

Competition, Antitrust and Foreign Investment

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Government of Canada Provides Greater Clarity Around National Security Reviews and Reaffirms Higher Threshold for Net Benefit Reviews under *Investment Canada Act*

On December 19, 2016, Minister of Innovation, Science and Economic Development, Navdeep Bains, announced the release of long-awaited guidelines relating to the national security review of investments by non-Canadians, and reaffirmed the Liberal government's intention to raise, in April 2017, the threshold for net benefit reviews of investments by investors from WTO member countries from \$600 million to \$1 billion.

Guidelines on the National Security Review of Investments

In 2009, the *Investment Canada Act* (the “Act”) was amended to introduce reviews of investments on national security grounds, in addition to the separate review of investments on grounds of whether they are of “net benefit to Canada.” These new provisions gave the Cabinet the power to order reviews of investments by non-Canadians of any size where the investment “could be injurious to national security.” However, until this week, there had been no published guidance respecting the factors to be considered in ordering or conducting such reviews.

With the release of the Guidelines on the National Security Review of Investments (the “Guidelines”), the Government of Canada has provided some important clarity and guidance concerning the factors the Minister or Cabinet may consider when making determinations relating to national security under the Act.

The factors cited by the Guidelines are:

- The potential effects of the investment on Canada's defence capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- Involvement in the research, manufacture or sale of goods/technology identified in Section 35 of the *Defence Production Act*;
- The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on Canada's international interests, including foreign relationships; and
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

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Recognizing that these factors are relatively broad, the Government has encouraged investors, particularly where any of these factors are present, to contact the Investment Review Division at the earliest stages of the development of their projects, and to file a notification or application for net benefit review in sufficient time to ensure that any national security review is triggered before a transaction closes. The Guidelines also reinforce the readiness of officials to meet with investors to discuss their projects.

Liberalized Thresholds for WTO Investors

Minister Bains also reaffirmed his government's plan to raise, in April 2017, the monetary threshold for net benefit reviews of certain investments to \$1 billion (from the current \$600 million). This threshold, measured on the "enterprise value" of the business, applies to direct investments in Canadian businesses by private sector investors from WTO member countries, or acquisitions of businesses currently owned by such investors. The

previous government had planned to raise the threshold for such investments in stages, from \$600 million to \$800 million in 2017 and to \$1 billion in 2019. The threshold for state-owned enterprises from WTO member countries remains at \$375 million in book value for 2016, to be adjusted by a GDP-based formula in the new year.

Conclusion

These announcements are welcome developments that reflect the generally pro-investment environment ushered in by Justin Trudeau's Liberal government just over one year ago. They are particularly positive signs in light of heightened concerns over growing protectionist sentiments and geopolitical instability internationally. We will continue to watch and report on these developments as they unfold.

For further information regarding the *Investment Canada Act*, contact any member of our Competition, Antitrust and Foreign Investment Group.