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ARTICLE

Comprehensive Economic And Trade Agreement (CETA) Now In Force

Amends key review threshold for private investors from trade agreement countries under the *Investment Canada Act*

Introduction

The Comprehensive Economic and Trade Agreement with the European Union ("CETA") has now been provisionally implemented in Canada, bringing into effect an increase to the net benefit review threshold to CAD $1.5 billion under the *Investment Canada Act* ("ICA") for foreign investors from free trade agreement partner countries.

Background

The ICA is Canada's legislation that governs reviews of foreign investments in Canada. It contains two separate review processes to which foreign investments may be subject:

1. A review process which considers generally whether an acquisition of control of a Canadian business by a foreign investor would be of *net benefit* to Canada ("Net Benefit Review"); and
2. A discretionary review process which considers whether a foreign investment in Canada could injure Canada's *national security* ("National Security Review").

Whether a Net Benefit Review of an acquisition is required turns on whether the value of the target Canadian business exceeds the applicable financial threshold. If the value of the target business exceeds the applicable threshold, investors must file an application for Net Benefit Review with the Investment Review Division ("IRD"), and observe a waiting period of up to 75 days prior to closing the investment. In order to secure approval under this process, investors must satisfy the relevant federal Minister that the investment is likely to be of "net benefit" to Canada, having regard to certain evaluative factors set out in the legislation. To do this, investors typically give enforceable undertakings to the Minister that address these factors — for example, commitments on employment levels, economic activity, innovation, global competitiveness, and the participation of Canadians in management and on the board.

Increase in the Net Benefit Review Threshold for Trade Agreement Investors

Starting September 21, 2017, the Net Benefit Review threshold was increased to CAD $1.5 billion in enterprise value[1] for non-state owned enterprise[2] investors from any CETA country or other bilateral free trade agreement partner country (now defined in the ICA as a "Trade Agreement Investor"). Other Trade Agreement Investors include Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea, and the United States. The increased threshold will be adjusted annually starting January 1, 2019 to reflect growth in Canada's GDP.

The threshold for investments from non-state owned enterprise investors controlled in a World Trade Organization ("WTO") member state remains CAD $1 billion.

In addition, as noted in our previous bulletin, the amendments to the ICA as a result of the implementation of CETA do not affect the other Net Benefit Review thresholds under the ICA, which apply to different types of transactions, including:

- Acquisitions by non-Canadian investors that are state-owned or controlled ("SOEs");
- Acquisitions of target Canadian businesses that are engaged in "cultural" activities (*e.g.*, in the film/TV, music, or publishing sectors); and
- Acquisitions by investors that are controlled in states that are not WTO members.

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1 The methodology for calculating enterprise value depends on the structure of the transaction (*i.e.*, whether it is an acquisition of shares or assets) and whether the shares of the target are privately held or publicly traded.

2 A state-owned enterprise is an organization that is owned, controlled or influenced, directly or indirectly, by a foreign government; a non-state owned enterprise is any other enterprise, such as a private sector investor.

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