportionate standards of compliance not necessarily contributing to the protection of an individual's privacy. Liability for violations will be increased, as will the likelihood of active enforcement. Below we outline some of the key areas in which the companies operating in the EU/EEA will likely be impacted.

The Most Important Changes

1. Scope of Application

The Regulation attempts to clarify one of the most challenging aspects of data protection: the scope of territorial application of the EU privacy laws. The Regulation will apply to any processing of personal data by a controller or processor established in the EU/EEA, as is currently the case under the Data Protection Directive. However, for controllers and processors established outside the EU/EEA, there is a fundamental change because the location of the equipment used to process data is no longer the determining factor. Instead, the Regulation would apply to any processing of EU/EEA residents' personal data when the processing relates to: (i) the offering of goods or services to such individuals, and (ii) the monitoring of individuals' behavior. (Art. 3.) This means that almost every website available in the EU/EEA will be covered by the Regulation. This was one of the key aims of the Commission.

As in the Data Protection Directive, "personal data" is broadly defined to cover any information relating to an identifiable individual. The Regulation now provides that such identification can be through all means "reasonably likely to be used" by the controller or other parties, in particular through references such as ID number, location information, online identification, or other factors. This means that most online information will be regarded as personal data, even if the data are not used to identify specific individuals.

The proposal also introduces new definitions of health data, genetic data, and biometric data. Health data are particularly broadly defined to cover any information relating to the physical or mental health of an individual or to the provision of health services to individuals. (Art. 4.)

2. New Compliance Requirements

Definition and Requirements for Consent

Consent is defined as any freely given, specific, informed and explicit indication of an individual's wishes, and can be expressed in the form of a statement or as clear affirmative action that signifies an individual's agreement to the processing of his/her personal data. This signifies that implied or tacit consent could be valid. According to the press statement, "assumed" consent is insufficient. Consent is not valid where there is a "significant imbalance in the form of dependence between the position of the individual and the controller". However, unlike earlier drafts, there is no explicit prohibition on consent in the employment relationship. (Art. 7.)

Also, unlike in previous drafts which imposed a consent requirement for all uses of personal data for direct marketing purposes, the Regulation does not include such a requirement. Therefore, it will be possible to rely on other legal bases such as legitimate interest.

The Regulation provides that parental consent will not be required to use personal data of minors over the age of 13, but this is limited to offering e-services. Controllers would need to make reasonable efforts to obtain "verifiable" consent, taking into account the available technology. In other areas, parental consent will be required for anyone under 18. (Art. 8.)

More Rights for Individuals

From the very beginning of the review of the data protection framework, Commissioner Reding stressed her intention to significantly strengthen the rights of individuals, including providing them with more information about how their personal data would be used. This translates into increased transparency obligations in the Regulation. Notice formats may be standardized across Europe and will need to be easily understandable and accessible, and include a much broader scope of information than under current laws, e.g., information about the data retention period and intended data transfers. (Art. 11.)

The Regulation sets out that the Commissioner may issue black lists and white lists of "adequate" countries.

The Regulation also introduces a one-month deadline for responding to access requests and gives individuals the right to obtain information about retention periods. However, where several individuals exercise access rights collectively, the deadline to respond may be prolonged for an extra month. (Art. 12.)

The proposal introduces an explicit "right to be forgotten" - the exercise of this right, highly problematic in an online environment, resulted in a great deal of debate in the course of 2011. The compromise proposed by the Commission requires a controller who has made the data publicly available to take all reasonable steps, including technical measures, to inform third parties using such data that an individual requests the controller to erase any links to the personal data and to refrain from copying or replicating the personal data. (Art. 17.)

Transfer Restrictions

The Regulation sets out that the Commissioner may issue black lists and white lists of "adequate" countries. Local data protection authorities may approve transfer contracts that the Commission may declare "generally valid", including contracts to be used by EU/EEA-based processors. These types of contracts may in fact largely resemble existing Standard Contractual Clauses. Other contractual clauses, deviating from the standard, are subject to prior authorization by the authorities. The Regulation also formally recognizes binding corporate rules as an adequate mechanism for the transfer of data

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outside the EEA, and sets out requirements and an approval procedure. The legitimate interest basis has been added to the list of exemptions to the requirements for data transfers to countries outside the EEA (or international organizations).

Regrettably, the Regulation does not sufficiently clarify the controller's obligations under foreign authorities' requests for disclosure (e-discovery). There only is a rather ambiguous Recital (No. 90) indicating that disclosure may be possible if justified by important grounds of public interest. However, any such conditions must be later specified by the Commission in an implementing act. Commissioner Reding in her speech did not provide any guidance but rather stressed this issue needs to be explored further.

This goes hand in hand with comprehensive requirements to demonstrate compliance, for example through internal policies.

3. Increased Liabilities

Joint and Several Liability for Joint Data Controllers and Service Providers

Under the draft Regulation, joint controllers are required to have a written agreement and must determine their respective obligations relating to data protection in such an agreement. Joint controllers, as well as processors, are jointly and severally liable for the total amount of damages. (Art. 77.) This provision in particular may be problematic for organizations offering services to other organizations or public entities.

Substantial Statutory Obligations for Service Providers

Under the Regulation, controllers would be obliged to carefully select and supervise service providers and put in place a detailed contract, including purpose limitations, confidentiality and security requirements, restrictions on sub-processing, return of personal data upon termination, and audit rights.

Currently only a few Member States impose statutory liabilities on processors. This new provision will drastically alter the legal risks for service providers in the processing of EU/EEA personal data, and include additional statutory obligations on processors, in particular the requirement to implement appropriate state-of-the-art security standards. Processors must also immediately notify controllers about any data security breaches. Processors may not process personal data outside of the specific documented terms. Providers who act outside of such terms will be considered controllers, and thus subject to increased liability. (Art. 26.)

Data Breach Notification

The Regulation introduces broad data breach notification requirements for any personal data security breach similar to those set out in the amended ePrivacy Directive for electronic communications service providers. There is no limitation to specific data sets, but any "breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure, or access to, personal data transmitted, stored or otherwise processed" needs to be notified to the national supervisory authorities. These authorities must be notified without undue delay within 24 hours of the controller becoming aware of the breach. Reasoned justification must be provided in cases of delays. Despite strong criticism that the deadline is unworkable in practice, the Commission has not changed its initial proposal. Individuals must be notified without undue delay, but only after the controller has notified the relevant authority. Individuals would not need to be informed where the controller can demonstrate that it applied appropriate measures (e.g., encryption) to protect the data. (Art. 31-32.)

4. Registration with Authorities Replaced by Accountability

Registration Replaced by Accountability

The Regulation to some extent replaces the requirement to register with national data protection authorities with a requirement to establish specific and detailed internal documentation. (Art. 28.) But the much-proclaimed easing of administrative burden does not correspond with the provisions of the Regulation. Controllers will be required to carry out onerous impact assessments prior to processing activities involving particular risks, such as profiling; processing sensitive, genetic and biometric data; or creating large databases of children's data. (Art. 33.)

The individuals concerned, and representatives such as works council, will need to be consulted.

This goes hand in hand with comprehensive requirements to demonstrate compliance, for example through internal policies. Codes of conduct, certification mechanisms, and data protection seals are given greater weight under the Regulation, and those obligations may become more significant.

Prior Consultation with Authorities

Where there are particular risks involved in data processing, controllers would still be required to consult with authorities. Such "consultation" may be relevant where processing involves: (i) analytics or ratings based on work performance, credit history, location information, health information, personal preferences, or behavioral or sensitive data; (ii) CCTV and video surveillance information; (iii) or large quantities of data on children, biometric or genetic data. (Art. 34.) In practice this may cover many types of processing operations and seems to suggest that those controllers will still be obligated to notify the data protection authorities.

Data Protection Officer Mandatory for all Larger Organizations

The Regulation would require all private sector organizations with more than 250 employees or those undertaking "risky" monitoring of individuals, as well as all public sector organizations, to appoint a data protection officer ("DPO"). Group companies may appoint a single data protection officer. The DPO may be an employee or contractor, and must serve a minimum of two years. Appointment of the DPO needs to be reported to the authorities and his/her contact details should be made publicly available. (Art. 35-37.)

5. Strengthened Enforcement

Stronger and Harmonized Powers of National Supervisory Authorities

The Regulation substantially strengthens the powers of national supervisory authorities, and also provides for a mechanism to ensure that only the data protection authority in the country of the controller's central operations is in charge.

The Regulation would introduce mandatory mutual assistance between these data protection authorities and a new "consistency" mechanism to ensure uniform application and enforcement of the Regulation. The Regulation replaces the existing EU-level consortium of national data protection authorities, the Article 29 Working Party ("WP29"), with a new European Data Protection Board. But as the composition of the Board will be the same as the WP29, this change is rather symbolic.

Right of Action and Right to File Claims or Complaints

Under the Regulation, individuals are explicitly entitled to file a complaint either in the country where they reside or in the country where the controller or processor is located. Importantly, consumer, privacy, and similar associations would be able to

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lodge complaints with the supervisory authorities and seek judicial redress. These changes will greatly facilitate judicial recourse for the individuals, but may also lead to an increase in litigation, a consequence that companies should take into account when implementing compliance measures.

The coming months will definitely bring interesting discussions as a balance between advocating amendments that may promote business and economic innovation and safeguarding people's right to privacy at all costs is sought.

Tougher Administrative Sanctions for Violations

The Regulation also sets out much-debated administrative sanctions, including fines of up to 2% of annual worldwide turnover. The imposition of fines is mandatory, without any discretion by the supervisory authorities - "the supervisory authority shall impose a fine". However, this is softened by a provision setting out that in case of a first and unintentional noncompliance with the Regulation, no sanction shall be imposed, but only a written warning be issued, where, e.g., a company with "fewer than 250 employees is processing data only as an activity ancillary to its main activities." (Art. 78.)

The Way Forward

The publication of the draft Regulation comes more than two years after the review of the data protection framework started. Before it presented this official proposal, the European Commission's Directorate-General for Justice had to consult with the other Commission Directorate-Generals and services. It appears that the final draft has been slightly amended to accommodate concerns raised by other Commission Directorate-Generals and services. It is very likely to undergo more changes after review by the Council and the Parliament. The coming months will definitely bring interesting discussions as a balance between advocating amendments that may promote business and economic innovation and safeguarding people's right to privacy at all costs is sought. ❑

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1 Available at http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm.

2 The European Economic Area ("EEA") is comprised of the EU Member States, as well as Iceland, Liechtenstein, and Norway. The 27 Member States of the European Union (EU) currently are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (collectively, the "Member States"). While the Regulation will not have the same immediate direct effect in the EEA countries as in the EU countries, the EEA countries will need to issue legislation essentially the same as the Regulation.

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