NAVIGATING FLUID AND UNCERTAIN CHANGES TO FDI REGULATION IN THE ERA OF GLOBAL PROTECTIONISM

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Legal Briefings – By **Veronica Roberts and Ali MacGregor**

In the context of increasing global protectionism, foreign direct investment (**FDI**) regulation has become ever more important, with many countries becoming more interventionist. This has resulted in several high-profile technology deals being blocked and unwound. However at the same time, a number of Asian countries wishing to encourage inward FDI have been progressively opening parts of their economies and streamlining their screening processes. Understanding the global trends and staying on top of frequent changes in the FDI rules is critical to navigate this fluid and sometimes uncertain environment.

THE EVOLVING CONCEPT OF "NATIONAL SECURITY"

"National security" has traditionally been the principal justification for state intervention in foreign investment. However, the scope of sectors and technologies considered by policymakers to fall within this concept has shifted rapidly to become much broader than military/defence interests and physical critical infrastructure.

In recent government interventions, the "national security" review has expanded to include communications assets, advanced technology and data. For example, in the US, the Committee on Foreign Investment in the United States (**CFIUS**), has intervened in transactions involving digital maps for the automotive industry and digital apps, due to concerns about foreign access to, and storage of, personal information.

The concept of "national security" as the basis for FDI intervention is becoming more like a "national interest" test. However, only a few developed countries – including Australia, France and Canada – have a formal “public interest” test for intervention. Another related trend is an increased focus on the consolidation of value chains, where it is perceived to harm sensitive industries (eg the advanced manufacturing and technology sectors). The real concern here is often not national security issues, but the potential rationalisation and relocation of value-adding activities. In such cases, it may be possible to offer up remedies either outside of the formal FDI regime[1] or within formal regime commitments.

LOOKING BEYOND CHINA

Coverage of this topic has focused heavily on Chinese investment in sensitive sectors like technology. It is easy to see why, given the current geopolitical backdrop and the fact that many high profile FDI interventions have involved Chinese investors. All four deals blocked by CFIUS in the US under the Trump administration (three of which were in the technology sector) involved Chinese acquirers,[2] as, for example, have both deals blocked to date under the German FDI regime.[3]

In reality, government intervention in most countries is directed much more broadly: 89% of acquisitions reviewed by CFIUS in 2019 involved non-Chinese purchasers, as did two out of the four most recent interventions in the UK. Undertakings are often required in order to secure clearance, but in some cases prohibition will be the only option: in December 2020 the French Government effectively blocked the acquisition of the French company Photonis by the US group Teledyne.[4]

ASIA OPENING UP

Pre-pandemic a contrasting approach had started to emerge with some Asian countries moving towards liberalising FDI regulation by opening up more sectors to foreign investment and streamlining the approval process. The Chinese Foreign Investment Law[5] implemented a significant overhaul of the previous regime. Similar strategies have been pursued in India and Vietnam, and resulted in record levels of inward investment (pre-pandemic).

It remains to be seen how the impact of the pandemic will influence this trend in future. Concerns about opportunistic acquisitions by foreign investors have surfaced in many Asian countries, and a number of additional restrictions have been introduced which go against the trend: in April 2020 the Indian government announced tighter FDI rules connected to the pandemic and a desire to protect Indian companies from acquisition by foreign buyers.

PRACTICAL GUIDANCE FOR INVESTORS IN THE TECH SECTOR

1. **Consider any potential for criticism of the transaction on national**

security/national interest grounds at the outset: early engagement with the authorities can be productive. In assessing the risk, it is important to think beyond the established legal parameters for blocking foreign investment in considering why an acquisition might be politically contested.

2. **Factor notification and "standstill" requirements as well as regulatory risk into deal planning and transaction documents:** in many jurisdictions, where a filing is required the deal cannot close without approval. You should also consider which party will take the regulatory risk. Provisions will need to be included in the deal documents to address these points.

3. **Where there are likely to be national security concerns, start thinking of possible remedies upfront**: these could involve behavioural commitments, (eg restrictions on access to data), or commitments to divest part(s) of the business. The deal structure can also be amended to assuage concerns (eg reducing the level of control to be acquired).

4. **Take a global approach to securing any necessary FDI clearances:** Cooperation between FDI agencies and the relevant national governments can be informal and opaque. However, in *Fujian Grand Chip Investment Fund/Aixtron* (2016), the German authority withdrew their initial approval, allegedly at the urging of US authorities. A consistent global approach to all FDI agencies will be invaluable when trying to navigate a cross-border transaction.

ENDNOTES

1. In 2018, in relation to the purchase of Arm by Japanese firm Softbank, the UK government obtained formal undertakings to keep the headquarters in the UK and to double the UK workforce.

2. *Ant Financial Services Group / Moneygram* (January 2018), *Broadcom / Qualcomm* (March 2018), *Beijing Kunlun Tech Co. / Grindr* (May 2019), and *Beijing Bytedance Tech Co. / Musical.ly* (*later merged into TikTok)* (August 2020).

3. *Yantai Taihai Corporation / Leifeld Metal Spinning AG* (August 2018) (ultimately abandoned prior to a formal prohibition decision) and *Casic / IMST* (December 2020). In August 2018, political influence was also used to prevent State Grid Corporation of China from acquiring a 20% minority stake in 50Hertz.

4. The French Government would only accept the transaction subject to onerous conditions including the French government retaining a 10% shareholding in the target. The acquisition was formally prohibited on 18 December 2020.

5. This came into effect on 1 January 2020.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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