

2023 MERGER NOTIFICATION AND INVESTMENT CANADA ACT THRESHOLDS UPDATES

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The 2023 updates to the notification thresholds under Canada's *Competition Act* and *Investment Canada Act* have been announced. For the second year in a row, this time after a period of historically high inflation, the Minister of Innovation, Science and Industry elected to [leave the *Competition Act* size of target threshold unchanged](#) at \$93 million. Last year was the first time the Minister elected not to change this threshold, which has generally followed GDP changes in a largely mechanical fashion. The Minister indicated that he made this decision, somewhat counterintuitively, in part due to the rising cost of living, [stating](#), “our government continues to do everything it can to make life more affordable, including ensuring a more competitive marketplace.” This policy choice is also said to reflect the government's ongoing commitment to increased scrutiny and robust enforcement by the Competition Bureau.

The *Investment Canada Act* 's updated thresholds for 2023 have also been released, and are described in more detail below.

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 2023.
- 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, which has remained constant since 1986).

The Competition Bureau's **filing fee** for submitting a merger notification is currently C\$77,452.36. This fee is

expected to be adjusted for inflationary changes on or about April 1st, 2023.

By way of some key statistics for the Bureau's 2022 fiscal year,* there were 252 merger reviews concluded by the Bureau, of which 237 involved formal filings under the *Competition Act* and an additional 15 that did not meet the notification thresholds but were nonetheless reviewed. Of the 237 merger reviews involving formal filings, 57 transactions were deemed complex (24%), and 9 (~3.8% of notified transactions) were subject to second phase Supplementary Information Requests. Of the 252 merger reviews, 7 were challenged (~2.8%), with 4 closing pursuant to consent agreements and 3 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) 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 countries with most-favored nation treatment under Canada's free trade agreements (including the EU, the United States, Australia, Chile, Colombia, Honduras, Japan, Malaysia, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, the United Kingdom and Vietnam – "**Trade Agreement Investors**")^[2] that are not State-Owned Enterprises are generally required to file a pre-closing application for review and approval when directly acquiring a Canadian business where the enterprise value exceeds **C\$1.931 billion** for 2023. **This represents a nearly 13% increase** from the C\$1.711 billion threshold for 2022, which represents **a 9% increase** from the C\$1.565 billion threshold for 2021. This 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 not Trade Agreement Investors will generally be required to file a pre-closing application for review and approval when directly acquiring a Canadian business where the enterprise value exceeds **C\$1.287 billion** for 2023. **This represents a nearly 13% increase** from the C\$1.141 billion threshold for 2022, which represented **a 9% increase** from the C\$1.043 billion threshold for 2021. 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 2023 asset size threshold is **C\$512 million**. **This**

represents a nearly 13% increase from the previous C\$454 million threshold in 2022, which, again, represented **a 9% increase** from the C\$415 million threshold in 2021. 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 2024.

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 2022 fiscal year, there was an all-time high of 1,255 non-cultural filings under the *Investment Canada Act* (including for acquisitions and for the establishment of new businesses), which represents an increase of 51.9% over the previous fiscal year, when there were 826 filings. The government attributes the low number of filings in 2020-2021 largely to the COVID-19 pandemic, and noted that in 2021-2022, filings increased 21.6% compared to two years ago (pre-pandemic). Of the 1,255 investments, there were only eight net benefit reviews, as a result 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. As of August 2022, in respect of an investment for which no notification or application for review is required (eg., a minority non-controlling investment), the investor has the option of (1) notifying voluntarily, which triggers a corresponding 45 day period following notification, or (2) not notifying, which triggers a period of 5 years from closing pursuant to which the government can elect to initiate a national security review. Where a transaction raises potential national security concerns, investors may wish to consider submitting the notification or application for review well in advance of closing, and minority purchasers may wish to consider a voluntary filing, in order to ensure they are not surprised with a national security post-closing review.

Of the 1,255 non-cultural investment filings in FY2022, 24 (~2%) investments triggered the operation of the national security regime. Of these 24:

- 9 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.
- 3 investors were notified that a full-scale national security review of their investments might be required, and the investors abandoned their transactions before any final decision could be made as to whether to initiate a full-scale review.
- 12 investments were subject to a full-scale national security review. This is one more than the 11 investments subject to review for FY2021 and is a marked increase from the average of 5.3 national security reviews per year from FY2018-FY2020.

The average length of national security reviews has increased significantly in recent years, the FY2022 data shows that average review time for an investment that engages the national security regime is 133 days (from the date the notification or application was certified as complete).^[4]

Of the 12 investments that triggered a full-scale review:

- 7 were cleared without conditions;
- 4 were with withdrawn; and
- 1 is ongoing.

Of the 39 transactions that have been the subject to full-scale national security reviews since FY2018, 22 (56%) originated from China. However, the vast majority of investments from China do not trigger full-scale national security reviews in Canada. In FY2022 there were 50 investment filings generated by an investor of Chinese origin, and only 6 (12%) of such investments resulted in a full-scale national security review.

It is also worth noting that 4 of the 12 investments requiring a full-scale review in FY2022 were of Russian origin. As ISED's annual report on the administration of the *Investment Canada Act* does not provide total figures for all Russian notifications and applications that were received in a give year, a percentage cannot be calculated. However, it is worth noting that in March 2022 ISED released a [policy statement](#) indicating that investments with investors that are associated with or influenced by the Russian state would be viewed as potentially injurious to Canada's national security. Therefore, it is expected that investments from Russia will be under even more scrutiny going forward.

Investments that have been the subject of national security reviews have most commonly involved industries relating to technology, manufacturing, and natural resources, with a particular focus on critical minerals.^[5] For more information concerning recent changes to Canada's national security regime, please see [our recent bulletin describing these changes](#) and other implications from the FY2022 annual report.

Additional Background on Mergers in Canada

Thresholds Chart: Please see our Canadian *Competition Act* and *Investment Canada Act* [Thresholds Chart](#), showing the 2023 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. 182-212.

Please reach out to McMillan's Competition and Foreign Investment Group if you have any questions about how a transaction may involve Canada's *Competition Act* or *Investment Canada Act*. We would be very pleased to explore whether your transactions exceeds any of the relevant thresholds and also to consider any national security or substantive competition law risks related to transactions that you may be contemplating.

by the [Competition and Foreign Investment Group](#)

* The government's fiscal year ended March 31, 2022.

[1] Competition Bureau, [Competition Bureau Performance Measurement & Statistics Report 2022-2023 for the period ending September 30, 2022](#).

[2] This list includes the seven non-Canadian countries that have ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as of the date of this bulletin. Brunei has not yet ratified the CPTPP. Brunei will obtain the benefit of the higher threshold once it ratifies the CPTPP.

[3] Innovation, Science and Economic Development Canada (ISED), [Investment Canada Act Annual Report 2021-2022](#) at 3. This count does not include investment filings received by the Department of Canadian Heritage in respect of the acquisitions of cultural businesses. Canadian Heritage's FY2021 and FY2022 annual reports on the administration of the *Investment Canada Act* have not been released, and its registry of reported decisions and notifications has not been updated since September 2021. Looking at its most recently reported 12 months (ended September 30, 2021), Canadian Heritage's registry suggests that Canadian Heritage received 53 filings during this annual period, including 22 requiring net benefit reviews.

[4] ISED, [Investment Canada Act Annual Report 2021-2022](#) at 22. In previous years, the Annual Report reported only on the length of full-scale national security reviews. In contrast, the most recent Annual Report for FY2022 reports only on the length of reviews of all investments that engage the national security regime, including those not requiring full-scale reviews.

[5] ISED, [Investment Canada Act Annual Report 2021-2022](#) at 23 and ISED, [Investment Canada Act Annual Report 2021-2022](#) at 20-22.

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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