

Recent Notable Developments in Foreign Investment and National Security Screening Regimes

In remarks to the media at the sidelines of the Ministry of Trade and Industry's annual economic dialogue on 28 August 2023, Mr Gan Kim Yong, Minister for Trade and Industry indicated that Singapore is exploring "*new tools*" to "*manage significant investments into critical entities*", which comes as Singapore faces "*significant challenges*" in the global economy. The Minister noted that there is a need to strengthen the country's position as "*a trusted hub for businesses to invest with confidence*". The Minister also highlighted the need to "*make sure that investments into critical entities do not affect Singapore's economic resilience and [Singapore's] national security interest*".

Investments in entities operating in regulated sectors in Singapore (e.g., telecommunications, broadcasting, energy and financial services) are currently already subject to review by sectoral regulators. As such, the reference to "critical entities" in the Minister's remarks could point to similar tools being put in place to review investments in entities engaged in critical activities which are *not* currently subject to sectoral regulation. It would also be interesting to see whether (and if so, how) the concept of a "*national security interest*" will be defined as part of the proposals.

While any such further details have yet to be provided, it is an opportune reminder of the tools that other governments have put in place to screen investments in sectors deemed significant from a national interest or security perspective. This note sets out some recent developments on this front which would be of interest to businesses that are or may be involved in cross-border M&A transactions.

United Kingdom (UK)

Since December 2022, two transactions have been prohibited / ordered to be unwound under the UK's National Security and Investment Act 2021 (**NSI Act**) which came into force on 4 January 2022:

- **Retroactive review:** One of these transactions (L1T FM Holdings UK Ltd's acquisition of Upp Corporation Ltd) had been completed in 2021 prior to the commencement of the NSI Act. However, the NSI Act gave the UK government the power to look back retroactively at any transaction completed between 12 November 2020 and 4 January 2022 (when the NSI Act came into force). The transaction involved the acquisition of a UK-based fibre network provider. The UK government directed that the acquisition be unwound due to national security risks presented by "*the ownership of Upp Corporation Ltd by the ultimate beneficial owners of [the acquirer's parent company]*". While this was not mentioned in the UK government's published grounds of decision, the acquirer's parent company reportedly had links to Russia.
- **Possibility of building technological capabilities:** A prospective transaction involving a proposed acquisition by a Chinese semiconductor company (SiLight (Shanghai) Semiconductors Limited) of a UK fabless chip company (HiLight Research Limited) was prohibited due to the concern that the target's technology could "*be used to build technological capabilities which may present national security risks to the UK*".

In the same period, remedies were also imposed in five other transactions to address national security concerns. These transactions involved targets operating in the energy and communications sectors, as well as a manufacturer of gearboxes which appeared to be a supplier to the UK's Ministry of Defence. The remedies imposed included orders that:

- Information and physical security requirements, as well as governance arrangements, to safeguard sensitive information be put in place;
- A Chief Information Security Officer approved by the UK government be appointed; and
- Production capacity be maintained in the UK and to ensure continued supply under contracts with UK's Ministry of Defence.

United States (US)

The US' foreign investment screening regime (administered by the Committee on Foreign Investment in the United States, or CFIUS as it is commonly known) gives the US government broad powers to review, impose conditions on or block transactions which raise national security concerns.

Figures from CFIUS' 2022 annual report showed an uptick in cases moving towards investigation (57% in 2022) as well as the percentage of cases requiring mitigation (i.e., conditions imposed by CFIUS to address national security concerns, which were required in 18% of the notices filed with CFIUS in 2022). 2022 also saw a record number of filings with CFIUS and interestingly, the highest number of notices filed with CFIUS came from Singapore investors (followed by investors from China and the UK).

More recently, the US introduced an outbound investment screening regime, the first of its kind in the world. President Biden issued Executive Order 14105 on 9 August 2023 directing the US Treasury to issue regulations: (a) prohibiting certain categories of US outbound investments; and (b) requiring notification of other US investments involving China (including Hong Kong and Macau). The issuance of this executive order follows past failed, and ongoing, attempts by the US Congress to pass legislation to implement such an outbound screening regime.

The proposed rules issued by the US Treasury appear to contain features to extend the application of the regime. For example:

- US persons may be prohibited from knowingly directing non-US person transactions if such transactions would be prohibited if engaged in by a US person under the regime. Such a rule could have implications for US persons holding executive positions in multi-national companies, regardless of their country of incorporation; and
- The US Treasury is also considering extending some of the obligations under the regime to foreign entities controlled by US persons, e.g., entities which are majority owned by a US person.

Australia

Two recent transactions blocked under Australia's foreign investment regime show the continued and close scrutiny of foreign investments in Australia's critical minerals sector. In July 2023, the Australian Treasurer, on advice from the Foreign Investment Review Board, issued a prohibition order preventing a China-linked acquiror from acquiring a lithium mining company (Alita Resources Limited). This follows a similar prohibition decision earlier this year where a China-linked investment fund was prevented from increasing its stake in an Australian rare earths producer (Northern Minerals Limited).

Apart from sectors which are typically deemed to be more sensitive, investors should also note that Australia's foreign investment review regime can apply to investments in any Australian business where prescribed monetary thresholds are crossed.

Benelux

A new Dutch investment screening regime came into force on 1 June 2023.

Similar to the UK's NSI Act, the Dutch regime applies to all investors (including Dutch investors) and to investments in Dutch companies which are active in the provision of certain critical services as well as in certain sensitive technologies. An acquisition of a 10% shareholding or the ability to appoint one or more directors can trigger notification / approval requirements for transactions involving entities involved in "*highly sensitive technology*". As with most European regimes, the Dutch regime is suspensory, i.e., a notifiable transaction cannot be completed until it is cleared by the relevant authority.

Similar investment screening regimes came into force in Belgium (in July 2023) / will come into force shortly in Luxembourg (in September 2023). However, unlike the Dutch regime, these regimes apply only to investors outside the European Union / European Economic Area.

Takeaways

With the number of jurisdictions with foreign investment screening regimes trending upwards year on year, dealing with such issues and filings in multiple jurisdictions has increasingly become a standard feature in many M&A transactions, particularly those involving targets operating in sensitive sectors.

The number of transactions which are prohibited or subject to remedies have also been on the uptick. As such, investors exploring acquisitions of businesses involved in activities that could potentially raise national interest or security concerns (in any jurisdiction) should:

- Be aware of the impact of foreign investment/national security screening processes on the transaction timeline and plan accordingly;
- Anticipate national security concerns that may be raised and formulate proposed mitigation strategies which do not adversely impact the commercial objectives of the transaction; and

- Pay particular attention to how the regulatory risk (i.e., of the transaction being blocked) is allocated under the terms of the transaction documents.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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