



Pre-Merger Notification Interpretation Guideline Number 1

Definition of "Operating Business"
(Section 108 of the Act)

This publication is not a legal document. It is intended to provide general information and is provided for convenience. To learn more, please refer to the full text of the Acts or contact the Competition Bureau.

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-866-694-8389
Fax: 819-997-0324
Website: www.competitionbureau.gc.ca

This publication can be made available in alternative formats upon request. Contact the Competition Bureau's Information Centre at the numbers listed above.

This publication is also available online in HTML at:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03358.html>

Permission to reproduce

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Competition Bureau provided due diligence is exercised in ensuring the accuracy of the information reproduced; that the Competition Bureau is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of the Competition Bureau. For permission to reproduce the information in this publication for commercial redistribution, please [Apply for Crown Copyright Clearance](#) or write to:

Communications and Marketing Branch

Innovation, Science and Economic Development Canada
C.D. Howe Building
235 Queen Street
Ottawa, ON Canada
K1A 0H5
Email: ISED@Canada.ca

Cat. No. Iu54-35/1-2011E-PDF
ISBN 978-1-100-18848-5
60911

2011-06-20

Aussi offert en français sous le titre Avis d'interprétation no 1 sur les préavis de fusion : Article 108 de la Loi. Définition d'« entreprise en exploitation ».



Enforcement guidelines

June 20, 2011

Notice

This publication replaces the following Competition Bureau publication:

Enforcement Guidelines — Notifiable Transactions under Part IX of the *Competition Act* — Interpretation Guidelines, April 25, 2000

This Interpretation Guideline is issued by the Commissioner of Competition ("Commissioner"), who is responsible for the administration and enforcement of the [Competition Act](#) ("Act"). The purpose of this Guideline is to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions. This Guideline sets out the general approach taken by the Competition Bureau ("Bureau") and supersedes all previous statements made by the Commissioner or other Bureau officials. This Guideline is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such, nor is it intended to substitute for the advice of legal counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Merger Notification Unit^{[Footnote 1](#)}.

Definition

Subsection 108(1) of the Act states:

108(1) "Operating business" means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.

Background

The definition of "operating business" is relevant to the determination of whether a proposed transaction is subject to notification because the transaction types in section 110 of the Act each make reference to an operating business.

Policy

"Business undertaking" is not defined in the Act. The term "business" is defined in section 2 of the Act. "Business undertaking" is broadly interpreted to capture all arrangements through which business may be carried on, including non-profit or charitable undertakings.

Whether a business undertaking is "operating" depends on the nature of the undertaking under consideration in each case. A company that is engaged in the business of holding investments, whether passive or otherwise, may be an operating business if it satisfies the remainder of the definition of that term.

The term "in Canada" requires that there be present in Canada an office or business location of a business undertaking. A business undertaking which is partly or predominantly in another jurisdiction may be considered to satisfy the "business undertaking in Canada" requirement if it has some component or presence in Canada.

"Employees employed in connection with the undertaking" are not limited to those persons employed by the operating business itself, but may also include persons employed in connection with the operating business. Thus, employees of a third party with a contract for services in connection with a business undertaking would satisfy this requirement.

"Ordinarily report for work" does not require that an employee reporting be a full-time employee. The frequency of an employee's reporting to work in connection with a particular undertaking and whether the reporting is ordinary may depend on the nature of the undertaking. For example, if a business undertaking consists of leasing property and an employee is only required to collect the rent once per month, that would satisfy the "ordinarily report for work" requirement.

Assets of an operating business

Assets of an operating business include all the assets of the operating business. Accordingly, dormant assets of an operating business, such as a closed (mothballed) plant of a corporation which owns several other operating plants, are considered assets of the "operating business".

Defunct businesses

A defunct business is not an "operating business" under section 108 of the Act. A business is considered defunct where the business has permanently closed. A business which has temporarily closed or suspended its operations is considered an "operating business". A business is not considered defunct by reason only that its assets have vested in a trustee in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, or that its assets have been placed in receivership. If a trustee or receiver is carrying on a business undertaking with a view to disposing of the business as a going concern or to reorganizing its affairs, the business undertaking may still be considered an "operating business"; Where the operating business cannot be either carried on or sold as a going concern, and the trustee or receiver takes steps to liquidate the assets on a piecemeal basis, the undertaking may no longer be an "operating business".

For further information, please contact:

Merger Notification Unit

Competition Bureau
Mergers Branch
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: 819-997-0615
Toll-free: 1-800-348-5358
Fax: 819-994-0998

E-mail: ic.avisdefusionmergnotification.ic@canada.ca

Footnote

Footnote 1

For further information, please refer to the [*Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*](#) at p.14.