M&A in Europe: Foreign Buyers May Soon Be Subject to an Even Tighter Review Process

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Tariffs. Trade wars. Protectionism. United States vs. China. Putin vs. most of the world. All of these terms are being bantered about. Along the same lines, but not given the same attention by the mainstream media, are steps taken by jurisdictions to screen foreign direct investment.

The United States established the Committee on Foreign Investment in the United States (CFIUS) in 1975. Though it was updated and strengthened over the years -- including through the Foreign Investment and National Security Act of 2007 (FINSA) -- CFIUS did not have much teeth during the first few decades of its existence. Only five transactions have been formally blocked by a US president since 1975 under CFIUS; two of those, however, took place under President Trump, most recently he blocked Broadcom Limited's intended acquisition of Qualcomm earlier this month, citing national security concerns. This measure was also noteworthy in that it was the first time that a president blocked an acquisition by a company other than a Chinese company. (Broadcom is based in Singapore.)

As discussed in an earlier post, Germany tightened last year its Foreign Trade Ordinance (*Aussenwirtschaftsverordnung*) by more specifically setting forth what types of transactions may be considered as threatening Germany's public order or national security. Germany's Federal Ministry for Economic Affairs and Energy may review and subsequently block these types of transactions. Similarly, France issued a decree in 2014 allowing the French Ministry of Economy to require authorization before a foreign investor may proceed with an acquisition in strategic industries in France, including in the energy, infrastructure, public health, telecommunications, transport, and water sectors. Italy also issued a decree in 2012 giving the Italian government special powers relating to the acquisition of specified industries, including defense, energy, national security, telecommunications, and transport.

Increased M&A transactions in the European Union by foreign investors over the past few years have heightened the European Union's awareness of the risks associated with foreign direct investment, including M&A transactions by state-owned enterprises (SOE's). According to a report published by Copenhagen Economics in 2017 on M&A transactions by SOE's ("Screening of FDI Towards the EU"), most of the SOE investments from 2003 to 2016 came from Russia (16.6%), followed by Norway (15.8%) and Switzerland (11.8%) while China came in fourth with 11.0%. Recent M&A transaction by Chinese investors in the European Union, as well as the increased political tension between Russia and the European Union, have caused the European Union to focus more on foreign direct investment by non-European investors, including from SOE's and emerging economies. As mentioned by Dr. Sylvia Baule, Deputy Head of the Investment Unit (Unit B2) of the European Commission at a German-American

Lawyers Association (DAJV) Conference I attended in Frankfurt, Germany on March 2, 2018, "traditional" foreign direct investment in the European Union has been on the decline; instead, there has been an increased focus on dual-use technology and goods. Dr. Baule stated that this causes concern within the European Union because technology that is acquired by Chinese SOE's will presumably end up in the hands of the Chinese government.

It is for this reason that the European Union published a proposal on September 13, 2017, for a regulation establishing a framework for screening foreign direct investment. The primary purpose of the Proposal is to increase cooperation between the Commission and the member states, as well as among the member states, when it comes to foreign direct investment. Right now fewer than half of the EU member states have legislation in place regarding the screening of foreign direct investment, i.e., Austria, Denmark, Germany, Finland, France, Italy, Latvia, Lithuania, Poland, Portugal, Spain, and the United Kingdom. The focus of the Proposal is on national security and public order; it does *not*, however, require member states to adopt screening procedures for foreign direct investment.

The Proposal sets forth that member states inform each other, and the Commission, of foreign direct investment that may threaten national security or public information. Specifically, the Proposal requires a member state to inform the other member states and the Commission within five days of the start of the screening of any foreign direct investment that is the subject of a national screening procedure. This information is to remain confidential.

Though the Proposal does not specifically define "security" or "public order", Article 4 of the Proposal provides guidance. Article 4 of the Proposal states in pertinent part as follows:

In screening a foreign direct investment on the grounds of security or public order, Member States and the Commission may consider the potential effects on, inter alia:

- critical infrastructure, including energy, transport, communications, data storage, space or financial infrastructure, as well as sensitive facilities;
- critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology;
- the security of supply of critical inputs; or
- access to sensitive information or the ability to control sensitive information.

Whether this Proposal will see the light of day remains to be seen. It is clear, however, that this Proposal fits in nicely with the current political climate in terms of an increased focus on national security. The European Union is to publish an in-depth analysis report on foreign direct investment by the end of 2018. The findings of that report will presumably be instrumental in the future of this Proposal.

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