

MERGER NOTIFICATION AND INVESTMENT CANADA ACT THRESHOLDS UPDATES

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The 2022 updates to the notification thresholds under Canada's *Competition Act* and *Investment Canada Act* have been announced. While the Investment Canada Act thresholds increased materially this year, given the increases to GDP, the Minister of Innovation, Science and Industry elected to [leave the Competition Act thresholds unchanged](#). The Minister made this decision in order to provide the “Competition Bureau [with] a greater field of view in its efforts to detect potentially harmful transactions”. This is an explicit policy choice, which is a departure from past practice in which the thresholds have generally followed GDP changes in a largely mechanical fashion.

Competition Act

Thresholds

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 book 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 be maintained at C\$93 million** for 2022.
- 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 2021, as it indeed has been since 1986.)

The Competition Bureau's **filing fee** for submitting a merger notification is currently C\$74,905.57. This fee is expected to be adjusted for inflationary changes on April 1st.

By way of some key statistics for the Bureaus 2021 fiscal year* there were 179 merger filings and 14 mergers which did not meet the notification thresholds were also subject to review. Fifty transactions were deemed as complex, and 11 (~6% of notified transactions) were subject to second phase Supplementary Information

Requests. Five transactions (~2.5%) were challenged, with two closing pursuant to consent agreements and three being abandoned by the parties.^[1]

Investment Canada Act

Threshold Updates

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.

Trade Agreement Investors from countries with most-favoured nation treatment under Canada's free trade agreements (including the EU, the United States, Australia, Chile, Colombia, Honduras, Japan, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, the United Kingdom, Vietnam)^[2] 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\$1.711 billion** in 2022. **This represents a 9% increase** from the C\$1.565 billion threshold for 2021 and **a 6% increase** from the C\$1.613 billion threshold for 2020. 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. 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\$1.141 billion** in 2022. **This represents a 9% increase** from the C\$1.043 billion threshold for 2021 and **a 6% increase** from the C\$1.075 billion threshold for 2020. 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.

For direct acquisitions by WTO country State-Owned Enterprises, determination of the threshold for approval is based on asset book value rather than enterprise value. The 2022 asset size threshold has been increased to **C\$454 million**. **This represents a 9% increase** from the previous C\$415 million threshold in 2021 and **a 6% increase** from the C\$428 million threshold for 2020. 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.

The thresholds for Trade Agreement Investors and WTO Investors) are subject to an adjustment based on the annual percentage change in nominal Gross Domestic Product, with the next adjustment expected in early 2023.

The asset size thresholds for investments by Non-WTO Investors that are not described above, and for investments in Canadian cultural businesses, remain at C\$5 million for direct acquisitions, and C\$50 million for indirect acquisitions.

Net Benefit Reviews

In the 2021 fiscal year, there were a total of 826 non-cultural filings (including for acquisitions and for the establishment of new businesses), but only three net benefit reviews, illustrating clearly the impact of the high thresholds for Trade Agreement Investors and WTO Investors.^[3]

National Security Reviews

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 either 45 days following submission of a notification or an application for review under the ICA, 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.

Of the 826 non-cultural investment filings in FY2021, 24 (~3%) investments triggered the operation of the national security regime. Of these 24:

- 12 investors were notified that a full-scale national security review of their investments might be required, but the investments were cleared without needing the full-scale review.
- one investor was notified that a full-scale national security review of its investment might be required, and the investor abandoned its transaction before any final decision could be made as to whether to initiate a full-scale review.
- 11 investments were subject to a full-scale national security review. This is a marked increase from the average of 5.2 national security reviews per year from FY2017-FY2020.

Of the 11 investments that triggered a full scale review:

- four were cleared without conditions;
- four were withdrawn;
- two required divestitures; and
- one was blocked.

The average length of national security reviews has increased significantly in recent years. The FY2021 data shows that a full-scale review lasted an average of 225 days (from the date the notification or application was certified as complete), up from 161 days in FY2019.^[4]

Of the 32 transactions that have been the subject to full-scale national security reviews since FY2017, 20 (63%) originated from China. However, the vast majority of investments from China do not trigger full-scale national security reviews in Canada. In FY2021 there were 42 investment filings generated by an investor of Chinese origin, and only 7 (17%) of such investments resulted in a full-scale national security review.

Investments that have been the subject of national security reviews have most commonly involved industries relating to technology, manufacturing, and natural resources.^[5] For more information concerning the types of investments that can trigger national security reviews, please see our [recent bulletin on Canada's recent expanded national security guidance](#).

Additional Background on Mergers in Canada

Thresholds Chart: Please see our Canadian *Competition Act* and *Investment Canada Act* [Thresholds Chart](#), showing the 2022 thresholds.

Getting the Deal Through: For a more detailed discussion of the Canadian merger review regime, see **James Musgrove, Mark Opashinov, Joshua Chad and Joshua Krane** "[Canada](#)", *Merger Control 2022 – Getting the Deal Through* (Lexology), pp. 93-104.

* The government's fiscal year ended March 31, 2021.

[1] Competition Bureau, [Competition Bureau Performance Measurement & Statistics Report 2021-2022; for the period ending September 30, 2021](#).

[2] 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.

[3] Innovation, Science and Economic Development Canada (ISED), [Investment Canada Act Annual Report 2020-2021](#) at 6. This count does not include investment filings received by the Department of Canadian Heritage in respect of the acquisitions of cultural businesses. While Canadian Heritage's FY2021 annual report on the administration of the *Investment Canada Act* has not been released, its registry of reported decisions and notifications suggests that Canadian Heritage received 31 filings during its FY2021 (ended March 31, 2021), including 10 net benefit review applications.

[4] ISED, [Investment Canada Act Annual Report 2020-2021](#) at 19; [Annual Report 2018-2019](#) at 15.

[5] ISED, [Investment Canada Act Annual Report 2020-2021](#) at 20-22.

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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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