Foreign Direct Investment Regulations Update: Australia, China, EU, Germany, UK and US

April 2019

This Alert provides an update with respect to foreign direct investment ("FDI") regimes in certain key jurisdictions since the Firm's comprehensive FDI Guide, *National Security Reviews 2018*, was published in November 2018.

Australian regulations evolve apace

Authors: **John Tivey**, **Nirangjan Nagarajah**, **Barnaby Matthews**

The Foreign Investment Review Board ("FIRB"), the body responsible for advising the Treasurer with respect to approving foreign investments, has not yet made any major policy announcements during 2019. However, some key updates include:

- Private entities from countries with whom Australia has a relevant trade agreement are entitled to a higher monetary screening threshold. For example, the monetary screening threshold for a non-sensitive business is US$1.154 billion, rather than US$266 million.
- The list of agreement countries (essentially countries with whom Australia has a free trade agreement and to whom less stringent reporting requirements apply, including Japan, China and the USA) has now been expanded to include countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) is in force.
- While no formal regulatory changes have been implemented, FIRB has publicly indicated an increased focus on acquisitions of data-rich entities, including data center assets and businesses in the health sector.

An important consideration for investors is the potential impacts of a federal election on the timing of FIRB approvals. With an election scheduled for May 18, 2019, the government has entered caretaker mode, during which, the Treasurer is unlikely to approve any major or controversial investments.

China Adopts New Foreign Investment Law

Author: Z. Alex Zhang

On March 15, 2019, the National People's Congress of China adopted the new Foreign Investment Law ("FIL"), with a view toward unifying and streamlining the foreign investment framework in China. The FIL will come into effect on January 1, 2020.

The FIL creates a general framework that will place foreign investors and foreign invested enterprises on equal footing with domestic investors and domestic companies. In particular, the highlights of the FIL are as follows:

- The FIL will replace the PRC Law on Sino-foreign Equity Joint Ventures, the PRC Law on Wholly Foreign-owned Enterprise and the PRC Law on Sino-foreign Cooperative Joint Ventures. The FIL defines the types of foreign investment activities that will be regulated.
- The FIL establishes a nationwide "pre-establishment national treatment and negative list" management system. The system is intended to create an environment where all foreign investment will be treated the same as domestic investments, other than foreign investments into the industries that are listed in the "Market Access by Foreign investors Special Administrative Measures (Negative List)."
- Meanwhile, the FIL formally does away with prior systems that required approval by Ministry of Commerce and registration with Administration of Industry and Commerce before a foreign investment would be permitted into China. Under the FIL, other than for investments under the restricted industries in the Negative List, foreign investors are only required to register their investment with the relevant agencies.
- As the FIL is intended to unify the approach for all types of foreign investment into China, all foreign invested enterprises will be required to follow the corporate governance rules under the PRC Company Law once the FIL comes into effect. For the foreign invested enterprises formed prior to the adoption of the FIL, a five-year period transition period is allowed to bring the corporate governance in line with the PRC Company Law.
- The FIL also includes certain principle to encourage foreign investment into China and measures to protect the lawful rights of foreign investors and foreign invested enterprises.

As the State Council in China continues to promulgate further rules to implement the broad guidance under the FIL, the specific implementation rules will empower China to continue to foster and develop a more open and transparent foreign investment environment it intends.

For additional details, please see our latest China FDI Client Alert: China Adopts New Foreign Investment Law.

New EU regulation goes live

Authors: Dr. Tobias Heinrich, Dr. Tilman Kuhn, Marc Israel

The European Council approved the regulation on the screening of FDI into the EU at the beginning of March 2019. The new rules will ultimately become applicable in October 2020, following a transition period of 18 months after the regulation came into force on April 10, 2019.

The Regulation sets out a cooperation framework in relation to FDI into the EU. As of today, only about half of the EU Member States have investment control laws in place, and there is still no obligation for Member States to adopt an investment screening process or introduce specific substantive standards for review. Nevertheless, it is likely that additional states will implement FDI legislation, as for example, Hungary did in January 2019.

While the Regulation does not introduce an FDI screening process at the EU level, it establishes a cooperation mechanism between the European Commission and Member States such that, going forward, a Member State will be required to inform the Commission and other Member States of any FDI review that has been initiated. Although other Member States and the EU Commission may provide comments, the ultimate decision whether or not a Member States will permit the FDI in its territory remains exclusively with each Member State.

For additional details, please see our latest EU Client Alert: New EU Foreign Direct Investment Regulation—Initial Steps towards Harmonized European Investment Controls.

Germany continues to tighten FDI controls

Authors: Dr. Tobias Heinrich, Dr. Tilman Kuhn

The German Federal Ministry of Economics and Energy ("BMWi") has a right to review and block acquisitions of domestic companies by foreign (non-EU/EFTA) acquirers or issue orders restricting such acquisitions if they threaten security or public order of the Federal Republic of Germany. In December 2018, the German Federal Government adopted a new amendment to the AWV (Foreign Trade and Payments Ordinance) specifically aimed at further tightening investment controls.

The last amendments did not change the substantive criteria for the assessment of a possible threat. The changes concern the review threshold, the definition of security-relevant companies and the determination of voting rights:

- The scope of application for sector-specific reviews (i.e., the acquisition of shares in defense-relevant companies) and for so-called cross-sectoral reviews with respect to certain defined security-relevant companies have been extended. For all these transactions, the AWV foresees a notification obligation for the acquirer and a review right for the BMWi if the relevant threshold of at least ten percent (previously 25 percent) of the voting rights is passed.

- Media companies that contribute to the formation of public opinion by means of broadcasting, telemedia or print products are now included in the list of companies classified as being of particular concern. The reasoning behind the extension of AWV's scope of application is the increasing pressure on the independence of the media sector.

- In order to prevent any circumvention transactions, a new AWV section provides more details on how to calculate and attribute acquired voting rights.

For FDI into Germany, the new legislation means that more transactions will be scrutinized by the German government, and hence, investment controls by the German BMWi will have to be taken into account with utmost diligence and at an early stage of any transaction involving non-EU/EFTA investors.

UK rules begin to solidify

Authors: Marc Israel, Sophie Sahlin

In June 2018, the UK government changed the thresholds at which it could intervene to review mergers that might raise national security concerns. However, the revised thresholds (which are materially lower than previously) only apply to cases involving military or dual-use goods, computing hardware and quantum computing.

Since the new rules were introduced, there have been no cases in which they have been applied. The new rules are also only temporary. The government has consulted on a wider proposed review of the UK's FDI regime, which will apply to a much wider range of transactions.

The period for commenting on the government's proposals has passed, and the government's response to the consultation is pending. However, there are two important features of the proposed new system to be noted. First, the regime will continue to be voluntary. Although the government will be able to intervene post-closing (for up to six months post-closing, in current proposals), it aims to encourage pre-transaction voluntary filings. Second, if the government intervenes in a completed deal and finds there is a problem, it is proposing a radical change to require the seller to take back the asset rather than simply requiring the purchaser to divest the asset to an approved third party.

For additional details, please see our latest UK FDI Client Alert: National security reviews 2018: United Kingdom.

US CFIUS Pilot Program

Authors: Farhad Jalinous, Karalyn Mildorf, Keith Schomig, Stacia Sowerby

There have been no changes to the CFIUS/FIRRMA Pilot Program since it went into effect on November 10, 2018, and no changes are currently expected. CFIUS is likely using the Pilot Program as a testing platform for some of FIRRMA's implementing regulations, including the new declaration process. This will help inform what needs to be changed or adjusted before FIRRMA goes into full effect later this year or early next year.

We estimate that there have been approximately 55 to 65 declarations submitted to date. While the prolonged US government shutdown may have created some backlog in accepting declarations in 2019, the current volume of declarations is fewer than the high numbers that many had predicted before the Pilot Program went into effect. In addition, we understand that only a relatively small number of declarations have resulted in CFIUS concluding action (i.e., clearing the investment) based on a declaration. As a result, it seems that, so far, most declarations have resulted in CFIUS taking one of the other three permissible actions in response to a declaration—requesting a full notice, declaring that CFIUS is unable to conclude action without a full notice, or initiating a unilateral review.

We are not aware of any actions by CFIUS to enforce the Pilot Program's mandatory filing requirements or penalize any failures to file. While CFIUS recently announced that, in 2018, it had imposed a US$1 million penalty against an unnamed company for "repeated breaches of a 2016 CFIUS mitigation agreement," this penalty did not involve the CFIUS Pilot Program. The sense we have gotten regarding the Pilot Program is that CFIUS is most likely to seek penalties in situations where the parties' decision not to file is viewed by the Committee as having been in blatant disregard of the requirements of the Pilot Program.

To date, "emerging and foundational technologies"—a category of critical technologies under the Pilot Program—has yet to be defined. In December 2018, the Commerce Department solicited public feedback on what technologies should be considered "emerging technologies" of national security importance, and it provided an indicative list of potential categories of such "emerging technologies." But the Commerce Department has not yet made any specific designations, nor has it yet solicited public feedback on what should be considered "foundational technologies." We expect that the Commerce Department-led inter-agency process created under the Export Control Reform Act of 2018 to identify and control "emerging and foundational technologies" is continuing to debate the pros and cons of expanding export controls on nascent technologies.

White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807
United States

T +1 202 626 3600