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Increased Foreign Direct Investment Scrutiny: How Are PE Firms Impacted?

AUGUST 17, 2021

Dechert's Antitrust/Competition and International Trade and Government Regulation groups presented "Increased Foreign Direct Investment Scrutiny: How Are PE Firms Impacted?", a bite-size episode of the firm's Committed Capital Podcast Series. The episode was presented by Clemens York, a partner in the firm's Brussels and Frankfurt offices, Hrishikesh Hari, an associate based in the firm's Washington, D.C. office, and Marjolein De Backer, an associate based in the firm's Brussels office.

HIGHLIGHTS FROM THE EPISODE

How do foreign investment reviews affect deal timetabling?

Statutory deadlines vary significantly across jurisdictions. For deals that are likely to attract close scrutiny, it can be advisable to engage in pre-filing discussions (timetabling can be part of those discussions). In the United States, the Committee on Foreign Investment Review (CFIUS or Committee) process (e.g., assembling filing, consultations with CFIUS and formal review) can require several months, depending on various factors, including the national security risks raised by a transaction, and the form of filing that is made (long-form notice vs. short-form declaration). Deals that do not raise national security concerns will in most jurisdictions be cleared within a few months of the filing date.

How to marry the deal timetable and statutory review periods?

In the United States, there are a variety of ways for parties to structure a transaction to proceed on their preferred timing while permitting the Committee to conduct a thorough review. It remains to be seen whether similar structures will be accepted in other jurisdictions.

How to determine whether a transaction creates a national security risk?

Typically, the relevant statutes, regulations or guidance will provide a list of sensitive sectors, including, for example, critical technology, critical infrastructure and sensitive personal data businesses. In addition, the pandemic has led to a greater focus on investments in the healthcare/pharmaceutical sector. Thorough due diligence is essential as potential national security risks may not be readily apparent.

Are there specific rules or exceptions that apply to certain types of investment?

In most jurisdictions, the investment related threshold is simply determined by the level of shareholding acquired, which is often very low, in the range of 10%. In the United States, there are limited exceptions available to certain non-U.S. investors, including, for example, non-U.S. limited partners of funds managed by U.S. general partners.

Risk of failure to file?

Transactions that do not seek mandatory (or even voluntary) approvals may be subject to potential penalties and carry infinite tail risk post-close. National security regulators have broad authority in many jurisdictions, including to order divestitures. In certain jurisdictions, the range of penalties includes potential imprisonment!

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