THE FOREIGN INVESTMENT REGULATION REVIEW

Tenth Edition

Editors
Calvin Goldman, KC and Alex Potter

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

This tenth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. This year, the publication begins with summaries of the more detailed country chapters that follow. These chapter summaries should make the text even more user-friendly.

This book is being published at a time of unprecedented geopolitical tensions. The combined effects of the invasion of Ukraine by Russia over the last number of months, together with the continuing escalation of issues between China and the United States in relation to Taiwan and other international matters, have created an environment in which foreign investment reviews across many jurisdictions will be heightened in both substantive terms and related timelines, particularly in relation to possible issues of national security and national interests. In our view, the tenth edition is exceptionally timely in this respect.

Foreign investment has been attracting increased attention for a number of years and this trend has accelerated throughout the past two years. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, now in its post-implementation stages, as well as increased tensions over trade and related policies, as we have seen between the United States and China and now between much of the western world and Russia.

In addition, unprecedented challenges have arisen during the past year or so in relation to supply chains of many essential products, from food supplies to computer chips to building materials, among many other products. These exceptional developments have served only to increase the focus of regulatory authorities on their respective national interests, which may enhance product supplies across many markets and economic sectors. In this regard, Russia's invasion of Ukraine has sent shock waves through the global economy and led to major changes in trade and investment. The significance of Russia's recent actions were exemplified by the exceptional decision of the Steering Group of the International Competition Network (ICN) to disinvite the Competition Authority of Russia from participating in the ICN's Annual Conference in Berlin in May 2022, in which more than 80 national delegations participated, as part of the broader exceptional decision of the Steering Group to suspend Russia's continuing participation in the ICN. This was an unprecedented step, especially for an international organisation that is generally considered to be apolitical and focused on promoting international cooperation and convergence in relation to competition law

principles, which include the regulatory review of proposed mergers that may overlap with concurrent foreign investment reviews, particularly in high-profile trans-border cases. That exceptional ICN decision is also particularly significant having regard to the fact that Russia hosted the ICN Annual Conference in Moscow in 2007.

These increased tensions overall have continued to heighten concerns about national interest considerations (such as the export of jobs, essential supply chains and industrial policies) and about cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations on the one hand, and national- and public-interest considerations on the other hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the ministerial decision-making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which had already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan for approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, although the Canadian Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHP Billiton decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corporation had a long-standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in regulatory decision-making occurred in November 2013 in relation to the proposed acquisition of Grain Corporation of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review. However, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Concerns voiced by farmers and distribution networks were apparently factors in that decision. Again, some commentators suggested that real-world political considerations had some bearing on that negative decision.

In May 2022, the UK government decided to subject the acquisition by Nexperia, a Dutch subsidiary of Chinese tech company Wingtech, of Newport Wafer Fab, a UK semiconductor manufacturer, to a detailed retrospective review under the UK National Security and Investment Act 2021, some 10 months after the deal closed. Press reports have suggested that politicians in the United States put pressure on the UK government to act.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted by foreign investment reviews that are increasingly broader in scope.

When the pandemic took hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have both been accelerating and increasing in scope. Concerns

about the benefits of globalisation have been on the rise in an environment where nations have found themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises (SOEs) that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical of the pandemic response, such as public health and supply chains. As the effects of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing-out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds that trigger foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, which saw the introduction of a mandatory notification regime and expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS's jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

The scope of national security and national interests is clearly continuing to grow. For example, in the United States in February 2022, a revisited and broadened list of technologies was announced as critical or potentially critical to the United States in national security and economic terms. Concurrently in Canada, the minister responsible for the Investment Canada Act was called before a parliamentary committee early in 2022 to explain the reasoning that led to a China-based company being permitted to acquire a Canada-based company that is developing its only mine for lithium, which is located in Argentina, having regard to lithium generally being considered a critical mineral under classifications that apply both in Canada and the United States.

In turn, the greater focus on foreign investment has continued in Europe, where the European Union's foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the Commission of foreign investments that they are screening under their national regimes. After nearly two years of implementation, the regular exchanges of information between the European Commission and the EU Member State authorities driven by the regulation appear to be increasing levels of scrutiny, with several examples of national authorities approaching parties to a transaction to initiate enquiries where notifications have not been made proactively. The momentum to introduce foreign investment review has been given added impetus by the Russian invasion of Ukraine, with the European Commission urging all EU Member States to implement foreign investment screening mechanisms as

a matter of urgency in light of the risks flowing from investment from Russia and Belarus. At the time of writing, 18 Member States have foreign investment screening regimes on their books, and a further seven countries are in the process of introducing them.

In the United Kingdom, the National Security and Investment Act 2021 is now in force and marks a step change in the UK government's power to screen, impose conditions on and block deals that pose unacceptable risks. The new Act requires mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the United Kingdom's (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to 'call in' by the government should there be concerns. Early experience testifies to the effects of the new Act: 222 notifications in the first three months of operation, one transaction prohibited (the first formal prohibition in the United Kingdom on national security grounds) and several cases subject to detailed reviews; this coupled with several national security interventions – including far-reaching remedies – under the outgoing UK public interest regime in its last months.

The United States and Europe are not alone in elevating concerns regarding foreign investment during the pandemic and in response to increasing concerns about China's global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs, as well as in Canadian businesses related to public health or the supply of critical goods and services, were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. The most recent annual report on the application of the Investment Canada Act (released by the Canadian government in early February 2022) reflects the Canadian government's increased application of national security screening for more proposed foreign investments on a proportionate basis than in past years. In this respect, while as a result of the pandemic there were fewer proposed foreign investments, the 2022 report indicates that there were considerably more national security screenings in the immediately prior year than in the previous year; moreover, there were almost as many investments that were subjected to increased national security screenings in the immediately prior year as compared with the number of proposed investments that were reviewed during the combined total of the previous four years. The highest percentage of these increased screenings pertained to China-based acquirers relative to other nations. This reflects an example of the increased scrutiny that Canada, one of the members of the Five Eyes alliance, is applying to foreign investment reviews in the context of the current geopolitical environment.

In Australia, the Foreign Investment Reform Act came into effect on 1 January 2021, ushering in sweeping changes to the country's foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of services to defence or intelligence forces, the storage of or access to classified security information and the storage, collection or maintenance of personal information about defence and intelligence personnel. The symmetry

between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes alliance (with the United States, the United Kingdom and New Zealand). The Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a 'last resort' power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to a greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there may be a sizeable number of distressed industries and failing firms in sectors that have been most significantly affected by the pandemic. The number of cases of failing firms is likely to increase the longer the pandemic continues to substantially affect the timeline for economic recovery from the effects of the pandemic.

In this exceptional environment, there may be cases of failing firms in which the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the target cannot be sustained during that period. That may lead to an anticompetitive acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant effect on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews (including, in some cases, as they may relate to or interface with normative competition reviews), the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019.

In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In addition, the ABA ALS Task Force on the Future of Competition Law Standards delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

In the context of these significant evolving developments, including the heightened geopolitical tensions and the unprecedented challenges that have arisen in relation to supply chains following the pandemic, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. The book provides relevant information about, and insights into, the framework of laws and regulations governing foreign investment in each of the featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction.

This publication examines the emerging issues described above and the recent trends that have continued to evolve, together with their implications. Parties would be well advised to ensure that they thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism, as well as serious geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

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Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients, or the editors or publisher.

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Chapter 4

CANADA

Huy Do, Andrew House and Robin Spillette[1]

I OVERVIEW

The Investment Canada Act (the Act), which was enacted in 1985, governs foreign investment in Canadian businesses.[2] Generally, investments by non-Canadians in Canadian businesses, or the creation of new Canadian businesses by a non-Canadian, require notification or approval under the Act, if the investments meet certain structural or monetary thresholds. The foreign investment review and approval regime under the Act is aimed at balancing the benefit from foreign direct investments, which support the growth and development of Canadian businesses, with the need to ensure that such investments are in fact of benefit to Canada and do not bring with them national security threats. The words 'national security' are not defined in Canadian law – a situation that tends to grant federal authorities wide latitude in determining what constitutes a threat to the essential security interests of the country, and one in which it can be difficult for investors and target businesses alike to determine how the government may react to or manage a given proposed investment.

While net benefit reviews remain fairly infrequent under the Act, and generally receive approval (albeit with some commitments being required on the part of the foreign investor), there has been an increase in scrutiny with respect to national security in recent years. In particular, in the wake of the covid-19 pandemic, there has been increased scrutiny with respect to investments in areas of critical infrastructure that are important to the health and safety of Canadians, and in response to the Ukraine crisis, there has been increased caution with respect to investments by Russian investors. Because of increased pressure placed on the Canadian economy by the covid-19 pandemic, and the following economic slowdown, there has also been increased caution to ensure that foreign investors are not taking advantage of distressed Canadian businesses that are facing sudden declines in valuations. Although Canada's understanding of its national security has always admitted considerations related to critical infrastructure, this concept has grown well beyond the traditional emphasis on combating espionage and countering violent extremism to consider the basics of life in Canada: what are the people, processes and institutions that keep Canadians alive, warm, sheltered and fed? Considerations of this kind have not entered into the calculus of public administration for at least two generations but are now at the forefront of what Canadian policymakers must consider when crafting and administering security policy.

1 Huy Do and Andrew House are partners and Robin Spillette is an associate at Fasken Martineau DuMoulin LLP.

2 Investment Canada Act (R.S.C., 1985, c. 28 (1st Supp.)) [ICA].

II YEAR IN REVIEW

There has been, and continues to be, a notable focus on investments that are potentially injurious to national security. In April 2020, the Minister of Innovation, Science and Industry (the Industry Minister) published the 'Policy Statement on Foreign Investment Review and COVID-19', which highlighted the enhanced scrutiny to be applied to certain foreign investments under the Act, including 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.[3] This enhanced scrutiny will also apply to foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments. The policy notes that this increased scrutiny will continue until the economy recovers from the effects of the covid-19 pandemic. Additionally, in March 2021, an updated version of the national security guidelines was released, which, among other things, identified areas that could present national security concerns in foreign investment (the NS Guidelines).[4]

A second policy statement was released in March 2022, in the wake of the Ukraine crisis. 'The Policy Statement on Foreign Investment Review and the Ukraine Crisis' notes that: (1) with respect to 'net benefit' reviews under the Act (as described further below), acquisitions of control of a Canadian business by direct or indirect Russian investors will be found to be of net benefit to Canada on an exceptional basis only; and (2) with respect to national security reviews under the Act (as described further below), if it is determined that an investment, regardless of its value, has ties, direct or indirect, to an individual or entity associated with, controlled by or subject to influence by the Russian state, this will support a finding by the Industry Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.[5]

Together, the NS Guidelines and these two recent policy statements underscore the increased attention currently being paid to foreign investment in Canada, particularly with respect to national security matters. This is reflected in the number of national security reviews completed in the past year. In the 2020/2021 fiscal year, there were 23 notices of potential national security reviews and 12 orders for a national security review. By comparison, the average number of notices of potential national security reviews over the past five fiscal years

3 Innovation, Science and Economic Development Canada, Policy Statement on Foreign Investment Review and COVID-19 (18 April 2020), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html.

4 Innovation, Science and Economic Development Canada, Guidelines on the National Security Review of Investments (24 March 2021), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html.

5 Innovation, Science and Economic Development Canada, Policy Statement on Foreign Investment Review and the Ukraine Crisis (8 March 2022), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81228.html.

(from 2016/2017 until 2020/2021) was 10 and the average number of orders for a national security was 6.4.[6] From 2009 (when the national security provisions came into effect) and 2016, only a total of eight national security reviews were ordered.[7]

This increased scrutiny of foreign investments with respect to national security issues has the potential to increase uncertainty for foreign investors, particularly with respect to investments that do not trigger filing requirements under the Act. As discussed further below, when an investor files a notification or application under the Act in respect of an investment that is subject to the Act, the Industry Minister has only 45 days from the certified date of filing to send notice that a national security review may be commenced under the Act.[8] However, prior to August 2022, if an investment did not trigger filing obligations under the Act, the 45-day review period commenced only when the Industry Minister first became aware of the investment, which could be any time, and, as a practical matter, could be long after implementation.[9] In these cases, the absence of any precise date on which the 45-day review period commenced created significant uncertainty for non-Canadian investors in this situation. However, in August of 2022, amendments to the National Security Review of Investments Regulations came into force, creating a voluntary filing regime.[10] Under this new regime, where an investment is not subject to mandatory filing required under the Act, the Industry Minister has up to five years after the date of implementation of the investment to decide whether to take any action if no voluntary filing has been made but has only 45 days from the date of the filing to initiate a national security review if a voluntary filing is made.[11]

III FOREIGN INVESTMENT REGIME

i Policy

As described further below, an investment by a non-Canadian may be subject to a net benefit review or a national security review under the Act.

Under a net benefit review, the applicable minister must determine whether a foreign investment is of net benefit to Canada by considering, among other things, the following factors:

a the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilisation of parts, components and services produced in Canada, and on exports from Canada;

6 Innovation, Science and Economic Development Canada, Investment Canada Act 2020-2021 Annual Report (accessed 26 July 2022), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html [2020/21 Annual Report].

7 Innovation, Science and Economic Development Canada, Investment Canada Act 2015-2016 Annual Report (accessed 26 July 2022), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81199.html#p4.

8 ICA, s. 25.2(1); National Security Review of Investments Regulations, SOR/2009-271 [NSR Regulations], s. 2.

9 National Security Review of Investments Regulations, SOR/2009-271 from 2015-03-13 to 2022-06-27.

10 Canada Gazette, Part II, Volume 156, Number 13, Regulations Amending the National Security Review of Investments Regulations [NSR Amending Regulation].

11 NSR Amending Regulation, s. 1.

b the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms, or would form, a part;

c the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

d the effect of the investment on competition within any industry or industries in Canada;

e the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

f the contribution of the investment to Canada's ability to compete in world markets.[12]

With respect to a national security review, the federal Governor in Council (the GIC and, for all intents and purposes, the federal Cabinet (the Cabinet) or a component thereof) will consider whether the investment would be injurious to national security.[13] While national security is not defined in the Act, the NS Guidelines do note that the nature of the assets (including intangible assets), business activities and the parties involved in the transaction, including the ultimate controller and potential for third party influence, are considered as part of a national security review. The NS Guidelines also include a list of factors that are considered, including:

a the potential effects of the investment on Canada's defence capabilities and interests;

b the potential effects of the investment on the transfer of sensitive technology or know-how outside Canada, on the supply of critical goods and services to Canadians, on critical minerals and critical mineral supply chains, or on the security of Canada's critical infrastructure;

c involvement in the research, manufacture or sale of certain goods or technology identified in the Defence Production Act;

d the potential of the investment to enable foreign surveillance or espionage, or to hinder current or future Canadian intelligence or law enforcement operations;

e the potential impact of the investment on Canada's international interests;

f the potential of the investment to involve or facilitate the activities of illicit actors; and

g the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation.

Canada has been at pains both to enhance the robustness of its national security approach to respond to an evolving and multi-vectored threat environment, and to ensure its investment control regime does not diminish the attractiveness of Canada as a destination for fluid international capital. This fine balance has been difficult to strike during the pandemic, and the invasion of Ukraine has served to make the situation even more volatile. However, this latter factor has also appeared to galvanise the resolve of western allies to counter threats to western liberal democracy more cooperatively – an outcome that was most likely not envisioned by proponents of the war in Ukraine.

12 ICA, s. 20.

13 ICA, s. 25.2(1).

ii Laws and regulations

The Act is the statute of general application in Canada with respect to foreign investment (sector-specific federal and provincial statutes are discussed below). Two sets of regulations exist under the Act: the Regulations Respecting Investment in Canada (which prescribe the information required to be submitted when an investment is subject to notification or approval under the Act) and the National Security Review of Investments Regulations (which prescribe, among other things, the timelines for national security reviews under the Act).

The Act is administered by the Investment Review Division (IRD) of the federal Department of Innovation, Science and Economic Development, with the exception of investments in cultural businesses, which are administered by the Cultural Sector Investment Review (CSIR) unit within the federal Department of Canadian Heritage. Both the IRD and the CSIR may be involved if an investment involves both non-cultural and cultural businesses. The ultimate decision to approve or disallow an investment is made by the Industry Minister, or the Minister of Canadian Heritage and Official Language (the Cultural Minister) in the case of investments involving cultural businesses. Where an investment involves both non-cultural and cultural businesses, both ministers may be involved. Examples of cultural businesses include those in the areas of publishing, film, video and music.

The national security provisions of the Act are administered by the IRD, with the GIC (i.e., the Cabinet) as the ultimate decision-maker.

iii Scope

The Act applies to (1) the establishment of a new Canadian business by a non-Canadian (as defined in the Act); (2) the acquisition of control of an existing Canadian business by a non-Canadian; and (3) the acquisition of, in whole or in part, or the establishment of an entity carrying on all or any part of its operations in Canada, if the entity has (1) a place of operations in Canada, (2) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations, or (3) assets in Canada used in carrying on the entity's operations.[14]

Under the Act, non-Canadian investor will generally only be required to submit a post closing notification;[15] however, if certain monetary thresholds are met, the approval of the investment based on a 'net benefit to Canada' test is required.[16] Additionally, regardless of the value of the transaction, all activities by non-Canadians that are caught by the Act may be subject to a review under the national security provisions of the Act.[17]

14 ICA, s. 11, 14, 25.1.

15 ICA, s. 11.

16 ICA, s. 14.

17 ICA, s. 251.

Establishment of new Canadian business

In most cases, the establishment of a new Canadian business by a non-Canadian is merely notifiable and not subject to approval. However, the establishment of a new Canadian business in the cultural sector may require approval if the GIC determines the review of the investment to be in the public interest.[18] Additionally, a national security review may be initiated in respect of the establishment of a new Canadian business.[19]

Acquisition of control of Canadian business

Direct or indirect acquisitions of control of Canadian businesses (whether or not already foreign controlled) by non-Canadians are at a minimum subject to notification under the Act (except for a limited number of exceptions).[20] Where direct acquisitions of control, and certain limited indirect acquisitions of control, by a non-Canadian exceed certain monetary thresholds, the investment will require the approval of the Industry Minister, the Cultural Minister or both, based on a net benefit to Canada test.[21]

National security review

Where the Industry Minister has reasonable grounds to believe that a proposed or implemented investment by a non-Canadian could be injurious to national security, it may be reviewed by the GIC.

iv Voluntary screening

An investor may consider a voluntary notification where they are concerned regarding the potential for a national security review under the Act and are seeking certainty in this regard.

As noted above, the Act authorises national security reviews of the following types of investments, whether implemented or proposed, by non-Canadians into Canada where the Industry Minister has reasonable grounds to believe that such an investment could be injurious to Canada's national security:

a the establishment of a new Canadian business or an entity carrying on operations in Canada;

b the acquisition of control of a Canadian business, including a part of a business capable of being carried on as a separate business, of any dollar value; and

c the acquisition of all or part of an entity carrying on operations in Canada.[22]

With respect to an investment that requires either a notification or an application for review under the Act (i.e., those falling into the first two categories above), the Industry Minister has 45 days after the date on which the filing was certified to (1) issue a notice that a national security review may be ordered; or (2) order a formal review.[23]

Investments that fall into the third category, such as an acquisition of part of a Canadian business that does not constitute an acquisition of control of that Canadian business under

18 ICA, s. 15.
19 ICA, s. 25.
20 ICA, s. 11.
21 ICA, s. 14.
22 ICA, s. 25.1.
23 NSR Regulations, s. 2.

the Act, do not require any filing. As such, the Industry Minister has five years after the date of implementation of the investment to decide whether to commence a national security review.[24] This creates significant uncertainty for investors. As such, where an investor is concerned regarding a potential national security review, they may choose to file a voluntary notification. The Industry Minister would then have 45 days from the date on which the voluntary filing is certified as complete to initiate a national security review.[25]

In accordance with the guidance provided by the government, investors are strongly encouraged, particularly where they are state-owned or subject to state influence, or in cases where the factors listed in the NS Guidelines may be present, to file a voluntary notification at least 45 days prior to the planned implementation of the investment.[26]

v Procedures

Notifications

If only a notification is required under the Act, the investor may file the notification prior to the implementation of the investment or up to 30 days post-closing.[27] Where the investment involves a cultural business or where national security issues could arise, it may be beneficial to file on an earlier basis, to ensure any issues are resolved prior to closing.

Net benefit review

Where a transaction is subject to net benefit review under the Act, it cannot close until approval has been received or is deemed to have been received, subject to limited exceptions.[28] Notably, where a delay in implementing the investment would result in 'undue hardship' to the non-Canadian or would jeopardise the operations of the Canadian business that is the subject of the investment, a transaction may be implemented prior to receiving approval.[29]

The applicable minister has 45 days after the filing of an application for review to decide whether to approve the investment on the basis that it is likely to be of net benefit to Canada.[30] That being said, the minister may extend the initial 45-day review period by 30 days or such longer period as the investor and the minister may agree.[31] The investment is deemed to be approved if no notice is sent by the minister within the initial 45-day period, or within the further 30-day or longer period if the initial period is extended.[32]

Where the minister declines to approve a transaction because it will not be of net benefit to Canada, the investor has an additional 30 days (or such longer period as the investor and

24 NSR Amending Regulation, s. 1.

25 NSR Amending Regulation, s. 1; this mechanism for voluntary notifications came into force on 2 August 2022. Prior to this, there was no mechanism for voluntary filings under the Act.

26 Innovation, Science and Economic Development Canada, An Overview of the Investment Canada Act (FAQs) (accessed 11 August 2022), available online at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html.

27 ICA, s. 12.

28 ICA, s. 16(1).

29 ICA, s. 16(2).

30 ICA, s. 22.

31 ICA, s. 22.

32 ICA, s. 21(9), 22(4).

the minister agree) to make further representations to the minister, including the submission of undertakings.[33] The minister must then inform the investor of their decision at the end of this 30-day (or longer) period.[34]

National security review

As described above under Section III.iv, the Industry Minister has 45 days from the filing of a notification, or five years from the implementation of an investment where no filing is required and no voluntary filing is made, to (1) issue a notice that a national security review may be ordered (which triggers an additional period for review of 45 days to consider whether a formal review is needed); or (2) order a formal review (which triggers an additional period for review of 90 days to consider what measures to protect national security will be taken, if any).[35]

The national security review process can take up to 230 days from the implementation of the transaction (where a notification or application is filed), or such longer period as the investor and the Industry Minister agree.[36] Notably, the deadlines for the Industry Minister to make a net benefit determination are postponed if a national security review is initiated.[37]

vi Prohibition and mitigation

For the 2020/2021 fiscal year,[38] there were 826 certified applications for review and notifications.[39] Of these, there were three applications for review submitted (all of which were approved as being of likely net benefit to Canada). The remaining 823 investment filings were notifications, including 247 filed in respect of new businesses established in Canada by non-Canadians.[40]

All 826 investments for which filings were made, as well as a number of additional, non-notifiable investments, were reviewed under the national security provisions of the Act. First notices of a potential national security review were sent with respect to 23 investments. Ten of these investments resulted in an order for a national security review being made and one additional investment proceeded directly to an order for a national security review without a first notice. Of these 11 investments, four of the reviews resulted in no further action under the Act, four investments were withdrawn, one was blocked and two required that the non-Canadian divest or wind up the acquired Canadian business.[41]

33 ICA, s. 23(2).
34 ICA, s. 23(3).
35 NSR Amending Regulation, s. 1, 2.
36 NSR Regulations, s. 2, 3, 4, 5, 5.1, 6.
37 ICA, s. 21.
38 1 April 2020 to 31 March 2021.
39 ICA Annual Report.
40 ICA Annual Report.
41 ICA Annual Report.

IV SECTOR-SPECIFIC REQUIREMENTS

Prohibited and restricted sectors

Under the Act, there are no sectors in which foreign investment is strictly prohibited or specifically restricted (i.e., subject to a value cap, etc.). However, foreign investments in certain areas are less likely to be approved (or approved without conditions) by either the applicable minister, in respect of a net benefit review, or the GIC, in respect of a national security review.

For example, foreign investments in Canadian businesses that meet the definition of a cultural business, are unlikely to be approved without the foreign investor making certain undertakings (i.e., commitments to the government) regarding the operation of the Canadian business in the future.

Aside from the Act, there are additional sector-specific and provincial laws that apply to foreign investment and that may limit it in certain circumstances.

For example, some provinces have implemented measures to protect sensitive sectors, including imposing special taxes on the acquisition of residential properties and restricting the ownership of certain lands by foreign investors.[42] In addition, other federal legislation sets specific limits on foreign ownership in certain industry sectors, including, for example, broadcasting, telecommunications and transportation.[43]

V TYPICAL TRANSACTIONAL STRUCTURES

i Establishing a new Canadian business

Foreign companies considering establishing a new Canadian business have various options available to them. The most optimal structure for a new Canadian business will depend on, among other things, the tax structure and liability structure that is most beneficial for the foreign investor. Available business structures include, among other things: corporations, sole proprietorships, partnerships, joint ventures, franchises and cooperatives.

Notably, while a Canadian partner is not required, a joint venture between a Canadian company and a foreign investor can be an attractive option, as it combines the strengths of the participating firms while reducing the risk of taking on new markets for a foreign investor. Joint ventures take several forms. They can be set up through a separate corporation or a general or limited partnership, or the parties in a joint venture can jointly own business assets.

When considering setting up a Canadian corporation, foreign investors should give consideration to the jurisdiction of incorporation, as the federal and provincial corporate law statutes have different requirements, including different director residency requirements. For example, federally incorporated corporations have a 25 per cent Canadian residency requirement for directors; however, there is no similar residency requirement for directors of a corporation incorporated in British Columbia.[44]

Where foreign investors do not want to set up a Canadian subsidiary, they can consider operating in Canada through a branch operation that is an extension of the foreign parent and

42 For example, see Property Transfer Tax Act (R.S.B.C. 1996, c. 378), s. 2.02; Lands Protection Act (R.S.P.E.I. 1988, c. L-5), s. 4.

43 For example, see Broadcasting Act (S.C. 1991, c. 11), Telecommunications Act (S.C. 1993, c. 38), and Canada Transportation Act (S.C. 1996, c. 10).

44 Canadian Business Corporations Act (R.S.C. 1985, c. C-44) s. 105(3)).

that requires licensing or registering in any province in which it operates. Foreign investors can also consider, in certain provinces, setting up an unlimited liability company that can act as a 'pass through' to the foreign parent for tax purposes.

ii Acquisition of an existing Canadian business

When considering the acquisition of an existing Canadian business, foreign investors must consider whether the target is publicly listed or privately held, and whether the acquisition will be implemented by way of an asset purchase or a share purchase. There are several factors that must be considered in this regard.

Where a Canadian business is publicly listed, a share acquisition would require compliance with, among other things, Canadian securities laws and the applicable securities regulators in each province. Depending on the relationship between the Canadian business and the foreign investor, a share purchase may be hostile, or friendly, and may be carried out by way of a takeover bid, amalgamation or plan of arrangement. Key preliminary issues for a foreign investor to consider in a share purchase of a public company include:

a change-of-control consequences for any material contracts;
b regulatory requirements;
c outstanding options or warrants;
d existing and potential shareholder rights plans;
e existence of any bonds, debentures, convertible securities or rights to acquire securities;
f contingent liabilities;
g coat-tail provisions for non-voting or low-vote shares; and
h location of the target's shareholders.

Notably in Canada, takeover bids cannot be conditional on the purchaser obtaining the necessary financing to complete the bid, as securities laws stipulate that the purchaser must make 'adequate arrangements before the bid to ensure that the required funds are available'.[45] Other forms of acquisitions do not have a similar 'fully funded' rule and can include a financing condition.

When completing a share purchase of a private company, foreign investors should keep in mind, among other things, that where a Canadian company is private, it has no obligation to make public disclosure and may often lack the resources to maintain full and accurate internal records and document management systems. As such, a large risk when acquiring the shares of a private company is the reliability of information. Due diligence should be focused on ensuring the accuracy of the information provided by the private target, and a foreign investor will generally want the Canadian business to represent and warrant that its information is accurate and complete.

A foreign investor may prefer to proceed by way of an asset transaction if the existing liabilities of a target are a concern. When acquiring assets, certain consents may be required, including the consent of the target's creditors, shareholders and certain third parties. Foreign investors should also be cognisant of certain legislation that may be triggered by an asset purchase but not a share purchase, such as employment legislation. As contracts of

45 National Instrument 62-104 – Take-Over Bids and Issuer Bids, (2016), s. 2.27.

employment are not automatically assigned to a purchaser in an asset transaction, application of the various provincial labour relations legislation and employment standards acts must be considered.

VI OTHER STRATEGIC CONSIDERATIONS

There is limited interaction between the merger control regime under the Competition Act[46] and the foreign investment regime. Among other things, the effect of the investment on competition within any industry or industries in Canada is one of the factors explicitly considered under the net benefit assessment under the Act.[47] Where a merger is notifiable under the Competition Act, it is common practice to note this in the application for review submitted under the Act. Any factors that make the investment pro-competitive should also be described in an application for review. Where approval under the Competition Act is provided by the Competition Bureau, this factor would weigh in favour of a finding of net benefit. However, where significant competition impacts are identified by the Competition Bureau, this could be a factor detracting from a finding of net benefit.

Because the Act may culminate in a decision by the GIC (which for present purposes has been described as being synonymous with the Cabinet) and, in the Westminster parliamentary tradition, the Cabinet is comprised of individuals who owe their presence in Cabinet to having first been elected, political considerations inevitably arise in relation to media pressure, constituent backlash, jobs created or lost, and communities supported or seemingly abandoned. It is for this reason that investors must consider the political dimension of a transaction subject to notice or review, taking careful note of the pros and cons of simply permitting a deal to stand on its own merits with officials. In some cases, it will be crucial to prevent the formation of negative narratives before they gain traction in the system that ultimately briefs ministers. In others, it will be necessary to marshal stakeholder support for an investment and to direct that support towards the political class. Built into the Act is a mandatory mechanism for consultation with provinces and territories that may be impacted by a contemplated transaction. As such, stakeholder work in Canada should extend to the sub-national level. Canada has a federal lobbyist registration regime (which is mirrored to a greater or lesser extent in most provincial jurisdictions) known for its rigour. This regime must be closely adhered to with respect to decisions to communicate with political actors outside the strict mechanism provided under the Act.

VII OUTLOOK

Given the current global economic uncertainty, and the recent economic slowdown in Canada, it is likely that Canadian companies will continue to (and, perhaps, increasingly) look to global capital to help support their growth. That being said, it is expected that there will continue to be increased scrutiny of foreign investment to protect struggling Canadian businesses from acquisition by foreign investors at a depressed value. Moreover, as noted above, national security concerns, in particular with respect to Russian affiliated investors and critical infrastructure, are expected to mean increased scrutiny of foreign investment (and potentially delayed review timelines) for the foreseeable future.

46 Competition Act (R.S.C., 1985, c. C-34).

47 ICA, s. 20.

Canada has established an Economic Security Task Force.[48] Whether the mandate of this entity is to study and counter threats to Canada's economic security or monitor and deter economic-based threats to our national security is unclear – perhaps these are deeply interconnected sides of the same coin. The results of a federal consultation may further impact how national security intersects with foreign investment and the conduct of national security reviews under the Act. The government is undoubtedly trying to separate passing panics (for instance, the run on toilet paper that occurred early in the pandemic) with more enduring or systemic weaknesses in Canada's critical infrastructure (for instance, Canada's recent tabling of legislation to designate elements of Canada's federally regulated industries as 'vital systems and services').[49]

What remains clear, however, is that if everything is somehow a matter of national security, then ultimately nothing is. Significant definitional and ring-fencing work must be done by government to decide where it will draw its red lines on foreign investment. Not only will the drawing of these lines put on notice all those who wish to operate beyond them but it should also signal to those within the lines that their intended investment will very likely not draw the kind of scrutiny that would cause a deal of this kind to be blocked (or at least delayed) by Canada. This kind of clarity would be beneficial to all.

48 Government of Canada, Government of Canada expands work to address economic-based threats to national security (27 May 2021), available online at: https://www.canada.ca/en/public-safety-canada/news/2021/05/government-of-canada-expands-work-to-address-economic-based-threats-to-national-security.html.

49 Bill C-26, An Act respecting cyber security, amending the Telecommunications Act and making consequential amendments to other Acts, available online at: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-26/first-reading.

Appendix 1

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