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Foreign Direct Investments: a new Practice Area for international M&A?

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11 October 2020, Regulation (EU) 2019/452 (Foreign Direct Investments Screening) entered into force in the EU, imposing an obligation for the member states to work together with the EU Commission. The timing of cross-border M&A involving non-EU investors is now of upmost importance.

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In the past, Foreign Direct Investments (FDI) screenings have mostly been relevant to transactions involving defence and military. However, in recent years the scope of and focus on FDIs have increased significantly. In early 2020, both the EU Commissioner for Competition and the EU Commissioner for Trade have expressed the need for member states to protect companies from foreign takeovers, and this has been described in more details here.

The Regulation (EU) 2019/452 establishes a framework for cooperation, and the regulation imposes an obligation for the member states to share specific information about the national investments undergoing screening, i.e. investments by investors residing in jurisdictions outside of the EU that may affect the security or the public order within the EU. Furthermore, the Commission may also request information regarding national investments not subject to screening, thus allowing other member states and the Commission itself to present comments, to which the member state must give due consideration. The framework for the cooperation is described in more details here.

Investment Screening in Denmark

Even though Regulation (EU) 2019/452 entered into force on 11 October 2020, Denmark does not currently apply any general obligation to carry out screenings of foreign investments in Danish companies, but only rules within certain sectors.

In its legislative programme for 2020/2021, the Danish Government has presented that a new act on foreign investment screening and procedures will be adopted, which will implement the screenings necessary in accordance with Regulation (EU) 2019/452, i.e. enable the Danish authorities to block investments in which non-EU investors (potentially with close connections to third-party states) attempt to acquire critical infrastructure in Denmark, e.g. within energy, telecoms, IT, transportation, health, or other assets considered paramount to the security of the public order.

New Issues to be taken into Considerations during M&A Transactions

It remains to be seen how the Danish legislation will be shaped, but the legislation should cater for the processes and obligations under the Regulation on member states that have screening processes in place.

Any implementation of an extended range of application for mandatory investment screenings will create an element of deal-uncertainty with regard to the completion of future transactions.

Investment screening will also constitute a new matter to be handled prior to any closing alongside with already known regulatory approvals.

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As a seller of an asset which could be subject to the scrutiny of a new FDI screening, there will be additional considerations when assessing potential buyers, e.g. (i) the nature of the buyer and where the buyer is located; (ii) whether or not the seller are willing to take the risk on the deal being blocked by the FDI screenings rules (here it will not be sufficient to assess the buyer from a legal perspective , but also from a higher political perspective in the EU).

As a non-EU buyer, there will also be additional considerations when assessing potential assets in the EU, e.g. (i) the nature of the asset and whether or not the asset will be subject to the scrutiny of FDI screenings; (ii) how to mitigate the risks if FDI screenings are relevant and how to be aware of the disadvantage this may have on the buyer's position in an auction process.

Finally, both parties must be aware of the rights and obligations during the approval proceedings for the FDI screenings, time aspects and the situation should the approval be denied.

As previously noted, it is reasonable to believe that the new FDI screening procedures in form and content will share significant similarities with the current merger control obligations, not least due to the type of information that we expect such notification must contain.

The potential extended procedure for notification or approval may be more complicated and time consuming than merger control procedures, as there would be a risk that member states would be reluctant in accepting specific foreign investments if the member state later risks receiving criticism by the other member state.

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