Canada still open for business despite new COVID-19 policy

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An announcement made by the Government of Canada on April 18, 2020, that certain foreign investments will be subject to enhanced scrutiny under the Investment Canada Act during the COVID-19 crisis is expected to have little to no impact on most foreign investors. Only investments related to public health and critical goods and services, and those by state-owned investors, are potentially affected. In this regard, Canada’s new policy is more limited than the approach taken by other countries, such as Australia and India, which recently implemented policies designed to curb any opportunistic acquisitions of domestic companies during the COVID-19 pandemic.

NEW POLICY

The scope of the new policy is twofold:

- “foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government”
- “investments into Canada by state-owned enterprises [that] may be motivated by non-commercial imperatives that could harm Canada’s economic or national security interests”

The new policy notes that the values of many Canadian businesses have declined as a result of the COVID-19 pandemic. Since the review thresholds under the Act generally are triggered by the enterprise value of the Canadian business — which in turn is driven mainly by market capitalization or the proposed purchase price — in the new valuation environment, this formula could lead to what the government has referred to as “opportunistic investment behaviour.” The new policy seems intended to capture a transaction that might have been large enough to be reviewable prior to the pandemic but is now no longer reviewable and might raise national security issues. The new policy is also directed at state-owned investors making investments that raise national security concerns and, for those investments that are reviewable, sets out a basis for securing stronger governance and commercial orientation commitments from such investors.

The new policy does not revoke or lower the current very high statutory review thresholds that generally apply to foreign investment in Canada. Instead, it restates pre-existing policies that apply to transactions related to the supply of critical goods and services and to investments by state-owned
investors.

Canada’s National Security Guidelines already cover the supply of critical goods and services, and arguably “businesses that are related to public health” were captured by those Guidelines. While some Canadian businesses clearly focus their operations in these categories, a number of Canadian businesses have retooled their production lines to manufacture public health goods that are in short supply in Canada. Although they were previously outside of those categories, they may now fall within them, at least temporarily.

Reviewable investments by state-owned investors have been subject to enhanced screening for many years under special guidelines. These guidelines focus on such investors demonstrating an appropriate level of governance and commercial orientation in determining whether their reviewable acquisitions of control in Canada are of net benefit to Canada.

The new policy indicates that, from a practical perspective, investments involving critical goods and services or state-owned investors may be subjected to requests for additional information or extensions of timelines. The new policy encourages foreign investors to engage with Innovation, Science and Economic Development Canada (ISED) officials before implementing an investment. For investments that constitute an acquisition of control under the Act, and to obtain regulatory certainty before closing, a foreign investor may choose to file a notification with the ISED at least 45 days before closing.

NATIONAL SECURITY

An investment that may be injurious to national security may be reviewed by the Canadian government regardless of enterprise value or book value of the Canadian business, and regardless of whether it represents an acquisition of control under the Act. This is the instrument that will be used under the new policy to screen certain investments in public health, critical goods and services and by state-owned investors. However, for context, Canada has exercised restraint in blocking cases on the basis of national security. In 2018-19, only two cases resulted in a final order requiring an investor to divest itself of control of the business at issue.

RELEVANCE OF THE COVID-19 ENVIRONMENT

For those relatively few transactions that exceed the high review thresholds under the Canadian foreign investment legislation, the authorities are likely to be receptive to compelling reasons for the transaction in the current economic climate as a result of COVID-19.

For further information, please see our summary of foreign investment.


[2] An investor that is controlled by nationals of a country with which Canada has a specified free trade agreement generally may acquire a Canadian business without approval where the “enterprise value” of the target business does not exceed C$1.613 billion. For example, investors from Australia, Japan, Mexico, New Zealand, Singapore and Vietnam are eligible for this threshold under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); investors from Mexico and the United
States are eligible under the North American Free Trade Agreement (NAFTA); and investors from the European Union are eligible under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The review threshold drops to C$1.075 billion for an investor controlled by nationals of a country that is a member of the World Trade Organization, such as China. An acquisition by a state-owned investor (from any country) does not require approval where the book value (rather than the enterprise value) of the Canadian business does not exceed C$428 million. As a result of these high thresholds, very few investments in Canada require pre-closing approval. In 2018-19, out of a total of 962 filed investments, only nine required approval.
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