FOREIGN DIRECT INVESTMENT UNDER GREATER EUROPEAN AND FRENCH SCRUTINY

The difficult balance to strike between adequately preserving national and European essential interests while maintaining an open and attractive investment environment

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The recent decision of the Trump administration, following a CFIUS review, to block the potential takeover of Qualcomm, the leading American chip maker, by Singapore-based Broadcom, on national security grounds underlines the climate of ramping economic protectionism in the United States. This decision is the latest in a series of decisions taken by the Trump administration to stall inward foreign investments (from PRC mainly), such as Moneygram's sale to an affiliate of China's internet conglomerate Alibaba Group.

The monitoring of foreign direct investment (FDI) inflows is also becoming a growing concern in the EU after a steep rise, in the last 18 months, in acquisitions of EU strategic assets, including companies with cutting-edge technologies, by non-EU investors from countries which have maintained investment barriers (e.g. forced joint-venture, technology transfer requirements, foreign ownership caps) rather than granting a similarly open investment environment to EU companies. In this trend, Germany saw some of its industrial "pearls" pass under the Chinese flag. An example was the acquisition of Kuka, the largest German robot maker, by China's Midea Group. The unexpected acquisition by Geely of almost 10% in Daimler Benz also created a shock in Germany.

In this context, proposed changes to the existing regulation are currently being debated both at the EU and the French levels, with a view to better monitoring and controlling FDI.

A PROPOSED HARMONIZED PAN-EU LEGAL FRAMEWORK FOR FDI SCREENING

In response to pressures from the French, German and Italian governments, the European Commission adopted on September 13, 2017 a proposal for a regulation establishing a framework for screening FDI inflows into the EU on grounds of security or public order.

The EU has no single FDI screening mechanism comparable to the well-established US scheme known as CFIUS. Today, less than half of the Member States (12 out of 28) have established national security protection and review mechanisms, and they differ widely. The proposal's objective is neither to harmonize the formal FDI screening mechanisms currently used by some of the Member States nor to replace them with a single EU mechanism. The proposed regulation does not require any Member State to adopt or maintain a national security protection and review mechanism either.

The proposed regulation is more cautious, thereby preserving the sovereignty of its Member States, and rather aims at (i) enhancing cooperation on FDI screening between the Commission and the Member States and (ii) increasing legal certainty and transparency.

The Commission proposes:

a) to set basic common requirements for Member States implementing FDI screening procedures: clear timeframes for reaching decisions; possibility of judicial review of decisions, equal treatment for foreign investors and transparency;

b) to define the criteria of security and public order with a non-exhaustive list of considerations to be taken into account in the screening procedures, such as the potential effects of an acquisition on critical infrastructure (energy, transport, communications, data storage, etc.), on critical technology (artificial intelligence, robotics, semiconductors, cybersecurity, space or nuclear technology, etc.), on the security of the supply of critical utilities, etc.;

c) to create new FDI screening rights for the Commission, with no enforcement powers however, thereby differing greatly from the more robust authority vested in the CFIUS. The Commission will only be authorized to issue a non-binding opinion if:

   i) FDI in a Member State may affect the security or public order of projects or programs with significant EU funding or that are covered by EU legislation regarding critical infrastructure;

   ii) FDI in a Member State may affect the security or public order of several Member States;

d) to create a cooperation mechanism between Member States and the Commission, with a view to enhancing the coordination at EU level;

e) to establish new transparency and information requirements for screening and non-screening Member States linked to this new cooperation mechanism.

Certain Member States, like France and Germany, regret that the proposed regulation does not go far enough and would have preferred that the screening rights of the Commission include a "reciprocity test" in the review, which would be particularly relevant in assessing FDI coming from China.

Although a first step, the new proposed EU legislation seems quite weak, given that the Member States' sovereignty impedes a unified EU binding and enforceable scheme, as currently exists and is extremely efficient in the context of antitrust and merger control.

A STRENGTHENED SCRUTINY OVER FDI INFLOWS IN FRANCE

In this international trend towards tightening FDI control, the French Prime Minister announced on February 19, 2018 the extension and diversification of measures to control FDI in French companies through the implementation of a legislative bill, called "PACTE" to be presented in the Council of Ministers on April 18, 2018 and the adoption of a more restrictive Decree.

With freedom remaining the guiding principle, FDI in France is not and will not, as a rule, need to be authorized. However, the sensitive nature of certain investments justifies a departure from this principle.

Until May 2014, a prior approval was required for FDI affecting public order, public safety or national security, with a list of 11 specific business sectors such as the manufacturing and sale of weapons, counter-terrorism, wiretapping, cryptology, the gambling industry, etc.

By a Decree adopted in 2014, the prior authorization regime was extended to 6 new sectors, such as critical energy and water supplies, vital transport and electronic communication networks, public health, etc.

Under the PACTE bill, the scope of national control would again be extended to strategic sectors taking into account the technological developments: artificial intelligence, space, data storage and the semiconductor industry. Some of these new sectors, such as data storage or artificial intelligence, are rather "catch-all" fields which could potentially give significant leeway to the French Ministry of Economy in its reviews, thereby raising concerns among players in the tech industry.

The PACTE bill also provides for a mechanism to monitor commitments taken by an investor upon making a pre-approved investment (e.g. no transfer of technology, no redundancies) with more deterring and more efficient breach penalties.

The legal framework related to "golden shares" could also be made more flexible, in particular to make it easier for the Government to exercise special rights with regards to decisions on transferring intellectual property rights or setting-up outside of France, disposing of certain asset, etc.

The Defense and National Security Council will also be vested with new monitoring duties and Bpifrance (the French sovereign bank) as well as the Agence des Participations de l'Etat (the Government shareholding agency) will be able to release funds to protect French companies, especially "gold nuggets" likely to be targeted by hostile acquisitions.

In the next few weeks, the French government will therefore have to strike the difficult balance between protecting French flagship companies with strategic technologies from the greed of aggressive foreign investors while preserving the attractiveness and openness of the French economy called for by French President Emmanuel Macron in his "Choose France" campaign.