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Cassels on Competition: March 2024

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In this edition: Merger notification and foreign investment review thresholds for 2024, Commissioner of Competition advocates further amendments to the merger regime under the *Competition Act*, new *Investment Canada Act* policy statements on foreign investments in the interactive digital media sector, and more…

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News You Need to Know

- The merger notification thresholds under the *Competition Act* (CA) are unchanged for 2024. The transaction size threshold continues to be **C$93 million**, while the party size threshold remains **C$400 million**.
- The thresholds for pre-closing "net benefit" reviews under the *Investment Canada Act* (ICA) of direct acquisitions of control of Canadian businesses (that are not cultural businesses) have increased for 2024.
    - **C$1.989 billion** (from C$1.931 billion) in enterprise value of the Canadian business for trade agreement investors, which includes investors from the US, EU, and Japan, among others;
    - **C$1.326 billion** (from C$1.287 billion) in enterprise value of the Canadian business for investors from countries that are members of the World Trade Organization (WTO); and
    - **C$528 million** (from C$512 million) in asset value of the Canadian business for state-owned or influenced enterprises from WTO countries.
- The Commissioner of Competition has submitted a letter the House of Commons and Senate Standing Committees on Finance, which are currently studying the amendments to the CA proposed in Bill C-59 (*Fall Economic Statement Implementation Act 2023*), in which he urges the adoption of additional amendments that would purportedly aimed at "strengthening" the draft legislation. Among other things, the Commissioner has proposed the adoption of rebuttable, structural presumptions aligned with the thresholds set out in the (highly controversial) 2023 US Merger Guidelines (the US Guidelines). The US Guidelines use a measure of concentration called the Herfindahl-Hirschman Index (HHI) to measure market concentration and changes in concentration resulting from a proposed transaction. Under the US Guidelines, and as proposed in the Commissioner's letter, a transaction with a post-merger HHI above 1,800 and a change in HHI of 100 would be presumptively

unlawful as would a transaction with a post-merger market share above 30 percent accompanied by a change in HHI greater than 100. Applying those thresholds, it appears that a “7-to-6” merger in a market where competitors have equal market shares will be presumptively anticompetitive. So too would a combination of two companies with shares of 28% and 2%. (HHI is calculated by squaring the market share of each firm competing in the relevant market and then summing the resulting numbers.)

- The Commissioner’s letter also advocates for an amendment to the remedial standard in merger challenges before the Competition Tribunal. Currently, when the Tribunal determines that a merger has or is likely to substantially lessen or prevent competition, the remedy imposed is required to be the “least intrusive” remedy that “restore[s] competition to the point at which it can no longer be said to be substantially less than it was before the merger.” The Commissioner’s letter argues this standard should be amended so that any remedies granted by the Tribunal would be required to restore competition to the level that would have existed without the merger.

Foreign Investment Review Update

- The Canadian government has issued new policy statements under the ICA regarding foreign investments in the interactive digital media (IDM) sector.
    - For the purpose of the new policies, “IDM” includes, but is not limited to, digital content and/or an environment in which users can actively participate or that facilitates collaborative participation among multiple users for the purposes of entertainment, information or education, and commonly delivered via the Internet, mobile networks, gaming consoles or media storage devices. Examples of activities that fall under the category of interactive digital media include, but are not limited to, video gaming (including PC gaming, console gaming, cloud gaming, mobile gaming) and technology platforms that can be used for entertaining, education, training, and e-commerce (including some mobile apps, virtual and/or extended reality devices).
    - “[R]ecognizing that hostile state-sponsored or influenced actors may seek to leverage foreign investments in the [IDM] sector to propagate disinformation or manipulate information in a manner that is injurious to Canada's national security,” the Policy Statement on Foreign Investment Review in the IDM Sector prescribes that investments in the IDM sector by entities owned or influenced by foreign states, particularly states that engage in activities that may pose a risk to Canada’s national security, will be subject to enhanced national security scrutiny.
- The Policy Statement on the benefit reviews of Foreign Investments in Cultural Businesses in the IDM Sector under the ICA prescribes that foreign investments in cultural businesses in Canada’s IDM sector that own or create their own IP and which are subject to “net benefit” approval under the

ICA, will likely be subject to stringent undertakings. Additionally, for foreign investments in the cultural IDM sector which include the creation and ownership of IP, the continued expression of Canadian voices and stories reflective of Canadian values will be of particular concern and may require additional undertakings, including commitments to ensure the creative independence of the Canadian business.

Back to Basics

- Each and every time a “non-Canadian” establishes a new Canadian business, a notification is required to be filed under the ICA within 30 days of implementation of that investment. For the purposes of the ICA, a "non-Canadian" is anyone who is not a Canadian citizen or a permanent resident and includes any entity that is not controlled or beneficially owned by Canadians. A “business” is defined in Section 3 of the ICA as “any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit.” The Minister responsible for the ICA has issued an interpretation note clarifying when an undertaking or enterprise will and will not be considered to be a “business” within the meaning of the ICA; specifically:
    - **Capable of Generating Revenue:** An undertaking or enterprise must be capable of generating revenue and be carried on in anticipation of profit before it is considered to be a business. It must therefore be actively earning revenue or be in a present position to produce revenue earning goods or services. Market research, test marketing or feasibility studies are not by themselves considered activities capable, of generating revenue. If it is in a pre-operational state due to the lack of an essential asset, source of supply or manpower, it is not considered to be a business within the meaning of the ICA;
    - **Carried on in Anticipation of Profit:** If an undertaking or enterprise is carried on with a charitable or other non-profit objective, it will not be considered to be a business. Profit-making must be a purpose of the undertaking or enterprise; however, even if it is being carried on at a loss in the expectation of future profit, it is considered to be a business;
    - **Oil and Gas Properties:** A property upon which only exploration for oil or gas has been conducted is not considered to be a business. A property which contains oil or gas reserves is considered to be a business if production of oil or gas is actually occurring or if it has been determined that the property contains economically recoverable quantities of oil or gas and the drilling of a well to recover such oil or gas for the purpose of production has been commenced. A property containing recoverable reserves which is capable of production but which has been temporarily shut-in is considered to be a business; and
    - **Other Mineral Properties:** As with oil and gas, other mineral properties which are only at the exploration stage are not considered to be businesses. A producing mine, however, is considered to be a business as is a property on which development of a mine has been

commenced for the purpose of production. A mine which has been temporarily closed due to prevailing economic conditions and not due to depletion of ore reserves constitutes a business.

- ?While a non-Canadian investor is always at liberty to notify the Canadian government *before* its new business in Canada satisfies the definition of “business” in Section 3 of the ICA (and may be advised to do so as early as possible where the proposed investment may raise national security concerns), the obligation to notify is not formally triggered until a “business” within the meaning of Section 3 has, in fact, been established.
