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Liberalizing foreign investment review

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The federal Liberal government has taken a number of steps in 2017 to liberalize foreign investment review, making it easier for foreigners to acquire Canadian businesses.

Higher thresholds for "net benefit" review

The most noteworthy development has been the significant increase to the financial threshold used to determine whether private-sector investments in Canadian businesses will be subject to "net benefit" review under the *Investment Canada Act* (ICA). The threshold began the year at $600 million, was raised to $1 billion on June 22, and to $1.5 billion on September 21. These increases were a result of the implementation of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) for investors from the European Union (EU), the United States (U.S.) and select other nations that have free trade agreements with Canada that include a most-favoured nation provision. Commencing January 1, 2019, the threshold will be adjusted annually to reflect a GDP-based index.

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These threshold increases also apply to transactions where the purchaser is not a private sector WTO investor or from one of the countries listed above, but where the vendor is an investor that satisfies one of those criteria. However, the threshold changes do not apply to investments by state-owned enterprises, which are still subject to a book value of assets threshold ($379 million in 2017).

The higher thresholds can be expected to result in a significant decrease in the number of investments subject to review under the "net benefit" provisions of the ICA. Review under the ICA can be time consuming (75-plus days) and approval is typically granted subject to commitments from the non-Canadian investor regarding its operation of the business following closing. Accordingly, the higher threshold will provide investors in Canada with improved timing certainty regarding the completion of acquisitions in Canada, as well as increased flexibility in their operation of acquired businesses.

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1. National security review

While the government carefully assesses all investments in Canada from a national security perspective, including those that do not lead to a change of control, the national security review power continues to be used judiciously. The 2016-2017 Investment Canada Act Annual Report (Annual Report) includes statistics on the national security review process, providing insight into a process that has historically been opaque. The Annual Report indicates that national security reviews are rarely conducted. In FY 2017, only five of the 737 investments that were subject to notification under the ICA (at a minimum) were formally reviewed on national security grounds.

According to the Annual Report, the three most important factors that led to national security review in FY 2017 were

- the potential for transfer of sensitive dual-use technology or know-how outside of Canada;
- the potential for negative impacts on the supply of critical services to Canadians or the government; and
- the potential to enable foreign surveillance or espionage.

Very few transactions are blocked, approved subject to commitments, or materially delayed due to national security concerns. However, it should be noted that these statistics do not reflect the full impact of the national security review process. For example, the statistics do not include potential transactions that were abandoned at an early stage due to concerns raised informally. In addition, investments may be informally screened on a voluntary basis through requests for information to rule out national security concerns at an early stage.

2. Approach to investment from China

The current Liberal government's efforts to encourage foreign investment represent a notable shift from the previous Conservative government. The government is now more open to investment from China. Canada and China are holding exploratory discussions regarding a possible free trade agreement. Chinese investment in Canada, both in terms of number of discrete investments and the aggregate enterprise value of those investments, was second only to investments from the U.S. in FY 2017. In terms of asset value of the investments, total investment from China actually exceeded that of the U.S.

Hytera's takeover of Norsat International (Norsat) was a recent high-profile investment from China. Norsat, based in Vancouver, produces satellite equipment and transceivers, including those for military applications. Hytera, a private Chinese firm, proposed a friendly takeover. Despite considerable criticism — including from the U.S. — the transaction was approved by the Canadian government without a full national security review, instead only requiring a 45-day extension to the standard 45-day initial review period required under the ICA. While the government's approach to investment from China continues to evolve, and there continue to be certain types of investments that would be expected to attract a high level of scrutiny, the government's response to the Norsat acquisition suggests a higher level of comfort with investments from China.

Several other high-profile transactions from Chinese investors were reviewed and approved by the government in 2017. These include Anbang Insurance's (Anbang) takeover of Retirement Concepts, which operates retirement homes in British Columbia, Calgary and Montréal. Anbang, which is privately owned and one of China's largest insurers, has faced questions in the U.S. relating to its ownership structure and possible ties to the Chinese government. The Canadian government approved the transaction as being of a net benefit to the Canadian economy.

In another notable development relating to the review of investment from China in sensitive Canadian industries on national security grounds, the government revisited and approved Hong Kong-based O-Net Communications' (O-Net) takeover of Montréal-based ITF Technologies, despite the previous Conservative government's rejection of the same transaction in 2015. This approval was granted despite O-Net reportedly being 25% owned by the China Electronics Corporation, a Chinese state-owned enterprise. Though the unique facts of the O-Net transaction may limit its precedential value, it does stand as another example of the government's willingness to work with investors and find solutions in some circumstances where a viable path to approval previously may not have been possible.

3. Cultural policy

Although the government has stated its intention to maintain existing protections for the Canadian cultural sector, it has adopted a flexible approach in addressing foreign investment in newer, digital media, most recently through the agreement reached with Netflix.