JONES DAY®

Foreign direct investment controls are increasing transaction complexity

Until recently, transactions involving small and medium-sized enterprises usually didn't require regulatory approval. However, new governmental investment control regimes, known as foreign direct investment (FDI) rules, here and abroad, are adding cost and uncertainty to transactions of all sizes. As Mark Jones and Jason Beer of law firm Jones Day warn, businesses and advisors must be aware of these regimes – and navigate them carefully – if they are to avoid the significant costs and transaction uncertainty that can result from falling foul of the laws.

The new UK regime

The UK National Security and Investment Act 2021, which came into force on 4 January 2022, has two main requirements. First, the government must be notified of investments in businesses conducting specified activities in 17 strategically sensitive industry sectors in the UK. These include military and defence, transport, synthetic biology, data infrastructure, computing hardware, artificial intelligence, energy and civil nuclear. Second, a broad 'call-in' power allows the government to intervene in a range of acquisitions of both companies and assets in all sectors if sufficiently important to the UK's interests. To pre-empt the risk of a call-in, the parties to the deal can voluntarily choose to notify upfront.

The regime applies irrespective of the acquirer's nationality, so even investments by UK owned businesses in other UK businesses can still be subject to mandatory notification requirements or a call-in.

What's more, the regime can apply to a broad range of transaction types from relatively small minority investments (including additional notification requirements for further increases in shareholdings or voting rights between thresholds) and internal corporate restructurings, to some types of financing arrangements.

The disruption is already being felt among businesses. In just the first three months of operation, 196 mandatory notifications and 25 voluntary notifications were made to the government, while the government issued call-in notices in relation to a further 17 transactions. A number of reviews have now resulted in significant regulatory interventions including prohibition orders, the imposition of information controls and security requirements, and ongoing obligations on businesses to continue servicing certain contracts and maintain operational capabilities within the UK.

What is happening outside the UK?

This proliferation of FDI regimes is a global trend. In Europe alone, 18 countries now have FDI rules, with Ireland and Belgium expected to introduce new regimes in early 2023. Five further EU countries have initiated reviews which could result in the introduction of further FDI regimes.

On top of this, a new EU regulation establishing a European screening mechanism for FDI came into force on 11 October 2020, requiring far greater co-operation and information sharing between EU member states and the European Commission. This increases risks for multi-jurisdictional deals, so parties will need to plan more carefully and have a coherent overall regulatory strategy across the countries affected.

What can I do to manage investment control risks?

It's important to consider early on in a transaction whether investment controls might apply and what notifications need to be made. Where clearances are required, you should allow plenty of extra time to obtain clearances before completion. And, in some cases, the need for FDI notifications might also influence the seller's choice of buyer, given the additional risks if the potential buyer is associated with jurisdictions not seen as friendly to the UK's national interests.

Contact us

Inferera@jonesday.com

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.