

# Raising the Bar: Global Expansion of Foreign Investment Controls

26 April 2018

Developments over recent months demonstrate that leading regulatory regimes around the world are increasingly calling upon and actively bolstering their foreign investment controls. For many transactions, this will have profound implications on deal evaluation, planning and timetable.

### CFIUS regime

In March 2018 President Trump blocked Broadcom's hostile takeover of Qualcomm in the US, only the fifth time that the US foreign investment process under CFIUS has resulted in an outright Presidential prohibition of a transaction. As in each of the previous four cases, a perceived threat from China is thought to have factored heavily into the US analysis. It is thought that Broadcom's takeover could have threatened Qualcomm's primacy in chip-making, giving China's Huawei the opportunity to leap ahead in the race for the next generation of advanced chipset technologies.

The pre-emptive move by President Trump, before the deal had even signed, spooked Wall Street analysts and asks questions about the increasing uncertainty of investment into the US in sectors not only directly connected to national security, but also concerning strategically important technologies more generally. For such deals, the threat comes not just in the form of prohibition risk (or the more likely requirement for measures to mitigate CFIUS concerns), but also in the form of uncertainty around timetable, which can seriously impact on deal planning.

The standard CFIUS clearance timetable has been gradually increasing over recent years to a position in 2017 when over 70 per cent of covered transactions were referred to a second stage 45 day investigation following CFIUS' initial 30 day review. That is on top of what has become an increasingly long pre-filing period of informal CFIUS review and a system in which applicants can be encouraged to withdraw and re-file their notice in order to give CFIUS sufficient time to reach a robust decision.

### Implications for deal planning

The importance of foreign investment controls to deal timetables can be accentuated in circumstances where other regulatory approvals, such as competition approvals, are less likely to be an issue or where the relevant timeframes are shorter. For example, under Melrose's recent hostile bid for GKN in the UK, given minimal overlaps between the companies' existing businesses, competition filings largely consisted of short-form technical filings, which generally received quick approvals.

In the Melrose/GKN deal set-up, without long-horizon merger control clearances, the CFIUS timetable became the obvious regulatory clearance outlier. As the deal was not pre-conditional, there was significant focus on whether Melrose would be able to obtain CFIUS approval within the parameters permitted by the City Code timetable. GKN argued publicly that Melrose would not be able to receive

# SLAUGHTER AND MAY

CFIUS clearance within the timetable. Before the end of the offer period, Melrose did indeed waive the CFIUS condition to its offer to allow it to close.

The implication of hold-up under CFIUS in a deal like Melrose/GKN is that, without an extension, the City Code timetable is very tight. A conditional purchaser might find itself having to waive CFIUS as a condition to its offer, closing over and taking a leap into the dark as to the potential mitigation measures that CFIUS might impose on the deal.

The CFIUS process may be the starkest recent example of the potential pitfalls of foreign investment policy, but the US is by no means the only jurisdiction to be focusing more on foreign investment controls. Companies contemplating cross-border M&A should also take note of developments elsewhere, particularly in the UK and EU.

## Regulatory position in the UK

The UK Government recently announced that it is expanding the scope of its existing jurisdiction to review, block or impose conditions to transactions involving a change in material influence or control over certain enterprises on national security grounds (see [Client Briefing](#)). This will cover foreign investment (which seems the most likely application), as well as more generally the acquisition by any purchaser of targets with national security dimensions in the military and dual-use, computing hardware, and quantum technology sectors in the UK.

In addition to these changes, the UK Government has proposed options for more extensive and long-term reform of the system. This will potentially expand the existing call-in power to capture any acquisition of a UK business entity by any investor which the Government reasonably believes raises national security concerns. It could also establish a mandatory notification regime applicable to foreign investment into the provision of essential functions in certain parts of key sectors of the economy (see [Client Briefing](#)).

Even when not actually using its powers of intervention, the UK Government has been known to voice concern over takeovers. Again, in relation to the Melrose/GKN deal in March 2018, the UK Government displayed in the last few days of the formal offer period that it is willing to take an interventionist stance in mergers touching on national security.

The Business Secretary sent Melrose an eleventh-hour letter, referencing powers of intervention under the Enterprise Act 2002, to leverage commitments to address broader stakeholder interests beyond national security. In April 2018, after the deal had gone wholly unconditional, the Business Secretary subsequently informed Parliament that on the basis of the commitments given, statutory intervention on the grounds of national security would not be reasonable and proportionate.

## Developments in Germany and France

Elsewhere in Europe, in both Germany and France, public interest issues have become increasingly prominent political topics in M&A. In 2017 the German government retracted its initial approval of, and ultimately blocked, a Chinese fund's takeover of chip equipment maker Aixtron. It then subsequently amended the German Foreign Trade Regulation to allow investigations regarding the acquisition of over 25 per cent of a domestic company by a non-EU/EFTA company if the acquisition could lead to risks to public order or security.

# SLAUGHTER AND MAY

Similarly, in France, the government is currently planning to expand the coverage of its foreign investment regime to cover Artificial Intelligence and other sections of the digital economy. This comes on the back of sweeping changes made in 2014 (at the time of General Electric's purchase of Alstom's energy business). Those changes expanded the French government's review powers beyond just companies with links to national security to also cover companies active in the fields of energy supply, water, transport, telecoms and public health.

## Plans in the EU

In the EU recent plans highlight the changing sentiment towards an increasingly defensive stance, particularly when it comes to the protection of key projects or foreign access to cutting-edge technologies. As in the US, Chinese investment into the EU was specifically identified in a 2017 European Parliament [briefing paper](#) as a primary factor underpinning the need to strengthen existing investment controls at the national level. The EU plan that has emerged is for a new regulation to enable the EU and its Member States to preserve essential interests through:

- a consistent framework for factors to be taken into consideration when Member States screen foreign direct investments on grounds of security or public order;
- a cooperation mechanism between Member States and the European Commission; and
- European Commission screening on grounds of security or public order for cases in which foreign direct investment in Member States may affect projects or programmes of EU interest, e.g. research, space, transport, energy and telecommunications.

Recent changes proposed by the European Parliament in March 2018 would compel the Commission to review cases raising security interests, rather than merely providing the basis for a voluntary review. In addition, Member State governments would be compelled to take action to impose conditions or block a deal where the Commission and a third of other Member States had raised concerns.

## Conclusion

Advocates of the new measures in the EU, UK, Germany and France have expressed satisfaction at the promotion of transparency and predictability for investors and national governments alike. It is, however, far from clear whether this will become a reality or, instead, whether expanded foreign investment controls will prove an increasingly prominent obstacle in international M&A transactions.

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