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Practical guidance on global foreign investment filings

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In M&A transactions, the assessment of foreign investment filings routinely needs to be part of the diligence, including for industries that, at first glance, do not appear to be the most critical ones from a national security standpoint (e.g. consumer goods, dating apps, base chemicals and healthcare products). One of the challenges for companies and advisors is that new foreign investment regimes are constantly added, the existing ones are being expanded and many are still evolving. The EU FDI Regulation, FIRRMA, the CFIUS Pilot Programme and the 2018 German foreign investment reform are prominent examples of such recent developments. In addition, every regime has its own particular features and there is no international coherence in approach or foreign investment laws.

The below provides practical guidance on what companies should be aware of with regard to foreign investment when doing global transactions.

The foreign investment filing analysis

There are "**usual suspects**" that should normally be considered in every transaction with a foreign investment angle:

- US

- Australia
- New Zealand
- Canada
- Russia
- China
- In Europe: Germany, Austria and France

When doing the initial analysis one should also look at **jurisdictions where merger control filings are triggered**. This is in particular as sometimes the authority who reviews the deal under merger control rules is also in charge of monitoring foreign investment, e.g. in Russia in certain instances the Federal Antimonopoly Service. This makes it all the more important not to miss a filing.

More concretely, there seem to be four key factors that may contribute to the jurisdictional analysis:

- Does the **target have a local subsidiary**? As a "rule of thumb" if there is no local subsidiary it is unlikely that a foreign investment filing will be required, but this needs to be confirmed with local counsel (e.g. the Chinese national security review has recently been extended to greenfield projects).
- Is the target active in the **field of "critical infrastructure"**? The notion of critical infrastructure becoming increasingly important in the different foreign investment regimes even though the definitions may vary. This might relate to activities in several sectors such as energy, telecommunications, healthcare, IT, transport, infrastructure, finance, software development and even personal data and media.
- Another key factor to consider: does the target have **sales to the national government, public entities or the military**? This is relevant for instance for the assessment in Germany and France.
- The **transaction structure and identity of the acquirer** need to be considered as well. Is the foreign investor government-controlled? Does one country have a sizable minority stake in the target entity? Has there been prior involvement of the investor in activities affecting security or public order? And one, currently important question – is the acquirer or a co-investor Chinese?

One major issue when conducting the actual analysis is that foreign investment laws are often formulated in an **open** and somewhat **vague way** (perhaps deliberately so to a certain extent) and that the laws are **interpreted broadly** by the authorities.

- For example, CFIUS recently investigated Goldman Sachs' acquisition of Boyd, a manufacturer of rubber seals and gaskets, which was done through a fund that Goldman established with a Chinese sovereign wealth fund (CIC) as an anchor investor. Notably, CFIUS found the investing fund to be "foreign"- and therefore within CFIUS's jurisdiction – despite it being "controlled" by Goldman. This shows that CFIUS is at least a question for US-based and US-controlled funds with non-US anchor investors.
- The EU FDI regulation specifically cites "*access to sensitive information, including personal data, or [the] ability to control sensitive information*" as a factor in assessing the security profile of a transaction; this may mean that going forward **in the EU data-intense sectors may become relevant** that would otherwise be seen as benign and not sensitive for national security purposes (e.g. social media companies, e-commerce).
- What is helpful for the analysis is that in some jurisdictions **quantity thresholds** exist for the relevant sectors and if these are not met a filing may be excluded. For instance, with regard to

healthcare (but also for other sectors), if the number of relevant medical products sold by the target in Germany per year is below a certain volume, no mandatory filing is triggered.

Another observation is that foreign investment filings are **typically triggered in the case of minority acquisitions**. Trigger events for acquisitions of 20%, 25%, 33% of the shares / voting rights are common but can even be 10% in some instances. It seems that in case of acquisitions **below 10%** the parties are generally in "**safe harbour territory**". A pure financial minority investment (no voting rights) is usually helpful as well unless the investment secures access to certain sensitive information (considered a non-passive investment, e.g., under CFIUS).

One can also **not assume that the same criteria apply for foreign investment as for merger control**. The size of the target, turnover, purchase price or market share thresholds are normally not relevant for the foreign investment assessment. The notion of "control" in foreign investment is not entirely the same as under merger control rules, e.g. in France, control is defined based on the French Commercial Code (which can make a difference in *de facto* control acquisitions).

Should there be pre-notification contacts?

This is a question that comes up often in practice. Some regimes will allow for an **informal consultation** with the authority prior to filing (e.g. Austria, France) which is helpful in particular in "borderline" cases, e.g. a large Chinese investor intending to acquire a stake in a company operating in a non-critical sector. In Germany, it is however no longer possible to informally to simply "pick up the phone" to the ministry for a view before a notification or application has been submitted. Austria and France seem to be more flexible in this regard. Companies have occasionally raised confidentiality concerns to have such informal consultations before the formal foreign investment review process has been started – normally this seems however work quite well.

Information to be included in foreign investment filings

Generally speaking, comprehensive information about the target and buyer needs to be provided including:

- Information about shareholders, corporate structure, financial statements
- Description of the target business
- Overview of the contemplated transaction

Some of the information or documents collected for the merger control filings can be used and one can also rely on information reviewed during the M&A due diligence process. Different from merger control no substantive analysis has to be provided which speeds up the process of preparing the notification. Similar to some merger control regimes, certain authorities require a translation of all documents into their national language which should be considered from a time and cost perspective when preparing a filing.

Review process & timetable

Foreign investment processes can be lengthy which needs to be factored into the overall deal timing. Most regimes have statutory timelines, but the timetable may be extended to receive feedback from other government departments as part of the consultation process and if there is national security concern. A withdrawal of the filing may also be requested ("pull and refile"), e.g.

by CFIUS in the US (*Creat/Biotest* is an example). In Germany the process can easily take 4-6 months in complex cases. Based on press reports, the takeover of the aircraft supplier Cotesa by the Chinese investor AT&M even took ~11 months before it was approved by the German Federal Ministry for Economic Affairs. There seems to be **no fast-track procedure** in most of the regimes and often cases that are unproblematic take longer to be cleared than merger control cases. One of the few exceptions is Germany where a certificate of non-objection is deemed to have been granted if the German Ministry does not open official review proceedings within 2 months after application.

The foreign investment review processes are often **not very transparent** (which to a certain extent is understandable given the national security aspects involved). The process is generally **not very interactive** (can be different for CFIUS) and there is not a lot of visibility / ability to "feel the temperature" with the competent case handler or the relevant governmental body. There are however regularly detailed discussions regarding the completeness of the filing when the case handler requests additional documents, claiming in-completeness of the notification or application (and this can add several months to the process); it is however "trickier" to discuss what the actual outcome of the case will be. The strategy should be to engage with the authority as much as possible and to communicate the purpose and objective of the transaction.

The **substantive test** – security and public order or national security concerns – is by its very nature a **vague one**. The competent authority has **wide discretion** and no hard criteria are available to judge on this beforehand. It is also important to understand what the "hot topics" are at the given time in a country. Different from merger control, there are broad categories of foreign investment "theories of harm" (protection of national champions, prevention of access to sensitive information etc.) but it is more difficult to anticipate concerns. What can be done in complex cases?

- **Public relations and political advisors** should be **engaged early** to set the narrative in particular if a negative public reaction can be expected; effort should be put into "political pre-clearing" with the relevant stakeholders.
- There should be a **plan for concessions and disposals** early on and these should be clearly communicated to the authority.
- **Appropriate deal structuring** from the outset can be of crucial importance: options could include consortium deals with more suitable bidders, reverse takeovers and carve outs of particularly sensitive parts of the business.

Can the deal be closed without having received foreign investment approval?

This is possible assuming that the relevant regimes that are not of suspensory nature (Germany and the US, for instance, are not – unless the military and defense sector is involved). However, the transaction may be **prohibited post-closing and the unwinding of the deal / divestiture could be the consequence**. Non-notified transactions can be pursued years after closing (in Germany for instance 5 years after the signing of the agreement).

In particular CFIUS has **stepped up post-deal investigations activities and have in recent cases required divestments**: this has happened for instance in *Kunlun/Grindr* case. Following the takeover of the dating app Grindr by Beijing Kunlun Technology by way of two separate deals in 2016 and 2018 (neither one of which had been notified to CFIUS), CFIUS apparently raised concerns that personal data stored in the Grindr database may pose national security risks if

used as blackmail material against persons with security clearances and as a result Grindr has to now be divested. Another example is the Chinese-backed life science company iCarbonX with regard to its majority investment of healthcare technology company PatientsLikeMe which was also not notified to CFIUS pre-closing. In April 2019, CFIUS ordered the sale of iCarbonX's stake in the company, possibly also over personal data concerns.

Early engagement with the authorities seems advisable also in "borderline" deals, even if sectors are concerned that do not necessarily seem sensitive.

Companies' rights of defense

During the process any such rights will be of limited use in practice as the parties will be keen to obtain approval and not be interested in engaging in litigation with the government. It will also be difficult to successfully appeal a prohibition decision given the broad legal test and discretion of authorities as well as the lack of detailed reasons as to the government's decision. One exception may have been the planned acquisition of German semiconductor company Aixtron by a Chinese investor Fujian Grand Chip Investment which was blocked by President Barack Obama in December 2016. While the transaction did not raise concerns in Germany initially the German Ministry of Economics withdrew and reopened its previous clearance following the US veto, even though it is not apparent that the circumstances had changed. In this somewhat atypical case one may have contemplated an appeal in Germany. In addition, process violations (e.g. the authority not adhering to a statutory deadline) may be somewhat easier to pursue than substantive appeals against veto decisions of the authority.

Conclusion

There currently is considerably uncertainty as to when foreign investment applies as well as regarding the process and timing. It would be advisable to have – to the extent possible – **clear-cut rules, definitions and jurisdictional thresholds** with regard to foreign investment reviews. Admittedly, governments will want a certain degree of flexibility, but one would assume that foreign investment filings should not be made out of caution if this is not necessary. Transparency of the process should also be a priority which is also one of the objectives of the EU FDI Regulation.

The views expressed in this article are purely those of the author and not necessarily those of Kirkland & Ellis. The author would like to thank Dr. Anna Schwander, Corporate partner at Kirkland & Ellis, for her valuable insights and thoughts.

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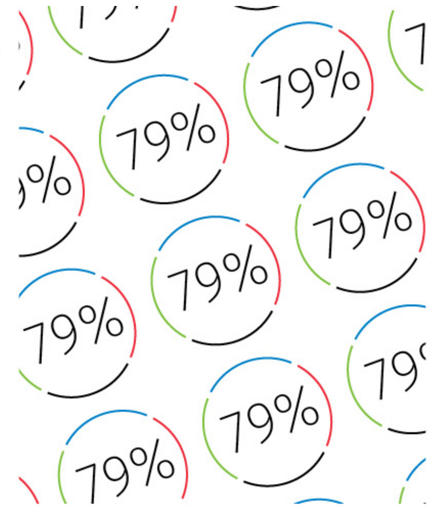

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