COVID-19 Coronavirus Business Impact Broadcast Series

COVID-19 Coronavirus Business Impact Broadcast Series: The Proliferation of FDI Controls

MAY 1, 2020

On May 1, 2020, Dechert LLP's Private Equity group presented "The Proliferation of Foreign Investment Controls," an episode of the firm's COVID-19 Coronavirus Business Impact Broadcast Series. The episode was hosted by Alec Burnside (moderator), a partner in the firm's Brussels/London offices; Jeremy Zucker, a partner in the firm's Washington office; Clemens York, a partner in the firm's Brussels and Frankfurt offices; and Sophie Pelé, a partner in the firm's Paris office.

The presenters discussed the acceleration in foreign investment controls being prompted by the COVID-19 pandemic.

HIGHLIGHTS FROM THE EPISODE

Increase and Strengthening of FDI Controls

New jurisdictions are adopting foreign investment controls, while governments with existing regimes are expanding and enhancing theirs. In Europe, a new FDI Regulation will come into full force in October this year. It does not create a central European review mechanism, but gives the European Union an important advisory role. COVID-19 has given more momentum to the EU's oversight role and to the EU's request that Member States implement foreign investment controls or strengthen their existing regimes. Germany, for example, has a draft bill responding to that request. France has also recently reinforced its foreign investment-control powers. Outside of Europe, India, Canada, Australia and the UAE all have recently created or enhanced mechanisms to restrict foreign investment, while in the United States CFIUS's reach and authorities were expanded earlier this year.

Impact of the FDI Controls Proliferation on M&A

Investment controls will increasingly become part of deal-feasibility analysis, deal documentation (e.g., condition precedents, mitigating measures the investor is willing to accept) and timetabling. Governments are expanding the sectors subject to foreign investment controls. The relevant industries are not limited to defense, but also include finance, healthcare, infrastructure, transport, media, agriculture, technology, etc. There is no nationality that shields an investor from foreign investment screening. While the U.S. might allow exemptions for some nationalities (Australia, Canada and the UK), France for example recently blocked a U.S. buyer from acquiring a French technology company.

FDI Controls and PE Investors

The level at which an investment may affect national security or public order is rather low, e.g., 25% in France (which may be lowered to 10%) and 10% in certain sensitive sectors in Germany. In Germany, a PE firm may also need to file for approval in case of an add-on acquisition by a non-controlled portfolio company in which the PE firm only holds a 10% stake. In the U.S., CFIUS jurisdiction now may apply even below 10% for targets in certain sensitive industries, but new regulations exempt investments by a non-U.S. entity via a U.S.-based PE fund subject to certain conditions ensuring that it is a passive investment only. Investments by sovereign wealth funds may under certain circumstances be subject to mandatory filing.