Regulation of Foreign Investment and Merger Regulation

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REGULATION OF FOREIGN INVESTMENT

The *Investment Canada Act* (the "**ICA**") applies when a "non-Canadian" (a non-Canadian-controlled entity): establishes a new business in Canada or acquires, either directly or indirectly, control of a Canadian business. Direct acquisitions of control that exceed specified statutory monetary thresholds are subject to a "net benefit" review which precludes the investor from completing the acquisition until the investment has been reviewed and the Minister is satisfied that the investment "is likely to be of net benefit to Canada."

Review Thresholds: WTO Transactions

By reason of the Agreement Establishing the World Trade Organization ("**WTO**") between Canada and certain other countries (there are currently 164 WTO members), direct acquisitions by non-Canadians who are WTO investors and direct acquisitions of Canadian businesses controlled by WTO investors have been subject to historically higher thresholds for review under the ICA. The review threshold for WTO investments in non-cultural businesses or by investors other than state-owned enterprises ("**SOE**"), which are addressed below, is C$1.326 billion in "enterprise value" for 2024.

The review threshold is higher for specified "trade agreement investors," set at C$1.989 billion in enterprise value for 2024. This higher review threshold applies to European Union investors falling under the Comprehensive Economic and Trade Agreement ("**CETA**") between Canada and the European Union as well as and to other Free Trade Agreement ("**FTA**") investment partners benefiting from Canada's Most-Favoured-Nation ("**MFN**") trade commitments. MFN treatment will be accorded to many FTA jurisdictions including the United States, Mexico, Chile, Colombia, Panama, Peru, Honduras, South Korea, Japan, Singapore, New Zealand, Australia and Vietnam.

Indirect acquisitions of control of non-cultural Canadian businesses by non-Canadians (i.e., by acquiring control of a non-Canadian parent of a Canadian subsidiary) are not subject to review for WTO investors (or for non-Canadian WTO sellers).

Notification of Non-Reviewable Investments

In view of the above-noted high monetary thresholds which trigger a net benefit review, most investments by non-Canadians require only that the Director of Investments (an officer appointed under the ICA) be notified of the investment. The notification, which may be filed up to 30 days after closing, requires information concerning the non-Canadian investor; the nature of the investment; a description of the Canadian business being established or acquired; details relating to the investor's officers, directors and shareholders; its sources of financing for the proposed investment; the transaction documents (or the principal terms and conditions, including the estimated total purchase price of the investment); whether the investor is owned, controlled or influenced, directly or indirectly, by a foreign government; and information to permit enterprise value information to be collected.

The notice is filed with the Director of Investments who issues a receipt certifying the date on which the notice is deemed complete. The receipt indicates that the establishment, or acquisition, of the business is not reviewable under Part IV of the ICA. The certified date of a complete notice is also relevant to commence the 45-day period in which any investment can be reviewed under the national security provisions of the ICA (see below).

Review Thresholds: Non-WTO Transactions

Acquisitions of control by non-Canadian investors who are neither WTO investors nor trade agreement investors remain subject to review where the book value of acquired assets exceeds C$5 million or C$50 million for indirect acquisitions of control.

Cultural Heritage or National Identity

Investment proposals, including indirect acquisitions of control, that might ordinarily be only notifiable can be ordered for review where the business is related to Canadian cultural heritage or national identity. Currently, these "culturally sensitive" businesses include the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, videos and music. These acquisitions are subject to review where the book value of acquired assets exceeds C$5 million. Indirect acquisitions of control are subject to review by the Minister of Canadian Heritage where the book value of the acquired assets exceeds C$50 million. The federal Cabinet also retains discretionary authority to review an investment in a cultural business falling below these thresholds.

State-Owned Enterprises

The review threshold for direct acquisitions by a SOE investor in 2024 is based on the book value of the assets of the acquired Canadian business exceeding C$528 million. The threshold is subject to an annual index. Indirect acquisitions of control by WTO SOE investors remain exempt from review.

The Canadian government has issued guidelines on the additional considerations that the Minister of the Department of Innovation, Science and Economic Development ("**ISED**") will take into account with respect to SOE investors. These guidelines expressly consider:

- whether the non-Canadian adheres to Canadian standards of corporate governance (including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders);
- adherence to Canadian laws and practices, including adherence to free market principles;
- the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada;
- the extent to which the non-Canadian is owned, controlled by a state or its conduct and operations are influenced by a state; and
- whether a Canadian business to be acquired by a non-Canadian that is an SOE will likely operate on a commercial basis.

In addition to the above guidelines, amendments to the ICA in 2013 incorporated a definition of an SOE to include "an entity that is controlled or influenced, directly or indirectly, by a government or agency" of a foreign state. As well, the Minister has been given the power to determine that an otherwise Canadian-controlled entity is not a Canadian-controlled entity if the Minister is "satisfied that the entity is controlled in fact by one or more" SOEs.

Acquisitions by SOEs which do not result in the acquisition of control are not reviewed under the SOE guidelines but may be subject to review under the national security provisions of the ICA (see below).

Factors

Where a proposed investment is reviewable, the Minister of ISED (or the Minister of Canadian Heritage in the case of "culturally sensitive" businesses) will approve the investment where the proposal is considered to be of "net benefit" to Canada. In assessing net benefit, the Minister will consider, with no particular weighting, such factors as the effect of the proposed investment on economic activity in Canada, participation by Canadians in the business, productivity, competition, the compatibility of the investment with national, industrial, economic or cultural policies and the contribution by the business to Canada's ability to compete in world markets. Often, applicants negotiate undertakings with the Director of Investments, which undertakings are designed to satisfy the net benefit to Canada criteria.

National Security Reviews Are Increasingly Prevalent

In 2009, amendments were enacted to the ICA concerning investments that may be considered injurious to national security. The amendments introduce a process similar to that found in the United States under the Committee on Foreign Investment in the United States ("**CFIUS**") review process, pursuant to which CFIUS is authorized to review, investigate and block any transaction or investment that could result in the control of any U.S. businesses or assets by a foreign person that may raise national security concerns, or involve critical infrastructure.

Under the national security provisions of the ICA, if the relevant Minister has reasonable grounds to believe that an investment by a non-Canadian "could be injurious to national security," the Minister may send the non-Canadian a notice under Part IV.1 of the ICA (within 45 days of a notification or application for review) indicating that an order for review of the investment may be made. The review of an investment on the grounds of national security may occur whether or not an investment is otherwise subject to a net benefit review or otherwise only subject to notification under the ICA. Moreover, a national security review can occur even if there is no "acquisition of control" of a Canadian business (i.e., minority investments that do not transfer de facto control).

There are significant time periods in the event of a national security review under Part IV.1 of the ICA. Once an investor has received a notice indicating that an order for review of the investment may be made, the national security review timeframe under the ICA can be more than 200 days and can be extended with the consent of the investor.

On August 2, 2022, amendments to the *Guidelines on the National Security Review of Investments* (the "**Guidelines**") were issued by ISED. Broadly, the Guidelines provide information regarding the procedures that will be followed in the administration of the national security review process in Part IV.1 of the ICA. The Guidelines set out eleven factors that the government may consider as they relate to national security. The focus of the factors is on core areas including defence, technology, critical minerals, critical infrastructure, intelligence gathering and enforcement and access to sensitive personal data.

The above-noted 45-day waiting period under Part IV.1 of the ICA in which the Minister may notify the non-Canadian investor of a possible national security review presents significant transaction uncertainty, particularly in the context of notifiable investments (i.e., those not ordinarily subject to review). To foreclose any risk of such a review arising after closing for investments that would not otherwise be subject to review, parties will often send the requisite notification to the Director of Investments at least 45 days before closing, thereby achieving certainty that no national security issues will arise.

Moreover, in response to this uncertainty, 2022 amendments to the *National Security Review of Investments Regulations* established a further channel for parties to achieve transactional comfort: a voluntary pre-clearance filing mechanism for investments not otherwise subject to the mandatory notification requirements, in particular for non-controlling and other minority investors. In such circumstances, a non-Canadian may choose to voluntarily provide the requisite information to determine whether their investment may be subject to national security review. Following a party's voluntary filing, the Minister of ISED has an initial 45 days to determine whether it will pursue a national security review, subject to an additional right to extend this period by a further 45 days.

Where a non-Canadian investor elects not to file under the above-noted voluntary filing mechanism, the Minister of the ISED retains the right to commence a national security review up to five years after the implementation of the investment. The filing path chosen depends on the investor's preference as some parties may prefer the regulatory certainty of a voluntary filing as opposed to the continued exposure of an impending review for five years.

Irrespective of the mechanism chosen, the Guidelines strongly encourage, particularly where an investor is a SOE (or subject to state-influence), or in cases where the eleven factors may be present, to contact the Investment Review Division "at the earliest stages of the development of their investment projects to discuss the investment and, where applicable, to file a notification (or an application for net benefit review) at least 45 days prior to its planned implementation."

Thus, investors should now be aware that the government has indicated its preference that in situations in which national security concerns are present, it prefers to manage these concerns on a "pre-closing basis" before ownership has transferred in lieu of the current requirement in the ICA which permits an investor to wait for as long as 30 days following closing for transactions that are only subject to notification. Thus, in order to achieve absolute investment certainty, the parties to a transaction should endeavour to file as soon as possible, ideally 45 days prior to closing if the transaction circumstances permit such a step to be taken.

Recent Amendments to the *Investment Canada Act*

On March 22, 2024, the Government of Canada introduced significant reforms to the ICA with the passing of the *National Security Review of Investments Modernization Act* ("**Bill C-34**"). While Bill C-34 has yet to come into force (as of June 2024), it nonetheless signals Canada's robust approach to national security enforcement as well as its continued efforts to more closely align with the national security regimes of its allies such as the United Kingdom and United States. The amendments contemplated in Bill C-34 are as follows:[1]

- New filing requirement prior to the implementation of investments in prescribed business sectors;
- Authority for the Minister to extend the national security review of investments;
- Stronger penalties for non-compliance;
- Authority for the Minister to impose conditions during a national security review;
- Authority for the Minister to accept undertakings to mitigate national security risk;
- Improved information sharing with international counterparts;
- New rules for the protection of information during the course of judicial review;
- New ministerial authority to review any state-owned enterprise investment for net benefit;
- Clarification on the net benefit review factors;
- Advancement of a national security review to the section 25.2 stage for corruption convictions;
- Clarification that the ICA's national security review applies to acquisition of assets; and
- Clarification of the transparency of the national security review process.

The legislation is intended to more effectively detect national security risks while improving enforcement methods against these risks. As noted above, specified category of investments in "prescribed

1 https://www.canada.ca/en/innovation-science-economic-development/news/2022/12/an-act-to-amend-the-investment-canada-act.html.

business sectors" will be subject to a mandatory pre-closing filing, even where the investment falls below the threshold for a net benefit review. While the Regulations precisely defining the contents of a 'sensitive sector' have yet to be published, a non-exhaustive list of potential sensitive sectors (based on areas identified by government officials during Study of the Bill) foreseeably include the following: advanced materials and manufacturing, advanced ocean technologies, advanced sensing and surveillance, advanced weapons, aerospace, artificial intelligence, biotechnology, energy generation, storage and transmission, medical technology, neurotechnology and human-machine integration, next-generation computing and digital infrastructure and space technology.

A proposed investment in a sensitive sector will be prohibited from closing for an undisclosed period. Where an investor fails to comply with this mandatory review notification, penalties of up to C$500,000 are applicable. Bill C-34 will also bolster the government's compliance powers, increasing the maximum monetary penalties for non-compliance up to C$25,000 per day.

MERGER REGULATION

Mergers

Under the *Competition Act* (Canada), the Commissioner of Competition (the "**Commissioner**") has authority for the administration and enforcement of the *Competition Act*, including the authority to review any merger, regardless of its size. A "merger" is defined to mean the acquisition or establishment, direct or indirect, by one or more persons (whether Canadian or non-Canadian), whether by purchase of shares or purchase or lease of assets, by amalgamation or combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

Merger Transaction Notification Under the Act

As is the case in the United States under the Hart-Scott-Rodino ("**HSR**") notification process, the *Competition Act* provides that the parties to certain large transactions must notify the Commissioner prior to completing a transaction. While the Commissioner may review all mergers irrespective of size, the *Competition Act* requires notification of a proposed transaction if both a parties' threshold and a transaction threshold are exceeded.

The parties' threshold is exceeded if the parties to the proposed transaction, together with their affiliates, have combined assets in Canada or gross annual revenues from sales "in, from or into" Canada exceeding C$400 million. The "target" or transaction threshold is exceeded when the target corporation (or the entity formed in the case of an amalgamation/combination) has assets in Canada or revenues from sales in or from Canada exceeding C$93 million, which is the threshold for transactions closing in 2024.

In the case of mergers involving the acquisition of shares over the target threshold, the acquiring person, together with its affiliates, must acquire more than 20% of the voting shares of a corporation that is publicly traded or more than 35% of the voting shares of non-publicly traded corporations.[2]

Where the above-noted thresholds are exceeded, the parties to the proposed transaction must notify the Commissioner by supplying information in accordance with the *Competition Act* and the regulations ("pre-merger notification") before completing the merger. Typically, counsel for the acquiring party will file a submission by way of a request for an Advance Ruling Certificate (see below) to establish that the proposed transaction will not result in a substantial lessening of competition. While all of the information provided to the Commissioner is treated as confidential under the *Competition Act*, the Commissioner has taken the position that the confidentiality provisions in the *Competition Act* permit the Competition Bureau to share the information filed with them and their review with others on the grounds that such exchanges are made for purposes relating to the administration or enforcement of the *Competition Act*. Also, the Competition Bureau has the power to speak with affected parties and others for the purposes of gathering information as part of their review. In the ordinary course, filing parties are aware of certain of and consent to these activities by the regulatory authorities.

Among the information that must be provided as part of a pre-merger notification are any studies, surveys, analyses and reports "prepared or received by an officer or director … for the purposes of evaluating or analyzing the proposed transaction." This broad information requirement is similar to that found in Item 4(c) of the HSR notification reporting form which must be submitted under the U.S. pre-merger notification rules.

2 In either scenario, if prior to the proposed transaction such persons owned more than 20% (public) or more than 35% (non-public), the threshold is triggered where such persons will acquire more than a 50% voting interest.

Advance Ruling Certificates

Parties to a proposed merger, whether or not subject to transaction notification, may apply to the Commissioner for an advance ruling certificate (an "**ARC**") with respect to such merger. The issuance of an ARC certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen competition substantially. Parties will often apply for an ARC when it is clear that no substantive competition issues will arise in connection with the proposed transaction and will often couple such application with the transaction notice filing.

The issuance of an ARC exempts the parties from the pre-merger notification requirements which otherwise may apply. Upon issuing an ARC, the Commissioner cannot challenge the proposed merger solely on the basis of information that is the same or substantially the same as the information on the basis of which the ARC was issued, provided the merger has been substantially completed within one year following the issuance of the ARC.

In the absence of an ARC (or a no-action letter in the alternative), a notifiable merger transaction may proceed following the expiry of the 30-day waiting period, unless the Commissioner applies to the Tribunal to prevent the proposed transaction from proceeding where the Commissioner believes that substantive competition issues will arise from the proposed transaction (see below). The 30-day waiting period can be extended by the Competition Bureau through the issuance of a supplementary information request, or SIR, within 30 days of the original filing, in which case a further 30-day waiting period will commence once the parties have complied with the SIR. The Bureau has indicated that it "will only issue a SIR when the proposed transaction raises significant competition issues and additional information is required."

The *Competition Act* imposes criminal sanctions for failure to comply with the waiting period requirements. These criminal sanctions may also apply if a party fails to notify when required. In addition, administrative monetary penalties of up to C$10,000 per day may be assessed for non-compliance.

The *Competition Act* provides limited exemptions to the notification requirements when a transaction otherwise exceeds the two financial thresholds referred to above. For example, transactions between affiliated parties are exempt from the notification requirements, as are certain acquisitions of real property or goods in the ordinary course of business under specified conditions.

Challenges Before the Competition Tribunal

The Commissioner may, by application made to the Competition Tribunal (the "**Tribunal**"), challenge a proposed merger (or any substantially completed non-notifiable merger within one year following closing) based on the grounds that the merger will prevent or lessen, or is likely to prevent or lessen, competition substantially. The Tribunal is comprised of judges of the Federal Court and non-judicial members knowledgeable in industry or economics. The *Competition Act* provides a list of factors for the Tribunal to consider in assessing whether a merger lessens competition substantially, including competition from imports and by foreign competitors; the solvency of the target business; the availability of product or service substitutes; trade and other barriers to entry; and the competitive effect of other firms in the relevant market.

If the Tribunal finds that a merger or a proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal is permitted to make certain orders, including the prohibition of a merger before it occurs, the dissolution of a merger after it has occurred and the disposition of assets or shares.

Recent Amendments to the *Competition Act*

On June 23, 2022, amendments to the *Competition Act* received royal assent as part of the *Budget Implementation Act*, 2022 (**Bill C-19**). Certain amendments have significance to the Competition Bureau's merger review analysis. In particular, an anti-avoidance provision expressly states that the pre-merger notification requirements under the *Competition Act* will apply to any transaction or proposed transaction "designed to avoid" the pre-merger notification regime. Moreover, Bill C-19 has expanded the relevant factors for assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In addition to the long-standing factors in section 93 of the *Competition Act*, the amendments expressly include additional factors, namely "network effects within the market," "whether the merger would contribute to the entrenchment of the market position of leading incumbents" and "any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy."

Bill C-19 also introduced significant amendments to the *Competition Act* impacting commercial and employment practices. Amendments to section

45(1.1) of the *Competition Act* which came into force as of June 23, 2023, introduce criminal prohibitions against-wage fixing and no-poaching agreements. Section 45(1.1) deems a criminal offence for two or more employers to agree to fix salaries/wages or terms and conditions of employment, or to agree not to poach each other's employees. The prohibition is limited, however, to *reciprocal obligations* between employers not to solicit or hire *each other's* employees. Moreover, the prohibition only applies to agreements between *unaffiliated* employers.

Bill C-56 (*Affordable Housing and Groceries Act*)

Bill C-56 has upended what was heretofore a relatively static legislative landscape in Canadian competition law. The significant amendments to the *Competition Act* in Bill C-56 include market study powers for the Commissioner of Competition, expanded competition collaboration provisions, repeal of the efficiencies exceptions for anti-competitive mergers and collaborations, revisions to the legal test for abuse of dominance, amendments to the legal test addressing business collaborations with an anti-competitive purpose and increased financial penalties.

(i) Market Study Powers

Newly enacted market study powers give the Commissioner a broad ability to compel production, by way of a court order, of information disclosure under section 11 of the Act, ranging from requiring market participants to submit to oral examinations under oath to providing specific data and records. The Commissioner does not need a reason to initiate a market study, other than the action being in the public interest. Therefore, a market study may be initiated even if there are no grounds for the existence of anti-competitive conduct.

(ii) Competitor Collaborations

Bill C-56 has also expanded the competition collaboration provisions in section 90.1 of the Act to include "civil collaborations" amongst non-competitors. This amendment, which is set to come into force on December 15, 2024, expands the existing competitor collaboration provisions, which only applied to *agreements* between competitors. Under the amendments, the Commissioner will be able to issue conduct orders with respect to any breach, even where the entities have not entered into any form of agreement or arrangement. Further, the amendments stipulate that section 90.1 may apply to entities' past conduct.

(iii) Repeal of the Efficiency Defence

Prior to Bill C-56, section 96 of the Act provided that the Commissioner may not prevent a merger where the proposed efficiencies of the merger would be greater than and offset any potential anticompetitive effects. The efficiencies defence was widely criticized amongst scholars as a 'loophole' for the passage of anticompetitive mergers.

(iv) Abuse of Dominance

The amendments also vastly expanded the scope of conduct covered under the Act's abuse of dominance provisions. Previously, section 79 stipulated that an abuse of dominance may be found where a dominant firm engaged in both "anticompetitive acts" *and where* "the practice had, or was likely to have, the effect of substantially lessening competition." However, the new amendments have effectively made the above requirement disjunctive, allowing for an abuse of dominance to be found where a dominant firm *either* engaged in anticompetitive acts *or* as a result of their conduct, engaged in activities that had, or were likely to, substantially lessen competition.

Bill C-56 raises the administrative monetary penalties ("**AMPs**") for a finding of abuse of dominance from C$25 million for an initial offence to C$35 million for subsequent offences. Both components of section 79 must be present for an AMP to be issued.

Bill C-59

Bill C-59 was tabled as part of Parliament's (2023) Fall Economic Statement. As of June 2024, the Bill is before the Senate. At its core, Bill C-59 strengthens the powers of the Commissioner to review and block anticompetitive mergers. The below details the legislation's potential effect on merger review in Canada.

Bill C-59 has expanded the scope of transactions falling under the C$93 million "target threshold" for notifiable transactions in section 110 of the Act to include "sales into Canada" of a Canadian operating business when calculating the transaction size.

The legislation also significantly extends the limitation period for the Commissioner to challenge non-notifiable mergers that have not voluntarily notified the Commissioner, from one year to three years. Additionally, the Bill repeals section 92(2) of the Act, which prohibits the Tribunal from making an order with respect to a merger "solely on the basis of evidence of concentration or market share." The Competition Bureau has said that the repeal

of section 92(2) is "a minimum initial step towards a structural presumption" that "would permit, but not require, the Tribunal to adopt structural presumptions" and "most likely result in the Tribunal placing greater weight on evidence of high market share and concentration than it has to date."

Finally, Bill C-59 prohibits parties from closing a transaction while there is an application for an "interim order" with the Bureau. This would prevent the parties from closing until the application for the injunction was heard and disposed of, effectively "pausing" the clock on the applicable time period for merger reviews in certain circumstances.

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