FOREIGN INVESTMENT: RISING TIDES OF POLITICS IN REGULATION

Foreign investment scrutiny in today's world

Recent years have seen important global shifts in both the policy frameworks for screening inward foreign investment and the way in which they are applied. These shifts come against a backdrop of protectionist political rhetoric and anxieties about the impact of foreign direct investment (FDI) in traditionally open economies. The new landscape is exemplified by the position in the US, from the increase in the volume and intensity of CFIUS reviews (leading to the collapse of deals such as Ant/MoneyGram and Canyon Bridge/Lattice Semiconductor), to the current proposals for expansion of the CFIUS mandate. It also extends to Europe, with increased intervention in France and Germany, the European Commission planning EU legislation on inward investment screening for the first time, and the UK government proposing extensive changes to its powers of national security review. Against the backdrop of these larger changes are many smaller shifts in the political mood around FDI across the OECD.

Governments in these countries are balancing competing concerns, seeking to remain attractive to necessary foreign investment while increasingly scrutinising the terms on which it is made. This is not happening in a vacuum. It reflects some big shifts in the global economy as well as the political mood. Moreover, it is likely to be structural, rather than cyclical. It will continue and may even accelerate.

Above all, the FDI changes reflect the growing weight of China as an exporter of capital, and a shift in what Chinese firms are seeking to acquire. But they also reflect increasing political concerns about how FDI by multinational companies – regardless of where they are based – is changing global value chains, with high-value activities being up-rooted from one location to another, as company ownership changes.

This pressure is manifesting itself in two distinct ways, which are important for foreign investors to understand. Politicians are adopting new political strategies for injecting informal government locus into deals, often deliberately creating ambiguity about the state's power of discretion to force acquirers to court their approval more assertively. This typically means using more fully the room for discretion that is invariably available within existing legislative frameworks. In some cases, however, they are going further and seeking new policy tools that allow for more thorough vetting of foreign investments. This often requires new legislation.

The result is a more fluid and uncertain environment for foreign investment, presenting additional hurdles for deal parties. This makes it essential for foreign investors to understand both the legal framework and the political and policy contexts they are operating in when pursuing acquisitions. FDI and public interest considerations now need to form a key part (together with antitrust review) of transaction parties' regulatory strategy.

In this report, Global Counsel and Herbert Smith Freehills' Foreign Investment Regulation Group (made up of experts from our global M&A and Competition, Regulation & Trade practices) consider the current landscape and how to navigate this through effective deal planning and execution.

Alongside this report Herbert Smith Freehills is publishing an interactive map and country-by-country guide summarising the FDI/ public interest control processes and trends in key jurisdictions, an essential tool when considering potential deal hotspots.

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Three trends and a shifting mood

We can identify three qualitative trends that are also important predictors of sensitivity for acquisitions: a Chinese pivot; a contested view of national security; and a value chain dilemma. These trends are inter-related. There is no reason to believe they will either be short-lived or reversed soon. All three are changing the way inward FDI is viewed by many host governments.

Client perception

In a recent global survey of clients carried out for our M&A in a changing world – Opportunities amidst disruption publication with The Economist Intelligence Unit[1], an overwhelming majority (88%) regarded increased political involvement as an impediment to M&A.

An impediment to M&A, and not welcome?

36%

An impediment to M&A, but necessary for wider social, economic or policy reasons?

52%

Not a significant impediment to M&A?

12%

A Chinese pivot

China has, for several years now, been the second most important destination for FDI, after the US, with the stock of foreign investment standing at US$2,866 billion in 2016. This is more than double the stock of FDI in the UK and four times that in France. China has progressively opened more parts of its economy to FDI and has streamlined its FDI screening process.

China's rise to prominence as a source for outward investment has been slower, with the total stock in 2016 standing at US$1,317 billion, lagging behind the US, the UK and the Netherlands for example. But it has been rising fast, growing at a cumulative annual rate of 25.3% over the preceding five years, compared to just 3.7% for OECD countries.[2]

Even more important, at least when attempting to understand the politics of FDI, is to consider how the nature of Chinese outward investment has changed overthis period. The last few years have seen a significant shift from Chinese investment in natural resources, including energy, metals and foods, to much broader range of sectors, with an increasing emphasis on critical infrastructure, such as utilities, and high-tech industries.

IN 2016 CHINESE DIRECT INVESTMENT IN THE EU ROSE BY

77% TO €35bn

Source: Rhodium Group and MERICS – Record Flows and Growing Imbalances: Chinese Investment In Europe In 2016, January 2017

[1] Source: http://www.hsf.com/cbmahub
[2] Source: OECD International Direct Investment Statistics, http://dx.doi.org/10.1787/data-00746-en

From ores to ports: the pivot in Chinese FDI in Australia

Australia has long seen Chinese investment in the extractives sector. More recently, this has proved more controversial, as the scale of Chinese investment has increased. But the controversy over Chinese investment has now become acute, as the nature of investment has also changed, most notably with increasing investment in the country's infrastructure.

In 2016, Australia's federal government blocked (following the recommendations of the Foreign Investment Review Board (FIRB)) two separate bids for a A$25 billion stake in Ausgrid, the largest energy grid in Australia – one from Chinese State Grid Corp and one from Hong Kong-based Cheung Kong Infrastructure. The reason given was national security, because of what the government in Canberra described as the 'critical' power and communications services provided to it by Ausgrid. The federal government's intervention came despite the deal enjoying the backing of the state government in New South Wales.

The outcome was more positive for another Chinese investment in the same year, by Landbridge in Darwin Port. That deal was much smaller – just A$0.5 billion – and it similarly enjoyed the backing of the state government, this time that of the Northern Territories. The controversy, in this case, was not based on the security concerns of the Australian government, but of the US government, which has a military base in Darwin. In this case, the controversy eventually blew over, and the investment went through, partly because the economic need for the investment was so great and the authorities in Darwin were unwavering in their support.

In July 2017, the Australian authorities in fact revised the FIRB protocols to raise the threshold for screening and widen the scope of exemptions. But political sensitivity in these core areas – and with respect to Chinese capital – remains high.

A contested view of national security

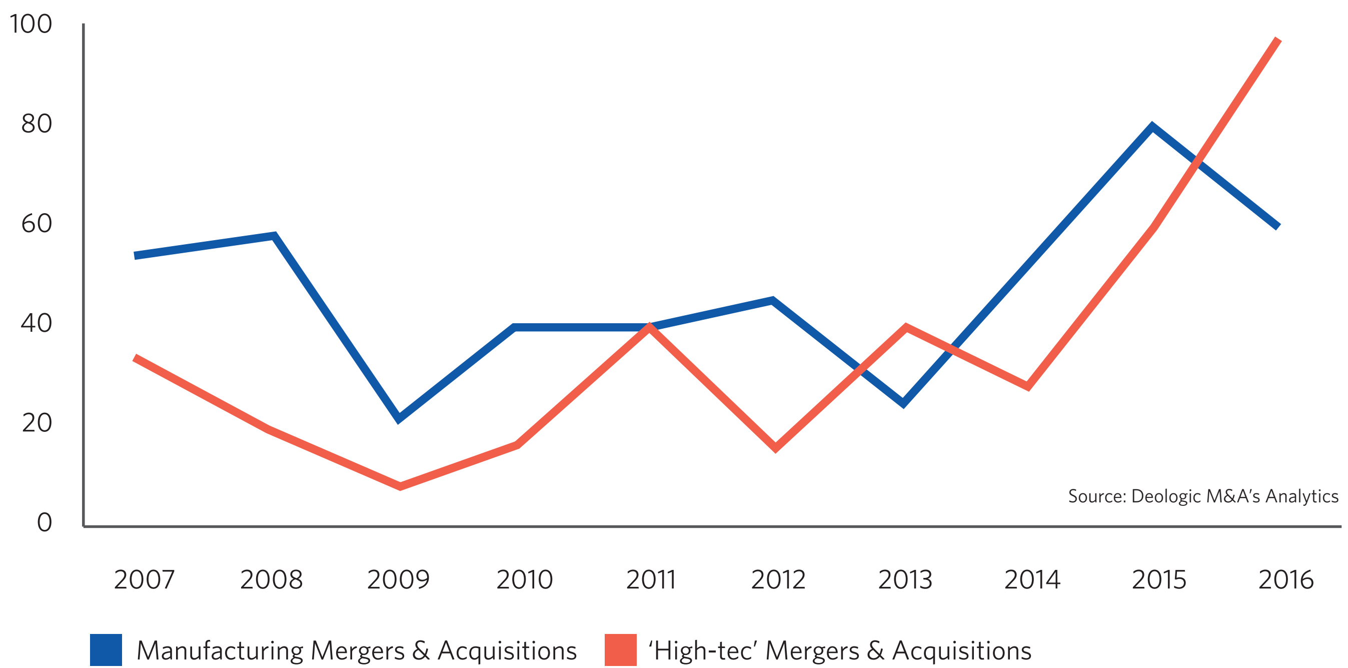
National security is well established as the pre-eminent public interest justification for state intervention in foreign investment (as demonstrated by the focus on this in the recent EU and UK proposals discussed below).

It is an obvious but important point that invoking national security as a basis for investment restrictions necessarily requires that policymakers are willing to label acquirers and the countries that stand behind the security threats. US policymakers overseeing the CFIUS process have had todate a much higher comfort level for such open confrontation than their European and other OECD counterparts. This is particularly true with respect to China. Yet this may be changing. The German withdrawal of its approval – at US urging – of the acquisition of Aixtron by the Fujian Grand Chip Investment Fund in 2016 marked the first time the German state has characterised China as a potential strategic threat for the purposes of foreign investment intervention.

What is also evolving is the scope of the technologies and interests captured by policymakers' views of national security. Alongside the conventional forms of defence material manufacturing is a growing list of 'critical' infrastructure, both physical and digital, and technologies such as artificial intelligence (AI) and data storage. These expanding definitions of national security concerns inevitably blur into more general political conceptions of national competitive interests and technological strengths.

One of the challenges for both acquirers and sellers over the years ahead is likely to be navigating this evolving definition of national security. While policymakers may have a relatively narrow conception of the security threats posed by technology transfer, politicians will often take a much wider view of economic competition and the strengths and assets that represent the national interest.

Non-EU FDI in high technology sectors and manufacturing



Source: European Commission Foreign Direct Investment – an EU screening framework: Factsheet presenting the Commission proposal, 14 September 2017

A value chain dilemma

This links directly to a third important trend in investment scrutiny. Against a rising public sense of unfairness with globalisation and economic inequalities, politicians are increasingly under pressure to consider the impact of acquisitions on politically-favoured employment in the advanced manufacturing, research intensive and technology sectors. This can be compounded by a perception, in the EU and the US in particular, that the opportunities which open investment frameworks have created in OECD countries for Chinese capital, above all, have not been reciprocated.

The result is a growing political focus on the impact of acquisitions, where these are motivated by a desire to consolidate international value chains in a way that is perceived to work against the interests of the countries which have nurtured the targeted industries. Notwithstanding anxieties about China, the concern here is often not nationality, but the intentions of acquirers with rationalisation and relocation of value-adding activities in mind. Governments are likely to consider the commercial logic of the deal, the economic circumstances facing the company that is being acquired, and the type and nature of the assurances that are given by the acquirer. The corporate character, or reputation, of the acquiring company may also prove to be important.

When Pfizer proposed to acquire UK drug-maker AstraZeneca in 2014, UK and US authorities were both sceptical of a deal that appeared to be structured chiefly for tax purposes. But it was Pfizer's reputation for cutting and consolidating research and development activity that mobilised many UK politicians anxious about the impact on such roles in the UK. Pfizer faced calls to make commitments to maintaining its research and development capacity in the UK from across the political spectrum, including the Prime Minister, Chancellor, Business Secretary and Shadow Business Secretary. The extent of this pressure – and the implied cost of ignoring it – was widely regarded as one of the reasons for Pfizer's eventual decision to abandon the deal.

Two years later when UK mobile technology company Arm was acquired by Japanese firm SoftBank, a government keen to present a post-Brexit referendum openness to FDI nevertheless sought and received commitments to keep Arm's headquarters in the UK and for a doubling of the UK workforce. These commitments ultimately took the form largely of legally binding "post-offer undertakings" given under new rules added to the UK's Takeover Code governing public deals in 2015, after the failed Pfizer/AstraZeneca bid. In this case, these were demands that dovetailed well with SoftBank's desire to export Arm's high-tech products internationally, while maintaining its UK cost-base at a time when the post-referendum fall in the value of sterling made this more profitable. The UK's approach to the possible acquisition of Imagination by Canyon Bridge in the same year (which was not opposed) sidestepped the security issues that had decisively turned US decision-makers against Canyon Bridge and its Chinese investors and focused instead on the risk of losing the UK's last chipmaker to bankruptcy.

Commitments to maintaining domestic investment from acquirers are now commonplace, backed by various forms of leverage. When Chinese firm Cosco acquired Piraeus Port in Greece in 2016, it was limited to a 51% stake, with an increase to 67% in 2021 conditional on the company completing its local investment programme. When Italian ship maker Fincantieri was allowed to take a 51% controlling stake in French naval ship-builder STX in 2017, it was with 1% of equity 'borrowed' from the French government. The government retained the option of taking back that stake, and control of the company, should the Italians fail to meet their pre-acquisition commitments, which included the protection of jobs. Such commitments can be expected to be a recurrent feature of sensitive acquisitions and the process of securing political support for them in the years ahead.

The evolving toolbox for investment scrutiny

To bring such concerns to bear, policymakers and politicians are adopting new approaches, often without materially changing the legal toolkit (for example the heightened scrutiny being exerted in the US and Australia). In some cases, such as the proposed CFIUS revisions, the overhaul of the German regime, the proposed new EU framework and the planned UK changes, they are seeking new powers or influence. But they are also looking for new ways to exploit the state's existing locus in takeovers, even where it is restricted by law.

Over recent years, most OECD states have progressively narrowed the scope for government intervention in acquisitions to a set of well-established national security and public order prerogatives set out in international agreements. Rather than attempt to reverse this consensus, most recent practice has focused on working inside these protocols in new ways.

The UK experience within the framework of the Enterprise Act 2002 illustrates this. The Act removed the decision-making power of ministers in merger control, except in defined exceptional cases. Under the Act, the Secretary of State can only intervene where there are concerns about national security, media quality, plurality and standards, or financial stability.

However, this limited formal political discretion does not exclude the informal influence politicians can and do have on the progress of takeovers through the media and the government's informal networks. This is crucial to understanding many systems, in which government ministers can operate in the grey areas of what might otherwise appear to be heavily constraining frameworks. As the Arm example in the UK shows, even though there was no basis for intervening in the acquisition under the Enterprise Act, post-offer undertakings (on which the government was consulted) were secured under the new Takeover Code regime.

The French system in many ways exemplifies this approach. Boxed in by the constraints of EU law on blocking takeovers (in particular the limitation on Member States' powers of intervention where the transaction falls within the scope of the EU Merger Regulation), the French state has nevertheless sought to institutionalise ambiguity about the discretionary powers of the state and ramp up pressure on dealmakers nervous about maintaining transaction momentum.

Since 2014, the 'Montebourg law' has obliged acquirers in a wide range of sectors impacting on the 'integrity, security, and continuity of supply' in the energy, water, defence, transport and communications sectors to consult the government on their intentions and receive formal government blessing. The list of covered sectors and technologies is in the process of being expanded to cover AI and data storage.

This gives the French authorities clear locus and a formidable platform to push acquirers to compromise on a deal. It also provides them with a pause button to delay them, while more politically-acceptable counterbidders are flushed out. The French system seeks to avoid breaching EU law by simply requiring that an acquirer engage and seek authorisation from the French state on the basis of protecting its legitimate interests.

This has allowed the French authorities to exert great influence over takeovers and corporate restructurings, such as those involving the industrial group Alstom.

Elements of the Spanish government have run a similar strategy in the recent Atlantia bid for Spanish infrastructure manager Abertis. Spanish ministers have sought to slow and complicate the process of obtaining the necessary regulatory approvals, in order to allow the German subsidiary of a Spanish conglomerate to put in an alternative offer. German politicians have also recently been widening their own scope for such informal intervention – see box on next page.

Spotlight on proposed UK reform

The government's October 2017 Green Paper (see overview here)[3] proposes to extend its powers of national security review. In the short term, this would involve expanding the regime to catch much smaller acquisitions of target companies active in the military/dual use and advanced technology sectors. In the longer term, a more significant overhaul is proposed, potentially involving the mandatory notification of transactions involving 'essential functions' in respect of key critical infrastructure. This would cover at least certain aspects of the civil nuclear, telecommunications, defence, energy and transport sectors.

[3] Source: Herbert Smith Freehills - UK Government Consults on proposals to expand national security review of foreign investments beyond current merger control regime, http://www.herbertsmithfreehills.com/latest-thinking/uk-government-consults-on-proposals-to-expand-national-security-review-of-foreign

Berlin and the power of the pause button

Germany's position on inward investment is an important bellwether. As one of the world's largest reservoirs of industrial IP and technological leadership, it is an inevitable target of Chinese FDI in particular. Where Germany leads in policy terms, the EU may follow.

Like many EU Member States, Germany already has a review system for foreign acquisitions under its Foreign Trade and Payments Act. This is a process overseen by the Economic Ministry, by which the government can test foreign acquisitions against public security criteria. However, this process previously rarely led to a transaction being blocked and, as a result, it was routinely requested by foreign acquirers as a hedge against political or public criticism.

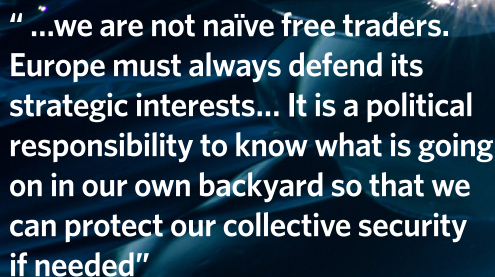
The controversy over the acquisition of German robotics company Kuka in 2016 has led to an overhaul of this system. German politicians objected to a Chinese firm – in this case, home appliances company Midea – buying up a business developing cutting-edge technology, because that would allow them to do what an independent German company could not, which is to fully exploit that technology in the vast Chinese market place.

When officials cleared the deal (despite opposition from the US on security grounds, which would prove more decisive in the subsequent Aixtron acquisition by Fujian Grand Chip Investment Fund), German politicians responded by asserting their prerogatives.

The result was a watershed political moment for Chinese investment in Germany and a rewriting of the current German rules. Under the revised rules (see the overview here)[4], the German authorities now have double the time available (four months) to investigate acquisitions. The scope of the rules has been broadened to cover new areas, spanning software providers, critical infrastructure and defence-related technologies. Officials are also able, for the first time, to investigate indirect acquisitions involving EU-based vehicles established for the purpose of a foreign acquisition.

While it is not yet clear whether the new system will capture much more than a handful of additional acquisitions annually, it does send an important signal. Germany, too, intends to exploit the power of the pause button. No less importantly, the shift of mood in Berlin has unlocked for the first time a set of proposals for a new EU framework for investment screening.

[4] Source: Herbert Smith Freehills - Germany implements extended foreign investment control mechanisms, http://www.herbertsmithfreehills.com/news/germany-implements-extended-foreign-investment-control-mechanisms



“ ...we are not naïve free traders. Europe must always defend its strategic interests... It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed”

JEAN-CLAUDE JUNCKER
PRESIDENT OF THE EUROPEAN COMMISSION

EU Member States which currently have FDI/public interest review mechanisms

Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Spain, UK

The most recent proposed changes to the EU’s approach to investment screening (see the overview here[5] and commentary here[6]) reflect all the trends described. The European Commission has proposed to harmonise to some extent the approaches of EU Member States to investment screening around a definition of national security that takes in control of critical infrastructure and technologies, especially where acquirers have state backing. These proposed technologies extend well into ‘new’ areas such as AI, robotics, and data management.

The draft legislation does not propose a power for the European Commission itself to screen and block foreign investments, nor does it mandate Member States to introduce new FDI controls. Instead, it proposes a set ofminimum requirements for such controls as Member States choose to put in place. It also proposes coordination and cooperation mechanisms between Member States and the Commission, including the power for the Commission to review investments in projects of EU interest and issue an opinion to the reviewing Member State.

The broad approach is a conventional one, although it remains to be seen whether and in what form the legislation will be adopted, in particular given potential opposition from Member States who see FDI as key to their economic development, such as Greece and Portugal.

Nevertheless, the proposals are part of a wider debate in the EU about the imbalances in the investment landscape between the EU and China in particular. While they stay carefully inside the established OECD and WTO parameters for investment screening, they will ultimately be invoked by politicians whose concerns about foreign acquisition go much wider and will often bring in questions of economic competitiveness and high value employment.
The global picture in the following map, showing the relative restrictiveness of FDI regimes across the world, could be about to change quite significantly.

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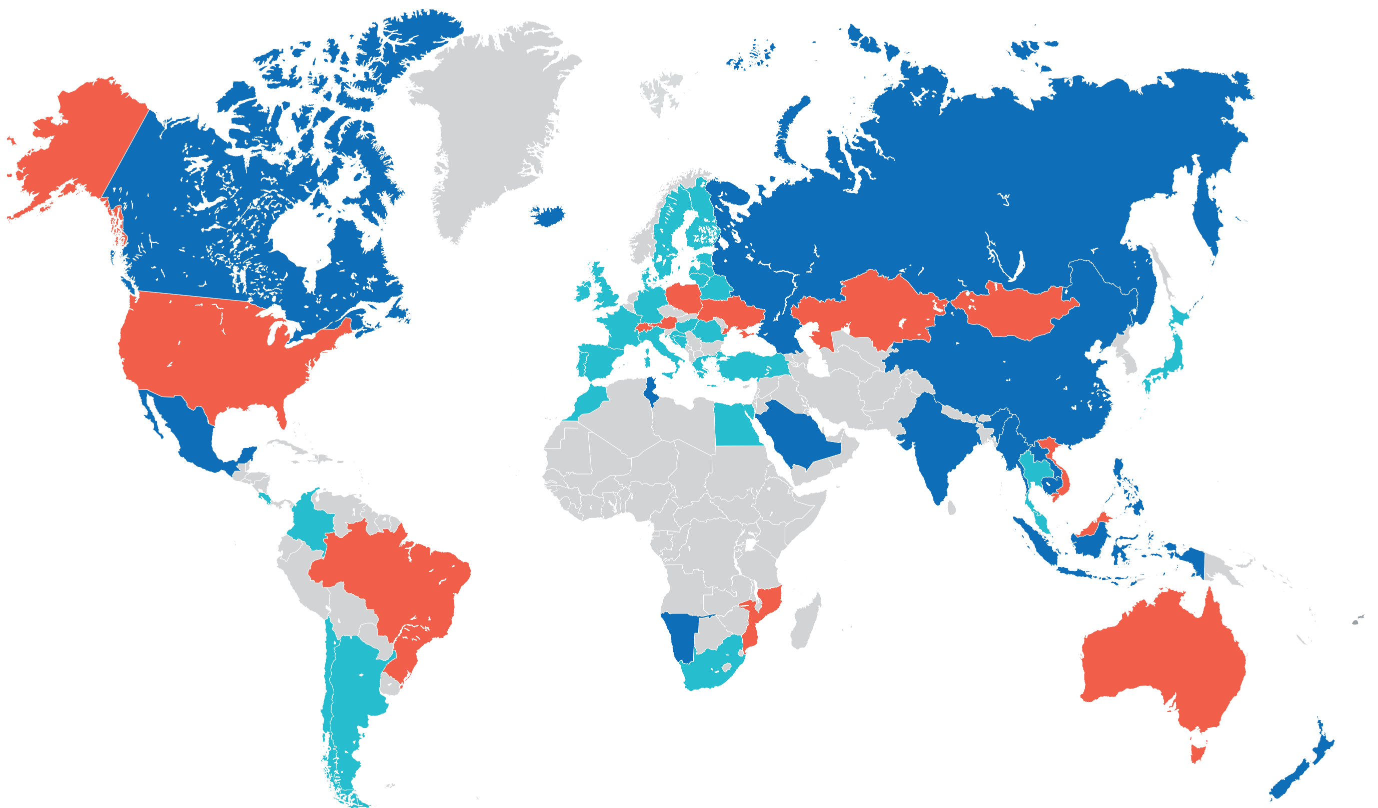
[5] Source: Herbert Smith Freehills - EU proposals for the screening of foreign direct investments, http://www.herbertsmithfreehills.com/latest-thinking/eu-proposals-for-the-screening-of-foreign-direct-investments

[6] Source: Global Counsel - Screen Tests: the EU’s proposed new framework for foreign investment, http://www.global-counsel.co.uk/analysis/insight/screen-tests-eu%E2%80%99s-proposed-new-framework-foreign-investment

Discrimination against foreign investors

Below OECD average | Above OECD average | Above Non-OECD average



Source: OECD FDI Regulatory Restrictiveness Index database http://www.oecd.org/investment/fdiindex.htm

Source: S.Thomsen and F. Mistura (2017), Is investment protectionism on the rise? Evidence from the OECD FDI Regulatory Restrictiveness Index, OECD Global Forum on International Investment, 6 March 2017, OECD

Navigating foreign investment controls in practice

Deal parties must consider early in the transaction planning process whether it is likely to give rise to investment screening issues, and whether these threaten the viability of the deal.

Anticipate your critics

In some cases (such as transactions involving military or dual use products) the political sensitivity will be obvious. But parties need to think well beyond the established legal parameters for investment blocking in considering why an acquisition might be politically contested. State backing, directly or indirectly, or acquiring key infrastructure or technologies, will always be "red flags", even if carefully managed. Extensive rationalisation or consolidation plans, which incentivise a deal for investors on paper, can also look like corporate social irresponsibility to political stakeholders. In the current mood, anticipating this kind of objection is essential.

Move carefully and prepare the ground

The simplest maxim for investors is always that the capacity to buy does not equal the licence to buy. The great majority of acquisitions will always pass without political comment. But a growing category of transactions are taking in targets that politicians and policymakers regard as political assets, as much as commercial ones. The licence to acquire such assets has to be earned through careful and sensitive engagement, compromise and, increasingly, binding commitments. A global approach is especially important as we have already seen examples of national authorities liaising with each other behind the scenes.

Get comfortable with institutionalised ambiguity about state discretion

The single most important trend in current investment screening behaviour is the desire to carve out new scope for governments to force acquirers to engage with authorities and give authorities time to dull the momentum of transactions or seek to redirect them through mechanisms other than blocking. Political disapproval can have a powerful chilling effect on acquirers and can spook wavering sellers and empower reluctant ones.

Factor FDI risks into deal planning

You should consider whether the transaction will trigger mandatory filing/approval requirements or whether voluntary filings (for example to CFIUS) should be made. You should consider whether completion must be suspended pending a screening decision, and, if not, which party will take the regulatory risk and what the timing implications will be. Timing of any merger control filings that are required will also need to be factored in, although usually merger control timelines are more transparent and predictable. You should also consider whether there are likely to be active complainants and whether reverse break-fees reflecting regulatory risk are warranted.

Consider possible mitigants up-front

These could be behavioural, such as restrictions on access to data, or structural, such as divestments. In some jurisdictions, it will be possible to seek confidential guidance as to the likelihood of issues at an early stage. In others it will involve taking into account previous interventions, regulatory trends and the political context. This could impact on transaction structure, for example where successful mitigation may be achieved through the inclusion of domestic co-acquirers or a reduction in the level of control acquired, or where carve out or "hold separate" arrangements may allow a transaction to be completed globally, while investment screening issues for a particular jurisdiction or business unit are assessed.

Example of successful public interest mitigation

The UK government intervened in the acquisition by China's Hytera of the UK's Sepura on national security grounds relating to Sepura's manufacture of radio devices used by emergency services.

The national security concerns were resolved without the need for an in-depth review by undertakings offered by the parties. The undertakings require Hytera and Sepura to implement enhanced controls to protect sensitive information and technology from unauthorised access, and to provide rights of access to premises and information so that relevant agencies can audit compliance with the security measures (as well as to continue to provide repair and maintenance service for the relevant radio devices).

How we can help

Global Counsel

Contact one of the Global Counsel contacts, experts in political and policy due diligence, to assist in planning and executing a coordinated strategy to deal with foreign investment risks.

Global Counsel is an advisory firm that works with clients navigating the critical area between business, politics and policymaking. We help companies and investors across a range of sectors to anticipate the ways in which politics, regulation and public policymaking create both risk and opportunity, and to develop and implement strategies to meet these challenges.

Global Counsel can provide support in specific markets or policy areas, or build teams to embed alongside strategic decision makers for projects or transactions. Our work is backed up by high quality analytical content and collateral that is politically and economically informed, and which builds quickly into executable strategy. Our team incorporates an international network and is led by former public policymakers and political advisors with experience at the highest level of government and policymaking.

Further insights from Global Counsel on foreign investment and other political risk issues can be accessed here[8].

Herbert Smith Freehills

For assistance with transaction planning contact one of the Herbert Smith Freehills Foreign Investment Regulation Group, who have extensive expertise in formulating and implementing regulatory strategies to secure global clearances and successful completion.

Herbert Smith Freehills is one of the world's leading professional services businesses, bringing together the best people, to meet clients' legal services needs globally. Accessing our deep global sectoral expertise, as well as our local market understanding, we help organisations realise opportunities while managing risk to help them achieve their commercial objectives.

Operating as one global team, we use innovative systems and processes to ensure client work is delivered intelligently, efficiently and reliably. When working with Herbert Smith Freehills, clients are assured world class, full-service legal advice and the best results.

In order to assist clients in identifying potential foreign investment and public interest hotspots, Herbert Smith Freehills has published an interactive map and country-by-country client guide summarising the main elements of FDI control processes and current trends in key jurisdictions.

Click here or email FDIPublications@hsf.com to access your copy.

Further insights from Herbert Smith Freehills can also be accessed on our Future of Global Trade and Investment hub[7], which contains updates on the latest developments in this rapidly evolving area.

[7] Source: http://www.hsf.com/fgti
[8] Source: http://www.global-counsel.co.uk/blog

Case studies

Ant/MoneyGram (US)

In January 2018 the proposed US$1.2 billion acquisition of money transfer company MoneyGram by Ant Financial Services Group (part of Chinese conglomerate Alibaba) was abandoned following the parties' failure to secure CFIUS approval for the deal. MoneyGram had reportedly committed to operate separate information technology networks to Ant and bar Ant's investors from accessing MoneyGram's customer data, but such proposals were not sufficient to assuage the national security concerns of CFIUS.

Midea and Kuka (Germany, US)

The acquisition of German robotics manufacturer Kuka in 2016 by Chinese home appliances company Midea led to a reassessment by the Berlin government of its FDI policy framework. The €4.5 billion deal was the largest ever in Germany by a Chinese company, but it was the motivation – accessing Kuka's advanced technology – that caused upset among German politicians and policymakers. While many could see the commercial logic for the deal – it makes it easier for Kuka to serve the rapidly growing Chinese market – this has led German politicians to ask why the Chinese authorities are making that difficult under German ownership. The deal was eased by winning the support of the Kuka board and by Midea providing assurances on jobs and keeping an independent HQ in Germany. It required the divestment of Kuka's US aviation subsidiary, which is active in the defence sector, as a result of US CFIUS considerations. What German policymakers found is that they were unable to block the deal under the previous rules.

Fujian Grand Chip Investment Fund and Aixtron (Germany, US)

A €670 million takeover of the German chip maker Aixtron by the Fujian Grand Chip Investment Fund was blocked late in 2016 by the US authorities, because of security concerns. Aixtron's technology is used in the manufacture of LED chips and is not designed for military purposes, but the US was concerned that it has military applications. The unusual factor in this process was that the deal had already won the approval of the German authorities, when US intelligence officials drew attention to the potential security risk, leading to withdrawal of the initial approval. While it was the US that pulled the plug on the deal, a review by the German authorities may have led to the same conclusion. It came as a blow for the Aixtron management team, which was an enthusiastic backer of the deal, arguing that it was necessary to remain competitive in a sector where Chinese companies are increasingly active.

Pfizer and AstraZeneca (UK, US)

In 2014, US-based Pfizer abandoned a US$118 billion takeover of British pharmaceutical company AstraZeneca. Pfizer declined to make a hostile takeover bid in the face of opposition from the AstraZeneca board and opposition from politicians on both sides of the Atlantic. The proposed deal provoked hostility in the US because the company planned to shift its tax base to the UK, under a so-called tax inversion scheme. In the UK, politicians were concerned about what the deal might mean for jobs and R&D investment by the company. Ultimately, the deal failed on price, but the political resistance made it easier for the AstraZeneca board to justify its opposition to shareholders.

Canyon Bridge and Imagination/Canyon Bridge and Lattice Semiconductor (US, UK)

The critical role played by national political and local attitudes to investment was illustrated at the end of 2017 by the contrasting fortunes of bids by California-based private equity group Canyon Bridge for chip designers Imagination in the UK and Lattice Semiconductor Corporation in the US. The potential sensitivity was created by the involvement of China Venture Capital Fund as a limited partner in the Canyon Bridge consortium. The US blocked the Lattice takeover on the grounds that it posed a threat to national security, given China Venture Capital Fund's links to the Chinese state. The UK authorities raised no concerns about the national security implications of the Imagination acquisition and are reported to have encouraged the transaction. The government's focus was on the implications for jobs, R&D and the headquarters of the company, which is the last major chip designer based in the UK. The company's share price had slumped earlier in the year when Apple said it would stop using its technology in its iPhones.

Atlantia and Abertis (Spain)

The potential for politics – and policymaker discretion within the legal framework – is shown by the rival bids for control of Spanish infrastructure group Abertis (which is still ongoing at the time of publication). A bid by Italian group Atlantia provoked political concerns in Spain and a rival bid by the German subsidiary of the Spanish construction conglomerate ACS. The Atlantia proposition was well buttressed with commitments to Spanish employment and investment, and appears to have the commercial and financial edge over the ACS offer. Nevertheless, Spanish government ministers have raised concerns about Spanish approval for the Italian bid, for what they say is a strategic asset. The German subsidiary of ACS must face the same approval process, but may not be subject to the same level of political concern.

Fincantieri and STX (France)

Fincantieri's takeover of French naval shipbuilder STX provided a reminder of how politics can still readily interfere in transactions within the EU. It also demonstrated how careful structuring of a transaction and high-level political deal-making can overcome obstacles. French concerns about the original offer were largely about jobs, but officials also questioned whether Fincantieri, which also builds ships in China, could be trusted with French naval technology. The government in Paris threatened the 'temporary' nationalisation of STX, unless its concerns were addressed. Under the deal that was eventually concluded in September 2017, the state-backed Italian industrial company took a 51% stake in STX, and control over the French company, but subjected itself to a 12-year period of reviews, which give the French government the opportunity to seize back control if it deems Fincantieri is not complying with its commitments. The deal was finally brokered by Italian Prime Minister Paolo Gentiloni and French President Emmanuel Macron.

SoftBank and Arm (UK)

The £24 billion takeover by Japan's SoftBank of British smartphone chip designer Arm in 2016 was the largest ever acquisition of a European tech firm and, as such, was always going to attract political attention. SoftBank provided the UK government with assurances that it would maintain its HQ in the UK and double its UK-based workforce. The latter commitment was a "post-offer undertaking" under the UK's Takeover Code for public bids and therefore legally binding. This was enough to win the support of the British government, which also welcomed the deal as an endorsement of the UK's economic prospects, coming soon after the Brexit referendum. The willingness of the UK government to be assertive in this case, in contrast with the Imagination takeover the following year, partly reflects the political circumstances, as the government had only recently announced its intention to place foreign takeovers under greater scrutiny. It also reflects economic circumstances, with Arm being acquired in a position of strength, contrasting with the weaker position of Imagination. As for SoftBank, its decision to engage the government early, and make commitments that ministers could claim as 'concessions', undoubtedly helped.

Cosco and Piraeus Port (Greece)

Before the debt crisis, the idea that a hard-left Greek government would sell off the country's prime port infrastructure to anyone, let alone a Chinese company, would have seemed fanciful. But that is what happened in August 2016, in a €280 million deal which saw Cosco take a 51% stake. Economic circumstances – including the privatisation conditions as part of the Greek bail-out programme – provided much of the impetus, but so too did the promise of substantial amounts of investment to upgrade the port's facilities, along with the company's vision for developing the port into an economic gateway for Asian trade with southern Europe. Cosco's case was helped by its track record at Piraeus, which it has established since it became the operator of one of the port's terminals in 2009, and during which time container traffic has risen substantially. Even so, the deal was structured so that the purchase of a further 16% stake will only be completed in 2021, providing the investment programme is undertaken by then.

State Grid Corporation and Ausgrid (Australia)

In August 2016, the Australian government blocked (in line with recommendations from FIRB) a A$25.1 billion bid for Ausgrid by the Chinese State Grid company, citing unspecified national security concerns. Ausgrid, which operates Australia's largest energy grid, was put up for sale by the state government in New South Wales. The Australian government claimed its decision was based on the nature of the asset and was not 'country specific', noting that Ausgrid provides 'critical power and communications services' for business and government. The government added that the process was unable to identify 'suitable mitigants' to allow the sale to go ahead. The decision has led to accusations of protectionism, particularly as State Grid already owns extensive gas and power networks in several Australian states. The proposed deal also enjoyed the backing of the New South Wales government. In October, the stake in Ausgrid was eventually sold to local investors for A$20.8 billion, a discount of A$4.3 billion.

Landbridge and Darwin Port (Australia, US)

When China's Landbridge purchased a A$506 million lease on Darwin port in 2016, it showed how unforeseen diplomatic consequences can threaten what was a relatively straightforward transaction, which enjoyed the full backing of the state government in Australia's Northern Territories. The complications were created because Darwin is also home to a US military base, located there since 2014, as part of the American response to the growing influence of China in the region. The US authorities were not consulted on the deal, which they subsequently claimed could open the door to espionage or even sabotage. Landbridge's close links to China's Belt and Road programme did little to assuage American concerns that the company had close links to the Chinese state and was dependent on its financial backing. In the end the diplomatic controversy blew over, despite the Canberra government's caution regarding Chinese investment, in large part because of strong local political support for the deal, and the belief in the Northern Territories that they had rigorously done their due diligence on Landbridge and its owners.

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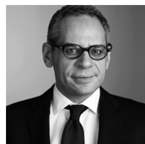

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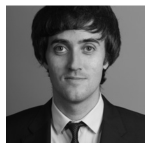

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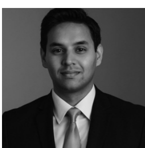

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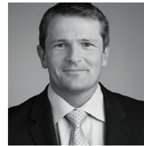

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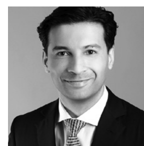

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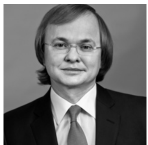

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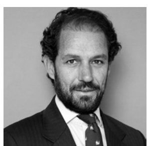

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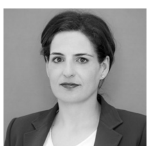

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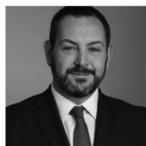

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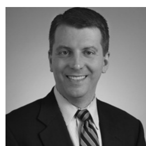

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