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New Rules Proposed to Scrutinise Foreign Direct Investment in Europe

Kyle Le Croy (Sidley Austin LLP) · Wednesday, June 6th, 2018

Consistent with recent trends in the United States, the European Union (EU) and many national governments in Europe are expressing renewed interest in greater scrutiny of acquisitions by foreign investors. Government ministers in Germany recently opposed a takeover in the robotics industry by a Chinese bidder, while government ministers in the Netherlands recently opposed a takeover in the pharmaceutical industry by an American bidder.

Similarly, a number of governments in Europe have recently taken steps to reform national rules in order to increase their powers to scrutinize foreign takeovers. In total, 12 of the 28 EU Member States operate regimes for the review of foreign direct investment, or FDI. The number of prohibitions has historically been low, but new rules are widening the scope for intervention. For example, France, whose FDI regime already covers acquisitions affecting national security or concerning the supply of energy, water, transport, telecommunications and public health, is now proposing coverage of artificial intelligence and digital technology.

Other jurisdictions have opted instead to expand the scope of review by their competition authorities. Germany and Austria, for example, recently introduced new thresholds into their merger control regimes which are designed to extend their jurisdiction to review acquisitions of data-rich targets in the technology and life sciences sectors.

As a result of these trends, we should expect an increase in the number of transactions subject to review and that more governments will be reviewing technology and data-related mergers not only from a competition perspective, but also taking account of wider national interests.

Two specific initiatives have recently been undertaken by the EU and the United Kingdom (UK).

EU-Level Initiative

The European Parliament is currently considering a proposal to coordinate FDI review across the EU. EU Member States may already take appropriate measures to protect legitimate interests, such as public security, plurality of the media and prudential rules, in the course of a merger review by the European Commission. The proposal, if adopted, will require EU Member States intending to adopt a decision relating to the protection of any other “public interests” under their FDI regimes to notify the Commission and the other EU Member States. The Commission and the other EU Member States will then have an opportunity to request information from the notifying EU

Member State and to convey their observations to it on the basis of a non-exhaustive list of factors, such as potential effects on infrastructure, including data storage, and critical technologies. This proposal might be expected to foreshadow more centralized procedures within the EU concerning the protection of data-rich industries in the future.

UK Initiative

Measures to increase oversight powers in the UK, which will formally leave the EU in March 2019, will enter into force on 11 June 2018. The UK's new rules will substantially reduce thresholds for notification in transactions relating to the development or production of items for military use, as well as the supply of computing hardware and goods or services employing quantum technology, as used in advanced computing and cryptography.

The UK government anticipates that the new rules will affect as many as 29 additional mergers each year, with as many as six such mergers creating a sufficient risk to national security for the Secretary of State to initiate a formal investigation (and a further 12 meriting at least an informal investigation).

The review of such additional mergers will be based on the existing criteria, but the UK is also considering (albeit not as part of the current reform) the implementation of a mandatory notification regime for FDI in the civil nuclear, defence, energy, telecommunications and transport sectors.

Kyle Le Croy is an associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.

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