

Key competition law considerations when transferring portfolio businesses to continuation vehicles

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Key takeaways

- Fund sponsors transferring a portfolio business to a continuation vehicle must consider whether the transfer is subject to mandatory notification under the *Competition Act*.
- If the existing fund and continuation vehicle are legal affiliates, they are exempt from notification.
- The transfer may be subject to notification if the financial thresholds for notification are exceeded.
- If the transfer is subject to notification, the filings must be made before closing to the Canadian Competition Bureau and the transaction cannot close until they conclude their review of the transaction and/or the statutory waiting period has expired or been waived.
- Fund sponsors should assess *Competition Act* implications early to avoid delays in portfolio business transfers.

Fund sponsors should be aware that transferring a portfolio business to a continuation vehicle may be subject to mandatory notification under the *Competition Act*, depending on the structure of the continuation fund. Transfers involving an entity that carries on as an “operating business” in Canada, defined as a “business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work”, may be notifiable if the existing older fund and the continuation vehicle are not legally affiliated and the financial thresholds for notification are exceeded.^[1]

If the existing fund and the continuation vehicle are legal affiliates, they are exempt from notification under the *Competition Act*. For the purposes of the *Competition Act*, legally related affiliates are those related through majority voting ownership in the case of corporations and majority economic ownership in the case of partnerships.

The financial thresholds that must be exceeded are the C\$400 million parties-size threshold

and the C\$93 million transaction-size threshold. For the parties-size threshold to be exceeded, the parties to the transaction and their affiliates must have aggregate assets in Canada, or gross revenues from sales in, from or into Canada exceeding C\$400 million. The parties to the transaction would be the continuation vehicle and the business being transferred.

Since affiliates must be factored in when determining if the threshold is exceeded, in the context of a continuous vehicle transfer, this means that, if the fund owning the acquisition vehicle making the investment has a majority economic owner, its assets and revenues will also need to be considered when determining whether the parties-size threshold is exceeded, along with any majority-owned portfolio companies of the investing fund that have assets in Canada, or gross revenues from sales in, from or into Canada. The second transaction-size threshold requires that the business being transferred have more than C\$93 million in Canadian assets (book value) or revenues from sales in, from or into Canada.

If a continuation vehicle transfer is subject to notification under the *Competition Act*, the filings must be made before closing to the Canadian Competition Bureau (CCB) and the transaction cannot close until the CCB concludes its review of the transaction and/or the statutory waiting period has expired or been waived.

Where a continuous vehicle transfer is subject to notification, the purchaser can expect (where it is not already pre-emptively addressed in the filings) to receive questions from the CCB asking them to identify whether the purchaser or anyone who has a 10% or greater direct or indirect interest in them has a 10% or greater interest in an entity competing with the portfolio business being transferred to the continuation vehicle, or an interest in an entity that serves as a supplier to or customer of the portfolio business. If there are minority investments in companies that competitively overlap with the portfolio business being transferred, the CCB will typically request additional information relating to those entities.

Accordingly, fund sponsors should assess potential *Competition Act* implications early to avoid delays in the transfer of portfolio businesses to continuation vehicles.

[1] Transactions between legal affiliates are exempt from notification under the *Competition Act*.