WHITE & CASE

National security reviews 2017: A global perspective

A guide to navigating the rules for investing in countries that require national security approval

Navigating national security reviews worldwide

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As national security reviews of foreign direct investment (FDI) grow into a global phenomenon, understanding the rules and pitfalls of the applicable FDI regimes is quickly becoming ever more critical in cross-border transactions

Governments worldwide are focusing greater scrutiny on inbound FDI into their countries. In particular, an increasing number of cross-border transactions are getting caught in the net of national security reviews that are being either strengthened or newly established across the globe.

In 2017, there were calls and steps taken worldwide to broaden this scrutiny. In the United States, a set of bills were introduced in the US Congress that propose to expand the scope and reach of the Committee on Foreign Investment in the United States (CFIUS). In Australia, the Critical Infrastructure Centre was established to address the Australian government's concerns about investors with access to and control of Australian critical infrastructure. And in Germany, the scope of sector-specific reviews was extended to key defense technologies. China's new Cybersecurity Law went into effect, providing additional national security review and standards for companies engaged in or seeking to engage in network and data operations in China.

Because it is critical for cross-border investors to know in detail each country's current requirements, we have updated the report on national security reviews we published last year, which covered the United States, France, Germany, the Russian Federation, Australia and China, and added new chapters on Canada, the European Union, Finland, Italy, the United Kingdom and Japan to reflect the widespread changes occurring worldwide.

Contents

United States

Deals are generally approved, but reviews are often taking longer and transactions are being scrutinized rigorously

By Farhad Jalinous, Karalyn Mildorf, Keith Schomig

The Committee on Foreign Investment in the United States (CFIUS), which is led by the US Department of the Treasury and made up of US national security and economic agencies, including Defense, State, Justice, Commerce, Energy and Homeland Security, reviews acquisitions of, and investments in, US businesses by foreign persons or businesses.

WHO FILES

The parties to the transaction file a joint voluntary notice that addresses specific information about the investor, the US business and the transaction, and includes attachments such as annual reports, the deal document and information about the target's US government contracts (if any). A CFIUS review is ostensibly a voluntary process, but in some cases it is effectively mandatory, e.g., acquisitions of cleared defense contractors or assets likely to qualify as critical infrastructure.

CFIUS actively looks for transactions of interest that were not notified and will "invite" parties to submit a filing regarding transactions it would like to review. In recent years, CFIUS has reviewed transactions in a wide array of industries.

TYPES OF DEALS REVIEWED

CFIUS has jurisdiction to review any transaction that could result in control of a US business by a foreign person. "Control" is defined—and interpreted by CFIUS—broadly and can include many minority investments. The types of transactions that CFIUS can review are quite varied, including deals structured as stock or asset purchases, debt-to-equity conversions, foreign-foreign transactions where the target has US assets, private equity investments (in some cases even from US-based companies) and joint ventures where the foreign partner is investing in an acquired or contributed US business.

The CFIUS statute does not specify what types of industries are relevant to national security. This has given CFIUS substantial leeway to review transactions covering a wide variety of areas, including semiconductors and other technology areas, identity authentication, biometrics, information technology, energy, telecommunications, food safety, financial services, real estate, cybersecurity and healthcare, as well as industries with a more direct link to national security such as aerospace and defense. External issues unrelated to the structure of the transaction, such as the US business's location in close proximity to sensitive US government assets, can also pose substantial national security concerns.

Accordingly, it is important to consider CFIUS issues in connection with any transaction involving foreign investment (direct or indirect) in a US business with a potential link to national security.

SCOPE OF THE REVIEW

The CFIUS review process is designed to assess the risk profile of the deal from a US national security perspective. It analyzes the threat posed by the foreign buyer, the vulnerability exposed by the target, and the consequences exposed by the combination of the threat and vulnerability. Based on that risk

There has been rising sensitivity to China-based transactions, which have continued to increase under President Trump's administration.

profile, CFIUS decides if the deal can proceed (with or without mitigation) or whether it needs to be stopped. Often the analysis is done based on the filing as well as follow-up Q&A. In some cases, the parties will also meet with CFIUS either per the parties' or CFIUS's request.

TRENDS IN THE REVIEW PROCESS

In recent years, there has been a significant broadening of the foreign investor base represented in CFIUS reviews, with greater activity from emerging markets, such as China, Japan, India and the Middle East. As a result, the risk factors CFIUS considers in its national security analysis have changed to reflect a broader pool of investors.

Most notably, there has been rising sensitivity to China-based transactions, which have continued to increase under President Trump's administration. In general, the CFIUS process for Chinese deals has become more complex and is taking longer. Despite the focus on China, even sensitive transactions involving investments from traditional allies can raise security concerns and take longer than anticipated.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

It is critical for foreign investors to consider CFIUS issues in planning and negotiating transactions, including with respect to allocation of CFIUS-related risk. The range of mitigation requirements that can be imposed is quite wide (based on the risk profile of the deal), and it is important for buyers in particular to have as clear an understanding as possible with respect to what mitigation requirements would be acceptable to them. As a buyer, you do not want to buy an asset and have CFIUS-imposed mitigation prevent you from achieving your objectives for the deal. It is also advisable for investors in potentially sensitive transactions to try to avoid owing reverse breakup fees should the transaction fail due to CFIUS objections.

REVIEW PROCESS TIMELINE

Typically, the process takes at least two to three months from the time the parties submit the joint voluntary notice and its attachments to CFIUS in draft (called a pre-filing) to completion. Concurrent with a recent surge in CFIUS reviews—2017 is on pace to well exceed the previous modern-era record for CFIUS cases in a year—the CFIUS process is often taking longer, sometimes significantly so. CFIUS typically takes about two to three weeks to review and comment on the pre-filing, though in some cases this process can take a month or longer. Thereafter, once the parties incorporate CFIUS's comments and formally file, CFIUS typically takes a few days to a week to accept the filing and start a 30 calendar-day review process. At the end of the 30 calendar days, the review is either completed or is taken to the investigation phase (which happens in nearly half of all filed cases annually). Investigation can take up to 45 calendar days. Thereafter, most reviews are completed. On rare occasions, contentious deals are taken to the President for a decision, who has 15 days to decide. Sometimes, most often when CFIUS needs more time to assess a sensitive transaction or parties are still negotiating mitigation terms with CFIUS, CFIUS may encourage the parties to withdraw and resubmit the notice to restart the 30-day clock. In the past year, more transactions have been withdrawn and resubmitted for a second review cycle.

2017 UPDATE HIGHLIGHTS

- The number of CFIUS reviews continues to rise. It is important to incorporate extra time for CFIUS review into deal-planning timelines
- Chinese deals, particularly those involving sensitive or state-of-the-art technologies, continue to come under significant scrutiny. Not only Chinese deals are sensitive, however—German-based Infineon abandoned its proposed acquisition of Cree's Wolfspeed business following CFIUS objections. Thus, it is critical to consider potential CFIUS concerns in all cases
- Senator John Cornyn, the second-ranking Republican in the Senate, has indicated that his bill will seek to modernize the CFIUS process to better handle emerging threats (e.g., from adversarial countries and those involving particularly sensitive technologies)
- In October 2017, US Senators Chuck Grassley and Sherrod Brown introduced a bill that would allow the US Department of Commerce to review and potentially block certain transactions based on the transaction's economic impact on the United States

OUTCOMES

- Most deals are approved
- Where CFIUS has national security concerns, it can impose mitigation conditions that can have significant implications on the foreign investor's involvement with the US business
- A relatively small but nevertheless notable number of deals are abandoned while going through the process
- Only the US President can formally stop a deal, which has happened four times in the history of CFIUS—twice in the past year alone. More typically in cases where CFIUS determines there are unresolvable national security concerns, CFIUS will suggest that parties abandon a deal or it will recommend a presidential block, at which point parties usually agree to withdraw from the transaction

Canada

While few deals are challenged in Canada, national security reviews are becoming more common and complex

By Oliver Borgers*

The Investment Review Division (IRD), which is part of the Ministry of Innovation, Science and Economic Development Canada (ISED), is the government department responsible for the administration of the Investment Canada Act (ICA), which is the statute that regulates investments in Canadian businesses by non-Canadians.

The IRD interfaces with investors and other parties as part of a preliminary (informal) review of an investment to determine if there are potential national security concerns. Where concerns arise, the IRD will work with the Minister of ISED, in consultation with the Minister of Public Safety and Emergency Preparedness, who will refer such investments to the Cabinet (the Canadian Prime Minister and his appointed Ministers, formally known as the Governor in Council), who may order a formal review if the investment could be injurious to Canada's national security. The national security review process is supported by Public Safety Canada, Canada's security and intelligence agencies and other investigative bodies described in the *National Security Review of Investments Regulations*.

WHO FILES

The ICA not only regulates national security, but, if there is a change of control and the relevant financial threshold under the ICA is exceeded, it also provides for a process of pre-merger review and approval of foreign investments to determine if they are of "net benefit" to Canada.

The entry point for national security review screening will usually be the obligatory filing under the ICA (either an application for review if the financial threshold is exceeded, or an administrative notification form if the threshold is not exceeded). The government also has the power to subject minority investments to a national security review, although there have been no instances of that to date.

If the financial threshold is exceeded, the investor must file an application for review and the transaction must be approved by the relevant minister. A key element in the application for review is the requirement to set out the investor's plans for the Canadian business, including plans related to employment, participation of Canadians in the business and capital investment. An application for review is a much more detailed document than a notification.

> **Investors subject to Canadian national security reviews have included American companies, as well as investors from emerging markets.**

If the financial threshold is not exceeded, the investor has an obligation only to file an administrative notification form, which can be filed up to 30 days after closing.

In either case (filing of an application for review or just a notification), the Canadian government has the jurisdiction (for 45 days after receipt of such a filing) to order a national security review if there are concerns.

TYPES OF DEALS REVIEWED

It is important to keep in mind that the Canadian government has the power to review any transaction (including minority investments) where there are "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security." Unlike the "net benefit" review process under the ICA, there is no financial threshold for investments under the ICA's national security review regime.

Further widening the potential scope of the national security review regime is the fact that there is no statutory definition of "injurious to national security." This lack of definition creates wide discretion for the Minister and some uncertainty for foreign investors.

The types of transactions that have been the subject of formal review under the national security lens include those relating to satellite technology, telecommunications, fiber-laser technology, as well as where a non-Canadian investor proposed to build a factory located in close

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proximity to Canadian Space Agency facilities. Investors subject to Canadian national security reviews have included American companies, as well as investors from emerging markets.

SCOPE OF THE REVIEW

The Canadian government recently issued guidelines that shed some light on the circumstances that may draw investors and parties involved in the investment into the realm of a national security review. A national security review will focus on the nature of the business to be acquired and the parties involved in the transaction (including the potential for third-party influence). In assessing whether an investment poses a national security risk, the Canadian government has indicated that it will consider factors that focus on the potential effects of the investment on defense, technology and critical infrastructure and supply.

Review can occur before or after closing. Transactions that run the risk of raising national security concerns are encouraged to seek clearance by making any ICA filings well before the proposed time of closing (at least 45 days). The Canadian government may deny the investment, ask for undertakings, and/or provide terms or conditions for the investment (similar to mitigation requirements in the United States), or, where the investment has already been made, require divestment.

TRENDS IN THE REVIEW PROCESS

The Canadian government has been steadily increasing its focus on national security (including rejecting mergers due to national security concerns). However, recent events appear to signal an increased willingness to encourage foreign investment, including the recent issuance of guidelines intended to increase the transparency of national security reviews and the setting aside of the prior Federal government's decision requiring a foreign investor to divest its investment in a Canadian business due to national security concerns.

In late 2016, in an unusual move, the new Liberal government consented to setting aside an order made under the previous Conservative government that required O-Net Communications (a high-technology company listed on the Hong Kong Stock Exchange) to divest its investment in ITF Technologies (a specialty fiber components and modules provider in Quebec) on the basis that the investment would be injurious to national security. Under a fresh national security review, the Liberal government reversed the prior government's decision and approved O-Net's acquisition of ITF Technologies. This development

OUTCOMES

- Formal national security reviews have been ordered by the Cabinet eight times (since the national security review process was introduced in March 2009 to March 2016)
- Many more transactions have been the subject of informal national security review by the IRD, most often resulting in successful pre-clearance. Only a small fraction of the thousands of notifications and applications for review filed with the IRD have attracted national security scrutiny
- The outcomes of the eight instances where formal national security reviews were ordered include: the investor was directed to not implement the proposed investment (three cases), the investor was ordered to divest control of the Canadian business (two cases), the investment was authorized with conditions that mitigated the identified national security risks (two cases) and, in one case, the investor withdrew its application prior to a final order being made

appears consistent with the Liberal government's foreign policy objective to deepen trade relations with China. Time will tell whether this move by the government is a sign of an overall policy shift or a unique case.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Where a transaction gives rise to national security risks, non-Canadian investors should consider filing notice of the transaction with the Minister at least 45 days prior to closing to obtain pre-clearance (assuming the Minister does not order a full national security review). For an investment that does not require notification (i.e., minority investments), the Canadian government encourages non-Canadian investors to contact the Investment Review Division at the earliest stage of the development of their investment projects to discuss their investment.

As in other jurisdictions, it is therefore critical for foreign investors to consider Canadian national security review issues in planning and negotiating transactions. In particular, an investor should ensure that it secures a closing condition predicated on obtaining national security clearance in Canada where that is appropriate. It may also be appropriate for merging parties to allocate the national security risk.

REVIEW PROCESS TIMELINE

The process can take up to 200 days (or longer with the consent of the investor) from the date the initial notice of the transaction is sent to the Minister of ISED. The Minister has 45 days (which can be extended by up to an additional 45 days) after an application or notification under the ICA has been certified, or after the implementation of a minority investment that does not require notification, to refer an investment to the Governor in Council for an order for national security review. If an order is made, it can take 110 more days (or longer with the consent of the investor) for the review to be completed.

European Union

European investment screening "light"—first steps towards European investment controls

By Tobias Heinrich, Mark Powell and Orion Berg

Due to the significant increase of foreign direct investment into European technology assets over the past 18 months, particularly from the People's Republic of China (PRC), there has been an increased call for the EU to take a more active role in scrutinizing investments. As of today, 12 out of 28 Member States (Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and the United Kingdom) have national security review mechanisms in place, differing widely in scope and enforcement. However, there is no unified approach towards national security reviews within the EU.

This may change since Jean-Claude Juncker, President of the European Commission, presented the proposal of an EU Regulation establishing a framework for the review of foreign direct investments into the EU. The announcement was made on September 13, 2017 as part of Juncker's State of the Union address to the European Parliament. The proposed EU Regulation is expected to come into force towards the end of 2018 at the earliest, given that it has yet to complete the European legislative process.

PROPOSED SCOPE OF EU REGULATION

The proposed EU Regulation seeks to establish a general framework for Member States and the Commission for the review of foreign direct investments into the EU. However, the proposal does not introduce an obligation for Member States to establish or to maintain investment review mechanisms. Yet, should Member States decide to have investment reviews in place, they will have to be in compliance with the proposed EU Regulation.

The European approach to investment reviews will revolve around the criteria of "security and public order." While such terms stem from European law, they are only vaguely defined by the European Court of Justice. The proposed EU Regulation specifies the criteria by a non-exhaustive list of considerations to be taken into account when conducting a review. The list of relevant aspects include, inter alia:

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

The EU Regulation's scope of investment reviews reveals conceptual and technical similarities with the recent amendments of the German Foreign Trade and Payments Act (AWV) (see Germany chapter). Contrary to the rules recently amended in Germany, the proposed EU Regulation also takes into account whether the acquirer is "controlled by the government of a third party, including through significant funding." Hereby, the Commission responds to investments backed by state-owned enterprises and state-supported funding (normally from the PRC).

NEW ROLE OF THE EU COMMISSION

One of the most significant changes to the existing national review mechanisms throughout the EU is the envisaged role of the Commission. The EU Regulation provides for a cooperation mechanism between the Member States and the Commission by virtue of which the Commission shall—for the first time—be authorized to conduct investment reviews in a coordinating and supporting function. Accordingly, the Member States will be required to inform the Commission, as well as other Member States, of any foreign direct investment undergoing the national review process. As a matter of practice, this raises confidentiality concerns

The Commission's role in the review process is generally limited to an advisory responsibility, falling short of the competences of CFIUS.

for the parties of a transaction, in particular when considering pre-filings. The Commission may review the respective investment in its own right and issue its opinion to the relevant Member State. Other Member States may also deliver comments to the reviewing Member State, though neither the Commission's opinion nor other Member States' comments will be binding, thus, leaving the ultimate decision on the clearance of a transaction to the reviewing Member State.

Furthermore, the EU Regulation introduces annual reporting obligations on the part of the Member States with respect to national security reviews on the basis of the information available to them, irrespective of whether they have review mechanisms in place. This is intended to achieve transparency of national review proceedings through the EU, as most Member States do not provide publicly available information on the domestic review processes or the decisions taken by the relevant authorities.

Should the Commission qualify a transaction as likely to not only affect public order and security but also projects or programs with significant EU funding (e.g., Galileo, Copernicus, trans-European Networks, etc.), the relevant Member State must "take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed." Yet, even in this context, the ultimate decision remains with the Member State.

Therefore, the Commission's role in the review process is generally limited to an advisory responsibility, falling short of the competences of the Committee on Foreign Investment in the United States (CFIUS). Although the ultimate decision on the clearance of the transaction in the US lies with the US President, CFIUS controls the review process and may, for example, provide Q&As to the parties—a measure beyond the Commission's power, which is limited to addressing any issues it may have vis-à-vis the Member States.

PROCEDURAL IMPLICATIONS

The implications of the proposed EU Regulation for existing national review mechanisms are expected to be mostly of a procedural nature. Under the proposed regulation, Member States retain the ultimate decision-making power and remain free to not implement investment reviews at all. The Commission may have the authority to review transactions undergoing review, but its opinion is merely advisory. Given that Member States will be obligated to give the Commission's opinion and other Member States' comments due consideration, the time frames for national review procedures are likely to expand further.

This is further illustrated by the fact that under the proposed EU Regulation, Member States will have to inform the Commission and other Member States of the transaction undergoing review within five working days following initiation of the review process. Opinions and comments will then have to be submitted within another 25 working days. Should the Commission require additional information, it may request such information from the reviewing Member State and the 25-working-day period will start upon receipt of such information. Should another Member State issue comments before the Commission's opinion, it would trigger a restart of the 25-day-review period, which may significantly reduce predictability of transaction timetables.

OUTLOOK

The new role of the Commission and other Member States will add another layer of complexity to the review process—a testimony to increasing significance of security reviews in the field of international M&A. Annual reporting obligations will contribute to reducing the current lack of transparency of national investment reviews, and the cooperation mechanism should serve as an important step towards a unified approach to security reviews through the EU. It remains to be seen whether the current proposal is an interim or more definitive step in the course of harmonizing European investment controls.

Finland

Deals are generally not blocked in Finland

By Janko Lindros

The Finnish government views foreign ownership positively as a catalyst for increasing internationalization and competitiveness. Deals are only restricted when they meet very specific criteria. The objective of the Finnish Act on Monitoring Foreign Ownership (172/2012), also known as the "Monitoring Act," is to assess foreign investments for their potential impact on national interests. When it is deemed necessary to protect national defense and safeguard public order and security, the government may restrict the transfer of influence to foreigners, foreign organizations and foundations. The Monitoring Act has a special focus on defense industry companies, including dual-use companies.

FILING OBLIGATIONS AND CONSEQUENCES IN THE EVENT OF BREACH

Under the Monitoring Act, a "corporate acquisition" occurs when a foreign owner gains control of at least one tenth, one third or one half of the aggregate number of votes conferred by all shares in a Finnish company—or otherwise secures a holding that confers decision-making authority.

All corporate acquisitions concerning the defense and dual-use sectors require advance approval by Finnish authorities. Deals not related to defense may also be covered by the Monitoring Act if the company being acquired is considered critical for securing vital functions of society. In such cases, investors are not required to submit an application prior to completing a transaction—but in practice applications are always submitted prior to completion. The government intentionally does not define the phrase "enterprise considered critical for securing vital functions of society" because the definition evolves over time.

For the defense and dual-use sectors, monitoring covers all foreign owners. For enterprises considered critical for securing vital functions of society, monitoring only applies to foreign owners residing or domiciled outside the EU or the European Free Trade Association.

If the Monitoring Act is breached, the transaction can be declared null and void.

REVIEW PROCESS

The review process starts when an investor submits an application to the Ministry of Economic Affairs and Employment. There are no formal requirements for the layout of the application, but the ministry has published instructions for preparing one. It is critical that the application is made by the potential foreign owner, not a Finnish holding company already set up by the potential new owner. After receipt of the application, the Ministry of Economic Affairs and Employment asks for input from other branches of government.

If the Ministry of Economic Affairs and Employment finds that the transaction may endanger a key national interest, it transfers the matter to the government's plenary session for resolution. The government's plenary session then makes the decision about whether to restrict or approve the deal, depending on whether it believes the deal poses a threat to national interest.

However, if the Ministry of Economic Affairs and Employment considers that a transaction does not endanger a key national interest, it approves the transaction. The vast majority of transactions submitted to date have been approved by virtue of this rule.

All applications are urgently processed by the Ministry of Economic Affairs and Employment. The Monitoring Act states that a transaction is deemed to have been approved if the Ministry of Economic Affairs and Employment does not make a decision on an in-depth review within six weeks, or if the application has not been transferred to the Government's plenary session within three months dating from the day when all necessary materials were received. In practice, the process with the Ministry of Economic Affairs and Employment usually takes six to eight weeks.

The Finnish government views foreign ownership positively as a catalyst for increasing internationalization and competitiveness.

France

Following the Montebourg Decree in 2014, the scope of activities covered by national security reviews has been significantly extended to several key industries

By Nathalie Nègre-Eveillard and Orion Berg

The Bureau Multicom 2, which is located within the Ministry of Economy's (MoE) Treasury Department, conducts the review. The process generally involves other relevant ministries and administrations depending on the areas at stake. Since January 2016, a commissioner of strategic information and economic security (attached to the MoE) also assists the Treasury when coordinating inter-ministerial consultations.

WHO FILES

The foreign investor files a mandatory request for prior authorization, which must include detailed information on the investor and its shareholders, the target, the pre- and post-closing structures, financial terms of the transaction and the sensitive activities at stake.

TYPES OF DEALS REVIEWED

Transactions reviewed under the French Monetary and Financial Code (MFC) include:

- Direct or indirect acquisition by a foreign investor of an undertaking whose registered office is established in France
- Direct or indirect acquisition by a foreign investor of all or part of a branch of activity of an undertaking whose registered office is established in France
- For non-EU investors only, acquisition of more than 33.33 percent in the capital or voting rights of an undertaking whose registered office is established in France

French law does not provide for any materiality threshold—even transactions of modest size can be captured for review.

The review only applies to foreign investments made in sensitive activities listed in the code. For EU-based investors, these activities include defense and security-related activities and dual-use technologies. For non-EU investors, additional activities are captured (e.g., gambling).

The activities reviewed under the MFC were expanded pursuant to a decree issued in May 2014 (the Montebourg Decree), which applies to both EU and non-EU investors. The Montebourg Decree significantly extended the scope of reviewable activities to "activities relating to equipment, products or services, including those relating to safety and the proper functioning of facilities and equipment, essential to guarantee the French national interests in terms of public policy, public security or national defense" in the following sectors: electricity, gas, oil or other source of energy; water supply; transportation networks and services; electronic communication networks and services; an installation, facility or structure of vital importance; and protection of the public health.

French law does not provide for any materiality threshold—even transactions of modest size can be captured for review.

SCOPE OF THE REVIEW

MoE assesses whether the transaction may jeopardize public order, public safety or national security based on the information the investor provided in its submission. Follow-up Q&A and meetings with MoE and other ministries involved are customary. The seller may also be requested to cooperate with the review.

TRENDS IN THE REVIEW PROCESS

Following the Montebourg Decree, the scope of covered activities has been significantly extended to several key industries, including the manufacturing of sensitive information technologies, related products or network industries. Any transaction involving the foreign acquisition of a French business in one of the specified industries should be carefully screened to assess if prior authorization is required. Involvement of other interested ministries in the process has also become customary.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

It is critical for foreign investors to anticipate foreign investment control issues ahead of planning and negotiating transactions. The responsibility for filing lies

primarily on the buyer and, if the transaction falls under MFC regulation, prior clearance by MoE should be a condition of the deal. The buyer may also seek a ruling from MoE to confirm whether a contemplated transaction falls within the scope of the MFC.

The seller's cooperation in the preparation and review of the filing is important. If the parties expect that conditions or undertakings will be imposed, the buyer should anticipate discussions with MoE and other interested ministries that may impact the timeline for clearance. In addition, the buyer should consider including a break-up fee or opt-out clause in the transaction documentation to protect its interests if the conditions imposed on the transaction are too burdensome. Preliminary informal contacts with French authorities may also be advisable.

REVIEW PROCESS TIMELINE

MoE must make its decision within two months of its receipt of a complete authorization request. Longer periods (e.g., three or four months) should be anticipated if MoE requests supplemental information and considers imposing conditions to clear the case.

2017 UPDATE HIGHLIGHTS

On October 31, 2017, the French National Assembly created a Parliamentary Enquiry Committee on French industrial policy. The Committee will investigate decisions by the French State regarding recent cross-border acquisitions involving French companies and will issue recommendations on "the available means to protect French industrial flagships in the context of a globalized economy". The Committee is likely to start its investigation in late November 2017, and could issue its findings after a six-month period. Parliamentary Committees have investigative powers such as the power to summon for hearings.

OUTCOMES

Once the review is completed, the MoE may:

- Authorize the transaction without condition (rather rare)
- Authorize the transaction subject to mitigating conditions/undertakings aimed at ensuring that the transaction will not adversely affect public order, public safety or national security (most of the cases when the MoE decides to review the investment)
- Refuse to authorize the transaction if adverse effects cannot be remedied (very rare)

Mitigating conditions/undertakings may pertain to the investor's preservation of the continuity of the target's activities and the security of its supply of products or services (for example, maintaining existing contracts with public entities, maintaining R&D capabilities and production in France). They may also include corporate requirements such as ensuring that sensitive activities are carried out by a French legal entity, and/or imposing information-access/governance requirements involving French authorities.

MoE review is a mandatory process. If a transaction subject to review is closed without MoE's prior approval, MoE may order the investor(s) not to proceed with the transaction, to amend the terms of the transaction or to unwind the transaction at their own expense, (potentially imposing a financial penalty of up to twice the amount of the original investment). Moreover, contractual agreements in breach of the mandatory process are deemed null and void. Violation of foreign investment rules may also give rise to criminal sanctions of up to five years of imprisonment and a fine of up to twice the amount of the investment.

Germany

Stricter regime for reviews of inbound transactions applied by the Federal Ministry for Economic Affairs and Energy

By Tobias Heinrich and Cristoph Arhold

Following a surge in political initiatives for stronger investment control at the German and European level, the German Federal Government recently amended the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung—AWV), which entered into force on July 18, 2017 pursuant to the Foreign Trade and Payments Act (Außenwirtschaftsgesetz—AWG) together with the AWV, the Federal Ministry of Economic Affairs and Energy (the Ministry) is entitled to review inbound transactions by foreign investors based outside the European Union (EU) or the European Free Trade Association (EFTA). The Ministry may prohibit or restrict a transaction if it poses a threat to the German "public order or security" (öffentliche Ordnung oder Sicherheit) of the Federal Republic of Germany.

AMENDMENTS

While the German government remains committed to the liberal investment climate, the recent amendments to the AWV brought about significant changes in the landscape of German investment control reviews.

The AWV distinguishes between a cross-sectoral review for all industries and a sector-specific review that applies only with respect to particularly sensitive industries, the scope of which has now been extended from arms and military equipment as well as encryption technologies to other key defense technologies such as reconnaissance, sensor and protection technologies.

More substantial changes have been made with respect to the cross-sectoral review, namely by expanding the previously applied criterion of "public order or security" to a non-exhaustive list of criteria to be taken into account when determining a threat. The list focuses around "critical infrastructures" in specific industries, such as energy, information technology and telecommunications, transport, health, water, etc. Furthermore, as a response to international transactions becoming increasingly complex and sensitive, the review periods were extended significantly. This leaves the Ministry with considerably more time to perform its review process, having a significant impact on the overall transaction timetables. In addition, the mandatory notification, which was previously only required for sector-specific reviews, will now also expand to the cross-sectoral review.

WHO FILES

The completion of the investment review process is by law not required for the consummation of a transaction. However, foreign investors often decide to initiate the review process by submitting an application to the Ministry for a non-objection certificate (Unbedenklichkeitsbescheinigung) in order to obtain legal certainty. Depending on the transaction at hand, the parties may also be subject to a general notification obligation. Prior to the amendments to the AWV, the obligation to notify the Ministry of a transaction was limited to the sector-specific review but now also extends to the cross-sectoral review if the transaction fulfills the above-mentioned criteria and is, therefore, likely to pose a threat to the public order or security. Upon notification, the Ministry has three months to decide whether to open formal investigations.

> **Recent acquisitions have shown that the Ministry has become more sensitive about acquisitions by non-EU/EFTA investors, especially in the technology sector.**

TYPES OF DEALS REVIEWED

The Ministry is entitled to review all acquisitions of German companies by non-EU-based investors (whether by way of asset and share deal) or acquisitions of a direct or indirect stake in the company should the direct or indirect share of the acquirer's voting rights reach 25 percent. The calculation of voting rights must take into account any agreement on the joint exercise of voting rights. The Ministry is also entitled to review transactions involving an EU-based or EFTA-based investor (Iceland, Liechtenstein, Norway and Switzerland) in which non-EU-based investors hold (directly or indirectly) at least 25 percent of the voting rights, if there are indications of circumvention of foreign investment control (e.g., if the EU-based acquirer is a mere acquisition vehicle without any

entrepreneurial activities). In contrast to this sector-specific review, the general review process only applies to non-EU/EFTA-based investors.

SCOPE OF THE REVIEW

Intervention measures by the Ministry require a threat to public order or security. As mentioned above, the AWV as amended, non-exhaustively stipulates that the acquisition of shares or assets in the following may endanger public order or security:

- Operators of critical infrastructure that is of particular importance for the functioning of the community
- Companies developing or changing industry-specific software for the operation of critical infrastructure
- Companies entrusted with organizational monitoring measures for telecommunication facilities
- Companies providing cloud computing services above a certain volume
- Companies engaged in the area of telematics infrastructure

TRENDS IN THE REVIEW PROCESS

Although the foreign investment review process is not publicly accessible, recent acquisitions have shown that the Ministry has become more sensitive about acquisitions by non-EU/-EFTA investors, especially in the technology sector, which is supported by the criteria mentioned above. The current market climate, in that regard, is characterized by the Ministry's increasing awareness and persistent efforts towards enhanced scrutiny.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Parties to M&A transactions—whether public or private—should carefully consider the risk of foreign investment control procedures as typically being part of the due diligence process. If AWG/AWV rules apply, it may be appropriate that the acquirer initiates discussions with the Ministry even before the signing of an SPA, or, in case of a public deal, the announcement of the transaction. Depending on the timing and the type of offer, the purchase agreement or the public takeover offer and a related business combination agreement will contain corresponding condition precedents and covenants.

In sensitive sector transactions, foreign investments meeting the above-mentioned thresholds must be communicated to the Ministry and should not be closed before the acquisition is approved or deemed to be approved by the Ministry. Any Ministry decision may be challenged before a German court.

REVIEW PROCESS TIMELINE

The review process is typically initiated by the parties applying for a non-objection certificate. Due to the recent amendments, the Ministry has now two months (instead of one) to decide whether to issue such certificate or open the formal review procedure. Upon expiration of this period, the non-objection certificate is deemed to have been issued.

The period available to conduct the formal review has been extended from two to four months. The period starts upon the receipt of all necessary documentation. Also introduced by the recent amendments to the AWV is the suspension of the period for as long as negotiations on mitigation measures are conducted between the Ministry and the parties involved. In order to safeguard public order or security, the Ministry may prohibit the transaction or issue "instructions" (taking the form of mitigation measures). Except for acquisitions in sensitive industry sectors, such interventions require the approval by the German Federal Government.

2017 UPDATE HIGHLIGHTS

- The scope of sector-specific reviews was extended to key defense technologies such as reconnaissance, sensor and protection technologies
- With cross-sectoral reviews, the previously applied criterion of "public order or security" was extended to a non-exhaustive list of criteria to be taken into account when determining a threat
- The Ministry now has two months (instead of one) to decide whether to issue a non-objection certificate or open the formal review procedure. Also, the period available to conduct the formal review was extended from two to four months. In addition, that period is now suspended for as long as negotiations on mitigation measures are conducted between the Ministry and the parties involved

OUTCOMES

- For many years, there were factually no prohibitions of foreign investments in Germany reported
- While the changing mood has become obvious on a number of recent transactions, the threshold in the current legislative environment still remains high, requiring an actual and sufficiently serious danger for public order or security
- The amendments to the German foreign investment review process introduce a stricter security regime and extend the review periods with considerable implications for the transaction timelines

Italy

Deals are generally not blocked by the Italian government. However, in connection with the clearance process, conditions may be imposed that can have a significant impact on the investment

By Ferigo Foscari and Leonardo Graffi

The Italian government, which is led by the President of the Chamber of Ministries, together with any relevant ministry (such as the Defense Ministry, the Ministry of Transport, the Ministry of Communications, etc.), reviews acquisitions of stakes in Italian companies that carry out "strategic activities" in the defense and national security sector and that hold "assets with strategic relevance" in the energy, transport, communication and high-tech sectors.

Italian law provisions on the so-called "golden power" procedure were adopted in March 2012 and were recently amended by a law decree adopted in October 2017 (the Golden Power Law). The amendment provides for new measures to fill in some gaps identified in the application of the existing legislation, as well as to strengthen the existing law, to protect Italian companies' technology and technical, industrial and commercial know-how.

FILING OBLIGATION AND CONSEQUENCES IN THE EVENT OF BREACH

The filing is mandatory and the notification shall be made by the company or by the seller/purchaser, respectively, in relation to (i) any relevant resolutions adopted by a company, and (ii) any acquisition of interests in a target company by a foreign investor, to the extent that the company exercises any strategic activity in the defense and national security sector or holds any strategic asset in the energy, transport, communication and high-tech sectors. Moreover, any purchaser of equity interests in a listed company active in the defense and national security sector must notify the acquisition if it exceeds the threshold of 2, 3, 5, 10, 20 and 25 percent of the share capital of the listed target company.

The breach of the notification obligation can lead the interested party to be held liable for a general monetary sanction equal to an amount up to twice the value of the transaction and, in any case, not less than 1 percent of the turnover realized by the companies involved in the transaction.

TYPES OF DEALS REVIEWED

The Italian national rules specify the industries and sectors having a national interest and the need to be protected from predatory acquisitions by foreign investors. In particular, the Italian government has jurisdiction to review any transaction which (i) in the defense and national security sectors may harm or constitute a material threat to the Italian government's essential interests in the defense and national security of Italy; and (ii) in the energy, transportation, communication and high-tech sectors may harm or constitute a material threat to the fundamental interests of Italy relating to the security and operation of networks and systems, to the continuity of supplies and to the preservation of high-tech know-how. In this context, the types of transactions that the Italian government can review are various in nature and include deals structured as stock or asset purchases,

Since the adoption of the Golden Power Law, the Italian government exercised its special powers only in relation to seven golden power procedures, out of more than 40 known filings.

mergers, joint ventures where the foreign partner is investing in an Italian business, etc., as well as transactions or corporate actions, which may have the effect of changing the target company's ownership structure or purpose, or winding up the target company's business.

SCOPE OF THE REVIEW

Based on the publicly known golden power procedures completed since the adoption of the Italian Golden Power Law (i.e., from 2012 onwards), the Italian government mainly focused its attention on transactions leading to: (i) changes in governance and internal policies that could be capable of harming national interests; (ii) transfer of headquarters outside of the Italian territory and total or partial delocalization of the manufacturing activities; and (iii) transfer of know-how outside of Italy and for the benefit of foreign investors, mainly in relation to companies operating in the infrastructure (energy, transportation and TLCs) and high-tech sectors.

The Italian government enjoys broad power to impose restrictions (i.e., the power to veto the resolutions or impose special conditions); however, it appears that the main measures and special conditions that have so far been imposed by the Italian government have included: (i) control measures, in particular with reference to corporate governance and composition of the management bodies of the target companies; (ii) safety measures, such as the approval of safety contingency plans to monitor strategic assets and operations as well as the appointment of a chief safety officer approved by the Italian government; (iii) monitoring measures, such as the establishment of independent committees tasked with the duty to monitor the target's compliance with the above measures imposed by the Italian government; and (iv) other management, organizational and technical measures aimed at preserving the confidentiality of information and the technological know-how of the target.

TRENDS IN THE REVIEW PROCESS

On the basis of public documentation made available by the Italian Government, as well as of our direct experience in assisting companies with golden power procedures, since the adoption of the Golden Power Law, a number of golden power procedures have been activated and completed before the Italian government. Among these, it appears that the Italian government exercised its special powers only in relation to seven golden power procedures, out of more than 40 known filings, in relation to the sectors of defense and national security and transport.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors willing to enter into a transaction in relation to any Italian company operating in the defense or national security sector or holding assets in the energy, transport, communication and high-tech sectors, should evaluate the possibility that a golden power filing is required and should carry out the relevant analysis before entering into any transaction. Moreover, it is crucial for foreign investors to understand and consider the risk that, in the event that a transaction falls within the scope of the Golden Power Law, it may be possible that the Italian government will veto or impose certain measures or conditions to the completion of the transaction.

REVIEW PROCESS TIMELINE

The filing shall occur within 10 days after the acquisition or adoption of the relevant resolution, as applicable. Upon receipt of the filing, a standstill period of 15 days begins during which the Italian government carries out the review of the envisaged investment or resolution, and any voting right attached to the acquired interests are frozen until the date on which the Italian government decides whether or not to exercise its powers.

In the event that the Italian government requests additional information, the above 15-day term may be extended by the Italian government only once and for a maximum period of 10 additional days.

If the Italian government does not exercise its powers before the end of the standstill period (as possibly extended), the transaction or the resolution may be legitimately implemented, as the procedure can be considered completed through a no objection (*silenzio assenso*) of the Italian government after the relevant term has elapsed.

OUTCOMES

- The majority of – publicly known – notified deals have been approved (i.e., not objected to)
- Since the adoption of the Golden Power Law (2012), to date the Italian Government has exercised its powers only to apply specific measures or conditions to the transactions, and to our knowledge, not to veto the transactions
- The review process by the Italian Government can last up to a maximum of 25 business days from the filing
- The notification obligation applies only to acquisitions of stakes in Italian companies carrying out "strategic activities" in the defense and national security sector and that hold "assets with strategic relevance" in the energy, transport, communication and high-tech sectors

Russian Federation

2017 amendments to Russian foreign investments laws potentially require approval of any transaction by any foreign investor regarding any Russian company to ensure national defense and state security

By Igor Ostapets and Ksenia Tyunik

The Government Commission on Control Over Foreign Investments in the Russian Federation (the Government Commission), which was established by the Russian government in 2008, is responsible for reviews. The Government Commission is headed by the Chairman of the Russian government and composed of the heads of certain ministries and other government bodies.

Although the final decision on the application is made by the Government Commission, all the preparatory work (i.e., reviewing an application's completeness, liaising with relevant government bodies) is done by the Federal Antimonopoly Service (FAS). FAS, among other things, performs a preliminary review of the application and prepares materials for a further assessment by the Government Commission.

WHO FILES

An acquirer must file if the proposed acquisition would result in the acquirer's control over an entity exercising activities of "strategic importance" to Russian national defense and security (a Strategic Entity). The acquirer is required to obtain consent of the Government Commission prior to the acquisition of control over a Strategic Entity; otherwise, the respective transaction is void.

To apply for the consent, the acquirer must submit an application to FAS with attachments, which include, among other things, corporate charter documents of the acquirer and the target, information on their groups' structures (including the whole chain of control over both the acquirer and the target), transaction documents and a business plan for the development of the target post-closing.

TYPES OF DEALS REVIEWED

The Government Commission reviews transactions that result in acquisition of control over Strategic Entities. Foreign investors must also obtain the Government Commission's consent for certain transactions involving acquisition of a Strategic Entity's property.

The list of activities of "strategic importance" has recently been expanded and currently comprises 46 activities that, if engaged in by the target, cause the target to be considered a Strategic Entity. The 46 activities encompass, among others, areas related to natural resources, defense, media and monopolies. The activities include not only those directly related to the state defense and security (e.g., operations with nuclear materials, production of weapons and military machines), but also certain other indirectly related activities (e.g., TV and radio broadcasting over certain territories, extraction of water bioresources and publishing activities).

> **"In 2016, FAS received 54 applications from foreign investors, exceeding the number of applications reviewed in 2015 by 30 percent."**

The criteria for determining control are rather wide and are different for a target that is involved in the exploration of "subsoil blocks of federal importance" (e.g., oil fields with certain size of reserves, uranium mines, and subsoil blocks subject to exploration within a defense and security zone).

Foreign public investors (i.e., foreign investors controlled by foreign states or international organizations) are not permitted to obtain control over Strategic Entities or acquire more than 25 percent of a Strategic Entity's property and must obtain consent of the Government Commission for acquisitions of the reduced stakes in Strategic Entities. The special, stricter regime established for foreign public investors has recently been extended to "off-shore companies" (entities registered in jurisdictions from a list approved by the Ministry of Finance—the list includes the UAE, Jersey, Hong Kong, BVI and Bermuda).

Certain transactions in respect of Strategic Entities or their property are exempt from the necessity to obtain the Government Commission's approval (e.g., transactions in which the acquirer is ultimately controlled by the Russian Federation, constituent entities of the Russian Federation or a Russian citizen who is a Russian tax resident and does not have dual citizenship, as well as certain "intra-group" transactions).

Recent amendments to Russian's foreign investment laws gave the Chairman of the Government

Commission the right to decide that approval is required with respect to any transaction by any foreign investor with regard to any Russian company, if this is needed for the purpose of ensuring national defense and state security. Upon receipt of such a decision from the Government Commission, FAS will notify the foreign investor about the need to receive approval for a prospective transaction. Any transaction made in breach of this requirement is void. What transactions could potentially fall under the requirements of this amendment is yet to be determined in practice.

SCOPE OF THE REVIEW

Generally, a review assesses the transaction's impact on state defense and security.

FAS initially requests opinions of the Ministry of Defense and the Federal Security Service as to whether the transaction poses any threat to the Russian defense and security. Additionally, if the target has a license for dealing with information constituting state secrecy, FAS requests information from the Interagency Committee for the State Secrecy Protection on the existence of an international treaty allowing a foreign investor to access information constituting state secrecy.

Russian law does not provide for more details on the review's scope or the criteria on which the transaction is assessed.

TRENDS IN THE REVIEW PROCESS

In 2016, FAS received 54 applications from foreign investors, which exceeds the number of applications reviewed in 2015 by 30 percent. Most foreign investors came from the US, China, United Arab Emirates, Canada, Norway, Netherlands, India and Singapore.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

At the early stage of a transaction, a foreign investor should analyze whether the target company qualifies as a Strategic Entity and whether the planned transaction triggers the necessity of the Government Commission's consent. This will allow the investor to start filing preparations and then file its application as early as possible, thereby reducing the filing's impact on the timing of the transaction.

REVIEW PROCESS TIMELINE

The statutory period for reviewing the application is three months from the date of its acceptance for review. The Government Commission can extend the review period for an additional three months.

2017 UPDATE HIGHLIGHTS

- Russia's foreign investment laws were substantially amended in 2017
- The first package of amendments extended special regulation (and thresholds) established for foreign public investors to offshore companies and organizations under their control. An "offshore" company is one registered in one of the jurisdictions included in a list established by the Russian Ministry of Finance. This list includes such jurisdictions as the British Virgin Islands, Jersey, the UAE, Bermuda, Hong Kong, and the Isle of Mann, among others
- The most important change made in the second package of amendments was to introduce a new right of the Chairman of the Government Commission to decide that approval is required with respect to any transaction by any foreign investor with regard to any Russian company, if this is needed for the purpose of ensuring national defense and state security. Any transaction made in breach of this requirement is considered null and void. What transactions could potentially qualify for the above amendment and how this provision should technically work is yet to be determined in practice
- The definition of a "foreign investor" for the purposes of Russian foreign investment legislation now also includes Russian nationals who are also holding any other citizenship and companies controlled by foreign investors, including Russian companies
- Other amendments opened up the list of obligations that the Government Commission may impose on a foreign investor as a condition for approval (previously the list of obligations was exhaustive), expanded the list of what activities are considered "strategic" activities (the list now includes, among other things, operations of an electronic platform for state purchases), and tightened liability for a failure to provide a notification to FAS on acquisition of a minority stake in a Strategic Entity

OUTCOMES

Once the review is completed, the MoE may:

- Most transactions submitted to the Government Commission for review are approved. Such approval contains the term within which the respective acquisition needs to be completed
- The Government Commission can approve the transaction subject to certain obligations imposed on the foreign investor. Until recently, the list of such obligations was exhaustive and established by law. The new amendments allow the Government Commission to impose any type of obligation on the foreign investor. Those obligations may include the obligation to invest certain amounts of funds into activities of the Strategic Entity, or to process bioresources or natural resources extracted by the Strategic Entity on Russian territory
- The Government Commission can reject the application for approval of the acquisition

United Kingdom

National security interventions have, with one exception, involved defense considerations

By Marc Israel

Unlike many other jurisdictions, acquisitions in potentially sensitive industries do not, as a matter of course, require parties to seek approval from a regulator or the government in the UK. However, that may change following recent proposals by the UK government to "strengthen powers for scrutinizing the national security implications of particular types of investment." That would be a radical change from the current system in which the government may, through the Secretary of State for Business, Energy and Industrial Strategy (SoS), intervene in cases in certain circumstances, one of which relates to national security.

WHO FILES

As there are currently no specific requirements relating to deals that may raise potential national security issues, strictly speaking no person needs to file an application. Rather, if the UK government considers that a deal raises national security issues the SoS may issue an "intervention notice." The procedures for the SoS to issue an intervention notice, and—if considered appropriate–ultimately block a deal, are set out in the Enterprise Act 2002 (Enterprise Act). Under the government's recent proposals, one option under consideration is the introduction of a mandatory notification regime for foreign investment into "essential functions" in key parts of the economy—notably the civil nuclear, defense, energy, telecommunications, and transport sectors. However, the details are subject to consultation and there is a risk that, in a system where merger filings are voluntary, requiring mandatory notification for only certain types of investment will cause uncertainty and confusion.

Consultation on the proposals runs until early 2018, but it may be some time after that before the government digests the views received and decides on next steps. The comments below therefore focus on the current system, given that there can be no certainty over the scope and timing of any changes.

TYPES OF DEALS REVIEWED

The Enterprise Act allows the SoS to intervene when specified public interest considerations arise. In addition to national security, the other specified public interest considerations relate to media plurality, quality and standards, and the stability of the UK's financial system.

As far as national security is concerned, as with CFIUS, the legislation does not specify what types of industries are relevant to national security. The term can be interpreted broadly. Therefore, in addition to transactions in the defense field (in which intervention notices have been served), the government could intervene in a wide variety of sectors. These no doubt include energy, transport, water and information technology and could possibly also extend to the food supply chain and healthcare sectors, depending on the facts.

To date, national security intervention notices have, in all but one case, involved defense

As general concerns about cybersecurity and control of critical infrastructure networks become more commonplace, it would not be surprising to see more SoS interventions on national security grounds."

considerations. The Ministry of Defence has on several occasions raised concerns about the maintenance of strategic UK capabilities and the protection of classified information, including when the acquirers have been from the US or other NATO allies. In these cases, the deals have been approved following undertakings provided by the acquirer to address the concerns.

The non-defense case relating to national security in which the SoS intervened was very recent. In 2017, a China-based corporation sought to acquire a non-defense UK company that supplied equipment to UK emergency services. The Chinese acquirer provided undertakings assuring that information and technology was protected and ensuring the maintenance of UK capabilities in servicing and maintaining certain technological devices involved in the deal.

SCOPE OF THE REVIEW

When an intervention notice on national security grounds is issued, the Competition & Markets Authority (CMA)—the UK's main antitrust agency—must investigate and report to the SoS. The CMA will consult on the national security issues and its report will summarize any representations received on the matters specified in the SoS's intervention notice (and, where relevant, will also deal with any competition issues). The SoS will consider the CMA's report and decide whether the transaction should be subject to a more in-depth "Phase 2" review by the CMA, or whether to accept any undertakings the acquirer may have offered to address public interest concerns (or indeed—which has never happened to date—whether the public interest concerns are not warranted or do not require any remedial action).

If there is an in-depth review by the CMA, it is required to report whether the transaction operates or may be expected to operate against the public interest, and make recommendations as to the action the SoS or others should take to remedy any adverse effects. The SoS will make the final decision on the public interest issues and any remedial steps to address the public interest issues.

TRENDS IN THE REVIEW PROCESS

There have been few cases in which the SoS has invoked national security, but the recent 2017 acquisition noted above shows that the UK government is prepared to do so in non-defense cases. As general concerns about cybersecurity and control of critical infrastructure networks become more commonplace, it would not be surprising to see more SoS interventions on national security grounds.

In fact, although the current system is more than capable of dealing with such cases, there have been calls for the UK government to introduce a CFIUS-type regime to protect UK business following the acquisition or proposed acquisition of a number of British high-tech companies by foreign entities (e.g., the offer by Canyon-Bridge (China) for Imagination Technologies). That may be one of the reasons for the government's proposals to amend the regime for reviewing cases that may raise national security concerns—including lowering the financial thresholds for deals that may be reviewed.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Potential issues should be considered as early in the planning process as possible, and increasingly in any case—not just defense-related deals—that might be considered to touch on national security. State-owned acquirers, or those with material links to (or financing by) state-owned enterprises should be particularly well prepared, and consider what undertakings they might be prepared to give, if concerns are raised. To date, such undertakings have tended to relate to ensuring the protection of classified information and ensuring UK capabilities. Early engagement with the relevant government departments would also be sensible, especially if an auction process is likely, because the target will want to ensure that the acquirer is able to complete any proposed deal.

REVIEW PROCESS TIMELINE

The CMA typically reports to the SoS within four to six weeks of the intervention notice, with the SoS's decision following shortly thereafter. If the SoS decides the CMA should conduct a Phase 2 investigation, it will take up to a further 24 weeks (followed by the time for the SoS to reach a final decision).

OUTCOMES

- No deal has been blocked by the SoS on national security grounds.
- All national security cases to date have resulted in behavioral remedies (e.g. ring-fencing information and ensuring strict controls are in place) in lieu of a detailed Phase 2 investigation. No divestments have been required
- Intervention on national security grounds is no longer limited only to defense-related transactions
- The radical changes proposed by the Government to the rules for reviewing deals potentially affecting national security are likely to have a material impact on M&A in the future

Australia

Australia requires a wide variety of investments by foreign businesses to be reviewed and approved before completion

By John Tivey and Laura Baykara

The decision to approve or deny a foreign investment application is ultimately made by the Treasurer of Australia, based on an assessment of whether or not the investment would be contrary to the national interest.

When making its decision, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals and advises on the national interest implications.

Australia's foreign investment policy framework comprises the Foreign Acquisitions and Takeovers Act 1975 (the Act), the Act's related regulations, Australia's Foreign Investment Policy (the Policy) and a number of guidance notes.

WHO FILES

A foreign person or entity making an acquisition that requires approval under the Act must apply to FIRB for approval before completion of the acquisition, and the agreement to make the acquisition must be subject to receiving FIRB approval.

An application includes a filing fee that varies according to the type of deal and the deal value.

TYPES OF DEALS REVIEWED

Approval is required for a range of acquisitions by foreign persons, including:

A "substantial interest" in an Australian entity: An acquisition of an interest of 20 percent or more in an Australian entity valued at more than AUD 252 million (approximately US$200.5 million).

Australian land and land-rich entities: Various acquisitions of interests in Australian land are regulated with varying monetary thresholds, including in respect of residential land, vacant commercial land, developed commercial land and an entity where the value of its interests in Australian land exceeds 50 percent of the value of its total assets.

Agricultural land and agribusinesses: Acquisitions of interests in agricultural land and agribusinesses are regulated separately in the Act. In addition, a register of foreign ownership of agricultural land is maintained by the Australian taxation authority.

Certain types of investors receive differing treatment for their deals:

Fair trade agreement investors: Consistent with Australia's fair trade agreement commitments, higher monetary thresholds apply to certain acquisitions made by investors from Chile, Japan, Korea, New Zealand and the United States. For example, an acquisition of an Australian entity by an agreement country investor will only require FIRB approval if the entity is valued at more than AUD 1.094 billion (approximately US$871 million), unless the investment relates to a "sensitive business" such as media, telecommunications, transport, defense and military-related industries.

Foreign government investors: Stricter rules apply to foreign government investors (which can include domestic or offshore entities where a foreign government holds a direct or upstream interest of 20 percent or more, or foreign governments of more than one foreign country that holds an aggregate interest of 40 percent or more). In general, foreign government investors must obtain approval before acquiring a direct interest (generally, at least a 10 percent holding or the ability to influence, participate in or control) in any Australian asset or entity regardless of the monetary thresholds for approval, starting a new business or acquiring mining, production or exploration interests.

> **FIRB has been increasingly willing to use conditions and undertakings as a mechanism to increase the government's oversight of more complex or sensitive investments.**

SCOPE OF THE REVIEW

The Treasurer may prohibit an investment if he or she believes it would be contrary to the national interest. In making this decision, the Treasurer will broadly consider:

- The impact on national security (with advice from the Critical Infrastructure Centre)
- The impact on competition
- The effects of other Australian

government laws and policies (including tax and revenue laws)
- The impact on the economy and the community
- The character of the investor

TRENDS IN THE REVIEW PROCESS

Historically, there have been few rejections by the Treasurer on the grounds of national interest. However, there have been some significant investment proposals that have been rejected on national security grounds, including the blocking of the New South Wales government's proposed sale of its electricity network Ausgrid to Chinese and Hong Kong investors in 2016.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign persons should file an application in advance of any transaction or make the transaction conditional on foreign investment approval, and a transaction should not proceed to completion until the Treasurer advises on the outcome of its review. For a more sensitive application (e.g., transactions involving the power, ports, water, telecommunications banking or media sectors), foreign investors should consider taking up the government's invitation in the Policy to engage with FIRB before filing an application for a significant investment. These discussions may help foreign investors understand national interest concerns the government may hold about a particular proposal and the conditions the Treasurer may be considering imposing on the proposal should it be approved. These discussions can also help with structuring a transaction in order to reduce the likelihood of rejection.

Such discussions should be held at an early stage in order to provide enough time to satisfy all FIRB queries. Where there is a competitive bid process for the acquisition, a foreign investor that does not actively engage with FIRB early in the bidding process may be placed at a competitive disadvantage to other bidders who do. Foreign investors should be prepared to discuss in detail any conditions and undertakings that may be requested by FIRB, especially for acquisitions that are likely to attract greater political or media scrutiny.

REVIEW PROCESS TIMELINE

Under the Act, the Treasurer has 30 days to consider an application and make a decision. The time frame for making a decision will not start until the correct application fee has been paid in full. If the Treasurer requests further information from the investor, the 30-day time period will be on hold until the request has been satisfied. The Treasurer may also extend this period by up to 90 days by publishing an interim order. An interim order may be made to allow further time to consider the exercise of the Treasurer's powers. Investors can also voluntarily extend the period by providing written consent.

2017 UPDATE HIGHLIGHTS

- **National security review of Australian critical infrastructure assets**: In January 2017, the Attorney-General's Department established the Critical Infrastructure Centre (CIC) to address the Australian government's concerns about investors with access and control of Australian critical infrastructure. Acquisitions in sensitive sectors of power, ports, water and telecommunications will be the initial focus of the CIC, which will pre-emptively assess national security risks for critical infrastructure and advise FIRB on the national security component of the national interest approval test
- **Business acquisition exemption certificates**: Foreign investors can now apply for business exemption certificates for broad pre-approval for a program of investment activity over a specified period. Similar exemption certificates are available for acquisitions of land and land entities, and mining and exploration tenements
- **Reinstatement of the custodian holdings exemption and increasing approval thresholds for offshore global transactions**: Companies that become foreign persons by virtue of their foreign custodian holdings are not subject to notification requirements and thresholds for global acquisitions that result in an acquisition by a foreign government investor have been increased
- **Clarifying treatment of various land interests**: These include residential land used for commercial purposes and land used or intended to be used for solar or wind farms

OUTCOMES

- Generally, the Treasurer approves the vast majority of applications
- However, FIRB has been increasingly willing to use conditions and undertakings as a mechanism to increase the government's oversight of more complex or sensitive investments. Undertakings required from FIRB may include matters relating to governance, location of senior management, listing requirements, market competition and pricing of goods and services (e.g., that all off-take arrangements must be on arm's-length terms) and other industry-specific matters. FIRB has also issued a set of standard tax conditions that apply to those foreign investments that pose a risk to Australia's revenue and make clear the requirements and expectations for investors
- The Treasurer has wide divestiture powers and criminal and civil penalties can apply for serious breaches of Australia's foreign investment laws

China

China is attempting to implement a more structured and comprehensive system to keep a closer eye on economic deals that might have security implications

By Z. Alex Zhang and Douglas Tan

A ministerial review panel established by China's Ministry of Commerce (MOFCOM) pursuant to a rule issued by the State Council in 2011 (the 2011 Rule) is responsible for conducting national security reviews of foreign investments in domestic enterprises.

In addition to the 2011 Rule, China is in the process of implementing a comprehensive set of rules and regulations governing national security reviews for foreign investments. On July 1, 2015, China promulgated the new PRC National Security Law (the NSL), which is China's most comprehensive national security legislation to date. However, the NSL's main provisions do not detail how these security measures will be implemented by the relevant agencies and local authorities. As such, the NSL's full impact on individuals and corporations in the private sector will remain unclear until relevant implementation measures are issued.

WHO FILES

According to the 2011 Rule, MOFCOM reviews foreign-investment transactions following voluntary filings by the parties to the transaction, referrals from other governmental agencies or reports from third parties.

Under China's current regulatory system, a national security review filing applies only to mergers and acquisitions involving Chinese companies and foreign investors under circumstances provided under the 2011 Rule. The 2011 Rule prescribes that a foreign investor must apply for a national security review if the investor acquires equity in, and/or assets of, a domestic enterprise in China. In contrast, a transaction between two foreign parties involving interests in Chinese companies is not subject to the national security review requirement.

TYPES OF DEALS REVIEWED

MOFCOM published a list of 57 industries in which a national security review for a foreign investment transaction is likely to be triggered. These industries mainly include military or military-related products or services, national defense-related products or services, agricultural products, energy, resources, infrastructure, significant transportation services, key technology and heavy equipment manufacturing.

China's Cybersecurity Law became effective on June 1, 2017. It provides additional national security review requirements and standards for companies engaged in or seeking to engage in network and data operations in China.

SCOPE OF THE REVIEW

The scope of review focuses on the overall risk profile and impact that various M&A transactions may have on China's national security, defense, economy and public interest.

Foreign investors targeting assets in free trade zones are subject to more stringent national security review rules. The ministerial review panel has wider discretion to terminate or restrict foreign investment transactions in these zones because, while the 2011 Rule gives the panel authority to review foreign investors that obtain "actual control" over companies in the industries listed above, rules governing free trade zones indicate that the panel is allowed also to regulate any foreign investor that has a "significant impact" on investees within the industries listed above.

Greenfield investments and investments in cultural and internet businesses established within these free trade zones through offshore and other contractual arrangements are also subject to national security reviews.

TRENDS IN THE REVIEW PROCESS

The NSL's promulgation indicates that China is attempting to implement a more structured and comprehensive system to keep a closer eye on economic deals that might have security implications. As of now, it is unclear what direction China's national security review will take due to the lack of implementation measures for the NSL. Further,

the NSL specifically discusses the need for the state to pay particular attention to cybersecurity and network data protection for national security purposes. Article 25 of the NSL provides that China shall "build a network and information security safeguard system, enhance network and information security protection capabilities… achieve safe and controllable network and core information technology, critical infrastructures and information systems…."

Therefore, as part of China's overall national security initiative, China's Cybersecurity Law (the CSL) became effective on June 1, 2017. It provides additional national security review requirements and standards for companies engaged in or are seeking to engage in network and data operations in China. As such, companies shall be mindful of the cybersecurity and network protection requirements under the CSL as the law places additional national security scrutiny for network operators in China.

The CSL primarily focuses on data security protection requirements and standards for critical information infrastructure operators, network operators and financial institutions to protect their networks from interference, damage and unauthorized access, along with the prevention of data leaks, thefts and falsification of information. The Cyberspace Administration of China (CAC) serves as the primary governmental authority supervising and enforcing the CSL. A tiered network security protection will be further introduced in the future and various network operators shall comply with their corresponding level of network security requirements.

The CAC has issued various measures to supplement and clarify certain requirements of the CSL. Some of them are still in the proposed draft form. In particular, on April 11, 2017, the CAC published a draft proposal, *Measures for the Security Assessment of Outbound Transmission of Personal Information and Critical Data*, together with the draft guideline on the valuation methods in August 2017. These draft rules extend the data localization requirement under the CSL for critical information infrastructure operators to other network operators, requiring such operators to undergo security assessments in order to transfer data to destinations outside of China. At this point, these drafts have not been published as final regulations; however, they represent a real possibility of what the final regulations could require.

Besides the rules on trans-border data transmission control, the *Measures for the Security Review of Network Products and Services* was finalized and came into effect along with the CSL on June 1, 2017, which provides detailed provisions regarding the security review standards of network products or services purchased by critical information infrastructure operators that may affect national security. The measures focus on verifying whether such products or services are "secure and controllable" and the review process will take the form of a security risk assessment of the products or services purchased by these operators. In light of the above, we expect that China will continue to issue implementation and national security review standards and requirements under the CSL, specifically targeting companies seeking to operate as critical information infrastructure operators or other network operators in China.

In light of the NSL and the CSL, foreign investors should continue to monitor the developments of China's national security review process in the future.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Until issuance of implementation rules to the NSL, foreign investors should continue to be mindful of the terms and conditions of the 2011 Rule and pay special attention to transactions that might fall within the 57 industries that are likelier to trigger national security concerns for MOFCOM. Buyers should also be cautious when completing transactions before obtaining a national security approval, since buyers might be forced to divest the acquired assets if the transaction ultimately fails the security approval process. Due to enforcement uncertainties and the broad scope of captured industries, foreign investors interested in sensitive industries often schedule voluntary meetings with MOFCOM officials to determine the national security review risk before commencing the formal application process.

REVIEW PROCESS TIMELINE

The timeline used in practice and details of the national security review process in China are unclear, as information related to each individual application is not publicly available. The notional timeline below is based on the 2011 Rule:

MOFCOM will submit an application to a ministerial panel for review within five working days, if the application falls within the scope of review.

The panel will then solicit written opinions from relevant departments to assess the security impact of the transaction. It could take up to 30 working days to complete the general review process.

The panel will then conduct a special review of the application if any written opinion states that the transaction may have security implications and will conduct a more detailed security assessment of the overall impact of the transaction. A final decision from the review panel will be issued within 60 working days of the start of the special review.

2017 UPDATE HIGHLIGHTS

The CSL became effective on June 1, 2017. The CSL primarily focuses on the security protection of data and information for critical information infrastructure operators and other network operators. Throughout 2017, the CSL's primary administrative authority, the CAC issued various draft and final measures aiming to provide more clarity to the CSL and the scope of its implementation. The CAC also made multiple proposals for public comment on additional measures aiming to extend the data localization requirement under the CSL to cover other network operators, which would require all such operators to undergo security assessments in order to transfer data to destinations outside of China. We expect to see further developments and clarification on the scope and impact of the CSL in the near future, and companies should keep a close eye on how the measures proposed and finalized by the CAC under the CSL would affect their business and operations going forward.

OUTCOMES

Generally, the outcomes of a national security review are as follows:

- The investment may be approved by MOFCOM, including with mitigation conditions
- MOFCOM will terminate a foreign investment project if it fails the national security review
- If the Chinese government has national security concerns about a transaction that is not submitted for approval, parties could be subject to sanctions or mitigation measures, including a requirement to divest the acquired Chinese assets
- A foreign investor may withdraw its application for national security review only with MOFCOM's prior consent
- Decisions resulting from a national security review may not be administratively reconsidered or litigated

Japan

Past deals have almost all been approved, but 2017 amendments to FEFTA widened the scope of review and strengthened enforcement mechanisms

By Jun Usami, William Moran and Fumika Cho

Under the Foreign Exchange and Foreign Trade Act (FEFTA), the Ministry of Finance (MOF) and the relevant ministries with jurisdiction over the transaction matter review foreign investments including acquisitions of Japan businesses by foreign persons or businesses. The Ministry of Economy, Trade and Industry (METI) also enforces FEFTA.

WHO FILES

FEFTA requires a "Foreign Investor" to submit an advance notice or a post-transaction filing depending on the type of the transaction to which such investor is a party, through the Bank of Japan to MOF and relevant ministries. Foreign Investors include:

- Any individual who is a non-resident of Japan
- Any entity established pursuant to foreign laws, or other entities having their principal office in a foreign country
- Any entity in which 50 percent or more of the voting rights are held by an individual or entity described above
- Any entity in which the majority of directors or the representative directors of the entity are individuals who are non-residents of Japan

TYPES OF DEALS REVIEWED

The MOF and the relevant ministries review two types of transactions: (a) Inward Direct Investments and (b) Designated Acquisitions.

An Inward Direct Investment includes the acquisition of shares of a Japanese company (including initial incorporation, and in the case of a Japan-listed company, limited to acquisition of 10 percent or more of its shares), certain loans to a Japanese company, and acquisition of certain company bonds of a Japanese company.

A Designated Acquisition is a transaction where a Foreign Investor acquires shares of a non-listed company from other Foreign Investors.

With respect to Inward Direct Investments, almost all transactions (with some statutory exceptions) require post-transaction filings, unless advance notice as described below is required. Transactions requiring advance notice are subject to review and approval by the MOF and the relevant ministries. The investment from certain countries or in certain designated industries (e.g., airplanes, weapons, nuclear power, agriculture, forestry and fisheries, and the oil industry) are designated as the transactions that may affect national security, public order or public safety of Japan, or may have a significant adverse effect on the Japanese economy, and consequently, require advance notice filings.

Regarding Designated Acquisitions, a Foreign Investor is required to submit advance notice if the transaction is related to Japan's national security (i.e., the target company falls in a designated industry such as airplanes, weapons and nuclear power). Post-transaction filings are not required for a Designated Acquisition.

> **In response to the increasing complexity of foreign investment, FEFTA was amended to place new restrictions on Designated Acquisitions, from October 2017 onward, which are equivalent to those placed on Inward Direct Investments.**

SCOPE OF THE REVIEW

For reviews of Inward Direct Investments and Designated Acquisitions that require advance notice, MOF, METI and the relevant ministries issued a public announcement in August 2017 whereby they clarified factors to consider. Such factors include:

- Whether the production base and technology infrastructure in Japan can be maintained vis-á-vis Japan's security-related industries (e.g., airplanes, weapons, nuclear power and space development)
- Whether outflow of sensitive technology important for security can be prevented
- Whether public activities during peacetime and emergency can be maintained
- Whether public safety can be maintained
- How the attributes of the financial plan and past investment behaviors of the Foreign Investors and their affiliates look, etc.

TRENDS IN THE REVIEW PROCESS

The ministries have approved almost all of the notified transactions in the past. The only known case where a transaction was blocked was in 2008 when a foreign investment fund planned to acquire 20 percent of the shares of a power company, which had a nuclear power plant. In response to the advance notice made by the fund, MOF and METI recommended that the acquisition not be allowed, because of the perceived risk that the transaction might disturb the maintenance of the public order in Japan. However, because the fund did not follow the recommendation, MOF and METI ordered the fund to discontinue the acquisition. The fund did not appeal the order.

Before October 1, 2017, only Inward Direct Investment transactions were reviewed. However, in response to the increasing complexity of foreign investment, FEFTA was amended to place new restrictions on Designated Acquisitions, from October 2017 onward, which are equivalent to those placed on Inward Direct Investments. In addition, the amended FEFTA also introduces enforcement measures for the breach of those restrictions. For example, if a Foreign Investor does not give advance notice as required by FEFTA or does not obey the recommendation or orders issued by MOF and the relevant ministries, the ministries are authorized to order the disposal of shares obtained in the transaction.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Although there is no specific provision regarding the procedures of mitigation measures in FEFTA and related laws or orders, MOF and the relevant ministries are allowed to require mitigation measures, which are assumed to be negotiated with the Foreign Investor. That said, Foreign Investors can proactively propose and negotiate mitigation measures with the ministries in charge.

REVIEW PROCESS TIMELINE

A Foreign Investor who has made an advance notice filing cannot close the transaction until the expiration of 30 calendar days from the date MOF and the ministry having jurisdiction over the transaction having received the notification. However, for certain transactions, such as greenfield transactions and roll-over transactions, the waiting period is usually shortened to two weeks. MOF and the relevant ministries can extend the waiting period up to five months, if it is necessary for the review.

If MOF and the ministry with jurisdiction find the reviewed transaction problematic in terms of national security, they can recommend that the Foreign Investor change the content of the transaction or discontinue the transaction after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions. The Foreign Investor after receiving such recommendation must notify MOF and the ministry with jurisdiction of whether it will accept the recommendation within 10 days. If the Foreign Investor does not provide notice or refuses to accept the recommendation, MOF and the relevant ministries may order the modification of the content of the transaction or its discontinuance before the expiration date of the waiting period.

OUTCOMES

- Almost all deals are approved
- The October 2017 FEFTA Amendment introduced new restrictions to transfer of shares in non-listed companies from a Foreign Investor to another Foreign Investor (i.e., out-out transfer)
- The October 2017 FEFTA Amendment has also introduced enforcement measures for the breach of the restriction thereunder, which was not available before the amendment
- In August 2017, MOF and the relevant authorities clarified factors to be considered during the review process for transactions subject to advance notice, in order to enhance clarity of the standard for review process

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