

# Kluwer Competition Law Blog

## Canadian government imposes strict new rules on Russian FDI in Canada

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On March 8, 2022, the government of Canada issued a policy statement regarding the review of Russian investments under the Investment Canada Act (ICA): <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81228.html>.

The policy statement was issued in response to Russia's invasion of Ukraine, which the government called "unprovoked and unjustifiable", and affects the application of both the ICA's "net benefit" review process and its "national security" review process.

### Net Benefit/National Security Reviews

The net benefit review process under the ICA requires that all foreign acquisitions of control of a Canadian business that exceed certain thresholds must obtain government approval that the acquisition is of "net benefit" to Canada. Historically, there have been very few foreign investments blocked on net benefit grounds. Rather, almost all reviewable transactions have been approved on the basis of undertakings provided by the investor with respect to the Canadian business post-investment, including commitments to maintain a certain level of employment in Canada, retain Canadian management, invest in the Canadian business, and so on.

The ICA also authorizes the Canadian government to review all foreign investments to determine if they could be "injurious" to Canadian national security. The national security review process has a broader reach than the net benefit review process, in that (a) it also applies to minority investments, there being no requirement that the investor acquire control of the Canadian business, and (b) there are no financial thresholds – all foreign investments are potentially subject to review, regardless of value. The ICA also does not define what "injurious" to Canadian national security means, which gives the government significant discretion in exercising this authority. For example, it is clear that the government's authority is not limited to "classic" national security concerns such as defence and espionage, but also extends to areas such as the impact of an investment on the supply of "critical" goods and services to Canadians or to the government, or the effects on access to sensitive personal data. If a formal review is initiated, the government can allow the investment to proceed with no conditions; block the investment from proceeding; order the divestiture of assets; or condition approval on the investor taking "mitigation" measures to address any national security

concerns. The majority of national security reviews to date have resulted in some sort of remedy or the investor abandoning the investment altogether.

### **The New Russian Investment Policy**

The government's new Russian investment policy provides that, effective immediately and until further notice:

- (a) all investments by Russian investors that are subject to "net benefit" review under the ICA will be approved only on "an exceptional basis"; and
- (b) all investments that have "ties, direct or indirect, to an individual or entity associated with, controlled by or subject to influence by the Russian state" will be subject to a full and formal national security review under the ICA, regardless of value.

Investors will be expected to pro-actively identify any potential Russian connections. Any such investments can also expect lengthier than normal reviews, as the government will require detailed information setting out corporate data, structures and financing relationships, including for direct and indirect investors, beneficial ownership and trusts. As it is, net benefit reviews can take between 75-105 days to complete and national security reviews take on average 225 days to complete. The government's new policy will only make this worse for affected transactions.

### **Implications**

There is some precedent for the Canadian government announcing that a class of foreign investments will face significant hurdles in securing ICA approval. In 2012, the government similarly announced that investments in Canadian oil sands businesses by foreign state owned enterprises would only receive net benefit approval "on an exceptional basis". However, this is the first time that a policy has been directed expressly at a specific country, and clearly represents a departure from the normal practice where transactions are almost never prohibited on net benefit grounds.

Given, however, that the number of net benefit reviews has been declining steadily in recent years (there were only three last year as compared to 11 national security reviews), the government's new policy is likely to have its greatest impact on the national security side. Russia was already considered a somewhat suspect source of foreign investment, with at least three national security reviews in the last few years involving Russian investors. However, the new policy escalates this considerably, by effectively designating all investments with connections to the Russian government as potential national security risks. Although perhaps not expressed as a complete ban on such investments, the Canadian government's new policy will clearly make it much more difficult – if not effectively impossible – for them to be approved in the foreseeable future.

The ripple effects of the government's new policy are already being felt. For example, there have been news reports suggesting that a major transaction in the Canadian airline industry could be at regulatory risk may because it would result in a Russian oligarch indirectly acquiring a minority interest in one of Canada's leading airlines. And just this week, a Canadian company that owns a

lithium mine in Argentina announced that it would be “provisionally” suspending a proposed transaction in which a subsidiary of Russia’s State Atomic Energy Corporation (ROSATOM) would acquire a 15% stake in the mine with the right to acquire another 35% at a future date.

In light of its new policy, the Canadian government recommends that all non-Canadian investors and Canadian businesses carefully review their investment plans to identify any potential connections to Russian investors and entities that may be involved as either controlling or minority investors. Parties should also be prepared to answer extensive questions from the government if any such connections exist – and if they still wish to proceed.

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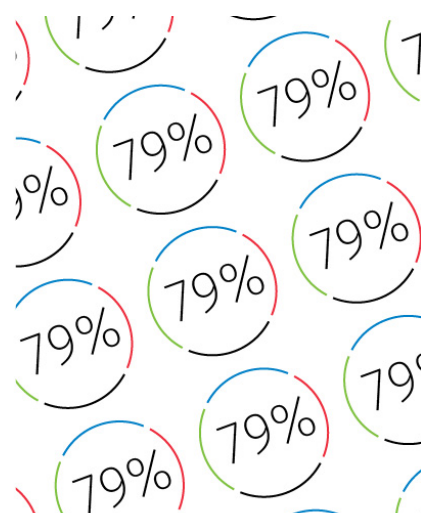
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