

# 2021 Competition Act and Investment Canada Act thresholds for Canadian M&A transactions

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Reflecting the COVID-19 pandemic's toll on Canada's economy, key financial thresholds relevant to pre-merger notification of proposed transactions under the *Competition Act* and "net benefit to Canada" review under the *Investment Canada Act* have been revised downward – not upward – for 2021. These changes are significant for all parties engaging in merger and acquisition activity involving Canada.

## 1. *Competition Act*

On February 11, 2021, the Competition Bureau (Bureau) announced that its key "size of transaction" threshold would decrease to CA\$93 million for 2021.<sup>1</sup> This new threshold came into effect on February 13, 2021 (see Canada Gazette Part I here).

This downward revision of the notification threshold from \$96 million in 2020 to \$93 million this year highlights the economic consequences wrought by the COVID-19 pandemic. The *Competition Act* contains a GDP-indexing formula for annual adjustments to the pre-merger notification "size of transaction" threshold. A decrease in Canada's national GDP in 2020 (from 2019 levels) led to the reduced threshold as calculated under this formula. While the *Competition Act* permits the Minister of Innovation, Science and Industry (Minister) to refrain from altering the threshold, in which case the threshold for the previous year applies – as occurred in 2020 and 2010 – the Minister declined to take this approach again in 2021.

### Pre-merger notification thresholds

Under the *Competition Act*, parties to transactions over certain financial thresholds must notify the Bureau in advance of closing and pay a filing fee. The fee in 2020 was set at \$75,055.68, and the 2021 value of this fee has not yet been announced at the time of this update's writing. While Bureau notification thresholds may vary by type of transaction, transactions will require notification when the relevant values exceed both of the following thresholds:

- Size of transaction threshold: Either (i) the value of the acquisition target's Canadian assets or (ii) the target's gross revenues from sales in or from Canada generated by its assets in Canada exceed \$93 million; and
- Size of parties threshold: Either (i) the value of the Canadian assets of the parties and their affiliates or (ii) the gross revenues from sales in, from or into Canada of the parties and their affiliates exceed \$400 million.

Where both thresholds above are exceeded, a notification must be filed with the Bureau and the parties must adhere to a 30-day waiting period (that can be extended) during which the parties are prohibited from closing.

## 2. *Investment Canada Act*

On December 31, 2020, the government also published decreased 2021 *Investment Canada Act* (ICA) thresholds for review of various categories of transactions in which non-Canadian investors may acquire control of Canadian businesses. If a transaction meets or exceeds the threshold applicable to it, the responsible minister must make a determination of whether the investment results in a “net benefit to Canada” before the transaction is implemented.

Reviews under the ICA are generally led by the Minister of Innovation, Science and Industry, except in the case of a target that is a “cultural business”, in which case the review is instead conducted by the Minister of Canadian Heritage.

## Private sector trade agreement investments in non-cultural businesses

For direct acquisitions of Canadian businesses by private sector investors from countries that have a free trade agreement containing certain provisions with Canada – currently, European Union member countries, the United States, Mexico, Australia, Japan, New Zealand, Singapore, South Korea, Chile, Peru, Colombia, Panama, Honduras and Vietnam – the threshold has decreased from CA\$1.613 billion to CA\$1.565 billion, measured by the enterprise value of the target Canadian business.<sup>2</sup> Indirect acquisitions by these investors (provided they are also World Trade Organization (WTO) members) are not subject to review.<sup>3</sup>

Although the UK was an EU member country last year, it left the EU at the end of 2020 and currently does not benefit from the preferred threshold, except in certain cases where the Canadian business subject to the UK investment in question is controlled prior to its acquisition by an investor from one of the above-listed trade agreement counterparty states.<sup>4</sup>

## Private sector WTO investments in non-cultural businesses

For direct acquisitions by private sector WTO investors that are not party to certain free trade agreements with Canada, the government decreased the threshold from \$1.075 billion to \$1.043 billion in enterprise value. Indirect acquisitions by these investors of non-cultural businesses are not subject to review.

## State owned enterprise (SOE) WTO investments

The government lowered the review threshold for direct acquisitions of a non-cultural Canadian business by an SOE of a WTO member country from \$428 million to \$415 million in the book value of the target’s assets.

## Non-WTO investments and investments in cultural businesses

For direct acquisitions of cultural businesses (such as those involving the production, publication, distribution, sale or exhibition of books, magazines, film and music recordings), and direct acquisitions of non-cultural businesses by investors from the few countries that are not WTO members, the threshold remains unchanged at \$5 million in book value of the target’s assets. Indirect acquisitions of cultural businesses and indirect acquisitions of non-cultural businesses by non-WTO investors are subject to a \$50 million threshold, based on the book value of the target’s assets.<sup>5</sup>

## National security review timelines restored

The ICA allows for all investments by non-Canadians into Canada to be potentially subjected to a national security review (NSR) process. As we previously reported last year, the Minister introduced an order in mid-2020 that extended certain review periods under the NSR process from 45 to between 60 and 180 days, subject to an ultimate extension date of December 31, 2020. This change had implications for the timing for closing of transactions in sectors with greater NSR-related risk. However, as of January 1, 2021, these extensions have expired and have not been further extended by the Minister. Accordingly, the ordinarily applicable 45-day timelines will apply to these time

periods in 2021.<sup>6</sup>

This article was co-authored by Elliott Windfeld.

For more information, please contact a member of Dentons' Competition and Foreign Investment Review group.

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1. All references to funds in this Dentons Insight are in Canadian dollars.↵
  2. Enterprise value is equal to the market capitalization for a public company transaction, or the purchase price for a private company transaction, plus liabilities (excluding operating liabilities), less cash and cash equivalents.↵
  3. "Indirect" investments are acquisitions of Canadian businesses by virtue of the acquisition of a non-Canadian corporate parent of a Canadian entity that carries on the Canadian business. See s 14.11(2) of the ICA for rules applicable to indirect acquisitions by trade agreement investors that are not WTO members. ↵
  4. On December 31, 2020, the United Kingdom (UK) ended its participation in the European Union Customs Union and European Single Market. The UK had maintained its participation in these arrangements as part of a "transition period" following its withdrawal from the EU on January 31, 2020. A practical effect of the UK leaving these arrangements is the discontinued application of the Canada-European Comprehensive Economic and Trade Agreement (CETA) to trade between Canada and the UK. On November 21, 2020, Canada announced the successful conclusion of talks on the Canada-United Kingdom Trade Continuity Agreement (TCA), which, once in force, will restore a trading regime between Canada and the UK similar to that in place prior to the UK's withdrawal. Until the TCA comes into force, however, UK-based investors will be subject to the WTO non-state owned enterprise net benefit review threshold of \$1.043 billion. The higher \$1.565 billion will continue to apply, however, in certain cases where the Canadian business that is the subject of the UK investment is controlled by a trade agreement investor listed in the text above: see s 14.11(1) of the ICA. ↵
  5. The \$5 million direct threshold and \$50 million indirect threshold for non-cultural business acquisitions do not apply if the seller of the Canadian business is a WTO or trade agreement investor (not including a Canadian). Instead, such transactions are subject to the thresholds applicable to WTO and trade agreement investments, as noted above.↵
  6. For example, in the case of a transaction that is notifiable or is subject to "net benefit" review, the Canadian government has a limited period of 45 days from the date of receipt of a complete notification or application for review to determine whether to issue a notice of a potential NSR or to make a NSR order. If no such action is taken during this period, then the investment cannot be reviewed under the NSR provision of the ICA. See the National Security Review of Investments Regulations, SOR/2009-271. ↵

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