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competition bulletin

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foreign investment review: Canada raises *Investment Canada Act* review thresholds but introduces a national security override

In an unprecedented move, the Canadian Government has included as part of its 2009 *Budget Implementation Act* (Bill C-10) a number of important amendments to the *Investment Canada Act*. Since budget bills normally are enacted quickly and with few revisions, a new era in Canadian foreign investment review is on the horizon.

Non-Canadians who acquire control of an existing Canadian business or who establish a new Canadian business are subject to the ICA. Most proposed investments are subject to relatively simple notification requirements. Only those foreign investments that exceed specified thresholds are subject to pre-closing or post-closing review by the Minister of Industry (or, in the case of transactions involving cultural industries, the Minister of Heritage), to determine whether the investment is of "net benefit" to Canada.

The amendments to the ICA in Bill C-10 follow on the heels of the June 2008 Competition Policy Review Panel Report, which recommended, among other things, that the ICA be amended to reduce barriers to foreign investment by increasing review thresholds and increasing transparency, while preserving close oversight in the cultural sector. In addition, Bill C-10 implements the Government's previously announced plan to provide for review of foreign investments that could be "injurious" to national security, regardless of the size of the transaction.

higher threshold for review

The current threshold for review of direct acquisitions by investors from World Trade Organization member-countries is a book value of C$312 million for the Canadian target. This threshold will rise to an "enterprise value" of C$600 million during the two years after the Bill C-10 amendments come into force; to C$800 million for investments made during the third and fourth years after the amendments come into force; and, finally, to C$1 billion for investments made between the fifth year after the amendments come into force and December 31 of the sixth year after the amendments come into force. This threshold will be indexed to inflation thereafter.

The Competition Policy Review Panel recommended changing the financial measure on which the threshold for review is based from book value, which it considered to be an "old economy" measure, to the target's enterprise value, to better reflect the increasing importance of service- and knowledge-based industries, in which much of the value of an enterprise may not be recorded on its balance sheet. Although Bill C-10 does not define "enterprise value", we expect that the Regulations under the ICA will use a definition that is substantially similar to that suggested by the Competition Policy Review Panel in its report, namely "the price to be paid for the equity of an acquired business and the assumption of liabilities on its balance sheet minus its current cash assets." While the deduction of current cash assets makes the rise in the review thresholds even more pronounced, the move from an accounting-based to a market-based measure of value will catch some transactions that would not otherwise have been reviewable.

There are currently four "sensitive" policy sectors where the threshold for review of direct acquisitions of Canadian businesses is C$5 million and indirect acquisitions of foreign corporations are reviewable if they have Canadian subsidiaries with assets exceeding C$50 million. These sectors are uranium, financial services, transportation services and cultural businesses. If Bill C-10 is passed, only cultural businesses will continue to be subject to the lower review thresholds (and the Government's discretion to order a review of below-threshold transactions in this sector will also be retained). The other three "sensitive" sectors will be eliminated. However, as noted above, the very broad "national security" provision that is to be added to the ICA could be used to compel reviews of uranium, financial services and transportation sector transactions in certain circumstances. In addition, transactions in the financial services and transportation areas may be subject to review under sector-specific regimes.

increased transparency

If the relevant Minister decides that a transaction is not of net benefit to Canada, he or she will be required to provide reasons for the decision. If the Minister decides that a transaction is of net benefit to Canada, he or she may (but will not be required to) provide reasons for the decision and allow these reasons to be made publicly available. We are confident that meaningful reasons can be provided while respecting the confidentiality of commercially sensitive information. If, as we would hope, the reasons are publicly disclosed as a matter of course, we would anticipate that the increased transparency would have the salutary effect of establishing precedents against which the "net benefit to Canada" of proposed transactions could be evaluated.

national security

Among major industrialized nations, Canada is unusual in not having a mechanism to block an investment that could threaten national security. The proposed amendments will fill this gap in Canada's foreign investment review framework. National security will effectively be defined in a wide sense, since the Federal Cabinet will be empowered to review, and ultimately to block, any investment it considers "could be injurious to national security". No specific definition of national

security is provided in Bill C-10. It is possible that national security grounds could be invoked to review investments by non Canadians in areas as diverse as mining (particularly uranium and other materials of military importance), finance, transportation, ports, electricity, oil and gas, and pipelines. It is even conceivable that national security grounds could be invoked to block an investment the Federal Cabinet feels might result in damage to the environment – for instance, if a foreign investor in primary resource exploration intends to employ exploration techniques that could potentially be harmful to air quality or the water supply.

concluding observations

These changes to the ICA represent an improvement over the *status quo*. As a result of the significantly higher thresholds and the removal of the very low "sensitive" sector threshold for all sectors except culture, we anticipate significantly fewer Applications for Review under the ICA. As for those few deals that will remain subject to mandatory review or are subjected to review under the "national security" provisions, we are encouraged by the plan to increase the transparency of the decision-making process.

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