2020 CANADIAN MERGER NOTIFICATION THRESHOLD UPDATES

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The 2020 updates to the merger thresholds under Canada's *Competition Act* and *Investment Canada Act* have been announced. Most notably, and for the first time since the current system was adopted, the *Competition Act's* size-of target threshold remains unchanged, at C$96 million.

Competition Act

The *Competition Act* requires advance notification of certain merger transactions involving operating businesses in Canada where "size-of-parties" and "size-of-target" financial tests both are exceeded:

- The "size-of-target" test requires that the value of assets in Canada to be acquired, or owned by the corporation the shares of which are being acquired, or the annual gross revenue from sales in or from Canada generated by those Canadian assets, exceeds a specified threshold. The Competition Bureau has announced that the **"size-of-target" threshold will remain at C$96 million for 2020**, which was the same threshold as 2019.
    - The Competition Bureau, in its press release providing this update, noted that the Minister of Innovation, Science and Industry has three options for setting the size-of-target threshold:

1. The Minister may use the result generated using a formula set out in the *Competition Act* that compares the year-over-year change in nominal Gross Domestic Product (GDP);
2. The Minister may prescribe a different amount by regulation; or
3. The Minister may choose not to adjust the threshold, which has the effect of keeping the same threshold from previous years.

- The "size-of-parties" test requires that the parties to a transaction, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, exceeding **C$400 million**. (The "size-of-parties" threshold remains unchanged from 2019, as it has been since 1986.)

The Competition Bureau also announced that the **filing fee** for submitting a merger notification in 2020 **has been raised to C$75,055.68**, effective immediately. This inflation-based adjustment represents a 2% increase from the 2019 filing fee of C$73,584.

Investment Canada Act

The *Investment Canada Act* requires that any Non-Canadian that acquires control of a Canadian business (whether or not that business is controlled by Canadians prior to the acquisition) must file either a notification or an application for review. For the purposes of the Act, a Non-Canadian includes any entity that is not controlled or beneficially owned by Canadians.

Investors from the EU and certain other countries with most-favoured nation treatment under Canada's free trade agreements (including the United States, Australia, Chile, Colombia, Honduras, Japan, Mexico, New Zealand, Panama, Peru, Singapore, South Korea and Vietnam)[1] that are not State-Owned Enterprises generally will be required to file a pre-closing application for review and approval when directly acquiring a Canadian business where the enterprise value exceeds **C$1.613 billion** in 2020. This represents a 2.9% increase from the C$1.568 billion threshold for 2019. The threshold also applies in respect of investments to acquire control of a Canadian business that was, immediately prior to the investment, controlled by an investor from one of these countries. The C$1.613 billion threshold is subject to an annual adjustment based on the annual percentage change in nominal Gross Domestic Product, with the next adjustment to come in January of 2021.

In this regard, we think it important to highlight that, post-Brexit, the United Kingdom is no longer a member of the EU, so it no longer benefits from the materially higher most-favoured nation trade agreement threshold.

WTO Investors (firms controlled in WTO countries) that are not State-Owned Enterprises and that do not enjoy the benefit of the most-favoured nation trade agreements noted above generally will be required to file a pre-closing application for review and approval when directly acquiring a Canadian business where the enterprise value exceeds C$1.075 billion in 2020. This represents a 2.9% increase from the C$1.045 billion threshold for 2019. The threshold also applies for non-WTO Investors that directly acquire control of a Canadian business that was, immediately prior to the investment, controlled by a WTO Investor. The **C$1.075 billion** threshold is subject to an annual adjustment based on the annual percentage change in nominal Gross Domestic Product, with the next adjustment to come in January of 2021.

For direct acquisitions by WTO country State-Owned Enterprises, determination of the threshold for approval is based on asset value (book value) rather than enterprise value. The 2020 asset size threshold has been increased to **$428 million**. This represents a 2.9% increase from the previous $416 million threshold in 2019. This asset value threshold also applies for non-WTO country State-Owned Enterprises that acquire control of a Canadian business that was, immediately prior to the investment, controlled by a WTO Investor. This asset size threshold is subject to an annual adjustment based on the annual percentage change in nominal Gross Domestic Product, with the next adjustment to come in January of 2021.

The asset size approval thresholds for investments by non-WTO Investors that are not described above, and for

investments in Canadian cultural businesses, remain at $5 million for direct acquisitions, and $50 million for indirect acquisitions.

As mentioned earlier, any acquisition by a Non-Canadian of a Canadian business that is not subject to an application for review is required to file a notification under the *Investment Canada Act*. This notification can be filed any time pre-closing or within 30 days following closing. As well, any Non-Canadian that establishes a new business in Canada is required to file a notification.

The *Investment Canada Act* also contains a national security review regime. Any investment (even the acquisition of minority interests) by a non-Canadian in a Canadian business that "may be injurious to national security" can trigger a national security review. A national security review can be initiated within 45 days following submission of a notification or an application for review, or in respect of an investment for which no notification or application for review is required (e.g., a minority non-controlling investment), until 45 days after the investment was implemented. Where a transaction raises potential national security concerns, purchasers may wish to consider submitting the notification or application for review well in advance of closing.

Additional Background on Mergers in Canada

Checklist: Please see our *Canadian Competition Act* and *Investment Canada Act* Filing Checklist, showing the 2020 thresholds.

Getting the Deal Through: For a more detailed discussion of the Canadian merger review regime, see **Neil Campbell, James Musgrove, Mark Opashinov** and **Joshua Chad** "Canada", *Merger Control 2020 – Getting the Deal Through* (Law Business Research), pp. 97-106.

by James Musgrove, Neil Campbell, John Clifford and Joshua Chad

[1] This list includes the six non-Canadian countries that have ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as of the date of this bulletin. Brunei, Chile, Malaysia and Peru have not yet ratified the CPTPP. However, Chile and Peru already benefit from existing free trade agreements with Canada. Brunei and Malaysia will obtain the benefit of the higher threshold once they ratify the CPTPP.[ps2id id='1' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.


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