

'FOREIGN INVESTMENT RULES: WHAT HAS CHANGED?'

Date: Monday 21 June 2021

Speakers: Matt Evans, DLA Piper
Elisabeth Eklund, Delphi
Dr Marius Boewe, Herbert Smith Freehills
Michel Ponsard, UGGC

1. INTRODUCTION

1.1 Bruce Kilpatrick ("**BK**") introduced viewers to the webinar. He stated that there was a huge amount of change in the FDI field in the UK with the introduction of the National Security and Investment Act, and also in EU member states as well. BK posed the question: "Is it a coherent legal system? Or are we seeing the return of the nation state?" BK then introduced the speakers: Matt Evans, DLA Piper; Elisabeth Eklund, Delphi; Dr Marius Boewe, Herbert Smith Freehills; and Michel Ponsard, UGGC.

2. MATT EVANS – UK FDI REGIME

2.1 Matt Evans ("**ME**") stated that the UK FDI regime is somewhat in a state of flux. Currently, transactions are subject to the old regime under the Enterprise Act 2002 but the new regime will soon be in force as the National Security and Investment Act 2021 was recently passed by parliament. There are indications that it will come into force in late autumn or early winter 2021. The new regime will have retrospective effect and any qualifying transaction completed after 12 November 2020 will be caught by the new regime. ME confirmed that he and his team have adopted the principles under the new regime when assessing transactions and engage with the UK government on that basis.

2.2 ME explained that the old regime is quite limited in scope – it covers media plurality, defence, the financial sector, military and dual use products, combatting public health emergencies, advanced materials, quantum technology, computer processing units, AI and cryptographic technology. The new regime covers 17 sectors, including those in the old regime.

2.3 The new regime operates under a hybrid mandatory and voluntary notification system. In terms of differences between the UK regime and most other FDI controls around the globe, the UK regime does not require the target to have a physical presence in the UK (subsidiary or branch) as merely exporting goods to UK customers could bring it under the regime. The UK regime does not have a de minimis threshold and the FDI regime applies equally to UK investors.

2.4 ME explained that there are 3 types of transactions that can be caught by the mandatory notification system and all are share deals. Asset acquisitions do not fall under the mandatory regime. The three stepped thresholds that can trigger a mandatory filing are as follows:

- a) Acquisition of more than 25% of shares or voting rights or of voting rights enabling a veto over any class of resolution governing the affairs of the entity;
- b) Acquisition whereby you already own more than 25% of shares or voting rights or of voting rights enabling a veto over any class of resolution governing the affairs of the entity and you are trying to increase that to over 50%; and

- c) Acquisition whereby you already own more than 50% of shares or voting rights or of voting rights enabling a veto over any class of resolution governing the affairs of the entity and you are trying to increase that to over 75%.
- 2.5 ME confirmed that if the transaction affects one of the 17 sectors, a mandatory notification is required.
- 2.6 ME stated that the voluntary notification regime applies to acquisitions of material influence and asset deals as well as share deals covering any of the non-mandatory notification sectors. He touched upon the UK merger control concept of material influence, explaining that it provides for a low threshold of control.
- 2.7 In terms of timing, ME explained that there is a statutory timetable for review and there will be an online notification system. An online form is being developed and consulted upon by government. The government will have 30 working days to review the online form. If they require more time, they could request an additional 45 working days for review. The Secretary of State can review deals up to 6 months after becoming aware of a trigger event. A trigger event is the actual acquisition of control. If a deal is kept secret or not in the public domain, the government will have up to 5 years after the event to review it.
- 2.8 ME confirmed that the UK mandatory regime has sanctions. Gun-jumping will be a criminal offence, with up to 5 years in prison, fines (5% of total global turnover of the business, or if higher, GBP 10 million) and directors can be disqualified. The government can effectively undermine or prohibit deals and impose a wide range of orders to address concerns. Although not spelt out, the government will focus on national security concerns and not economic concerns. The new legislation is not intended to address keeping jobs in the UK or keeping research and development or capex investments in the UK. The government will retain additional powers under the existing Enterprise Act regime to address economic concerns.
- 2.9 ME reiterated that the National Security and Investment Act will have retrospective effect and deals that have not closed by 12 November 2020 can be caught. In practice, ME said that he was already notifying deals to BEIS, which has a specific Investment Security Unit for notifications. ME said that the Investment Security Unit has an email address and it is possible to send a briefing note to seek non-binding comfort that a deal would not be called in and to seek some form of undertaking.
- 2.10 ME highlighted that under the old regime, until 2 years ago, there were 2-3 FDI cases per year. Now there are expected to be between 1000-2000 notifications per year. This is a big change for the UK and a considerable amount of work for dealmakers and clients. ME stated that UK FDI will be one of the longer poles in the clearance tent. ME also underscored the fact that if customers are in the UK and if the transaction affects one of the 17 sectors, clients must consider UK FDI – it does not matter how small the transaction is.

3. MICHEL PONSARD - FRENCH FDI REGIME

- 3.1 Michel Ponsard ("MP") introduced himself and brought attention to the upcoming LIDC 2021 Congress in Brussels "Does disruptive innovation call for disruptive law enforcement?" from 22-24 September 2021.
- 3.2 MP stated that the French FDI regime is a recent one. It was amended on 22 May 2019 with Loi Pacte which broadened the scope of FDI regulation. On 22 July 2020, the FDI regime was further amended on a temporary basis to take into account the specificity of the Covid crisis. This Covid amendment lowered the threshold from 25% of voting rights of a company to 10%. This amendment has been extended until 31 December 2021.
- 3.3 MP explained that there is a mandatory regime for specific sectors. If an investment is targeted by law, a notification is required. Without notification, the transaction would be null and void. MP emphasised that the French FDI regime is wide and not very clear. It is quite complicated to navigate French FDI rules as it is difficult to know whether or not you need to notify a transaction. For example, one of MP's recent cases involved an engineering company in the infrastructure sector. It was difficult to discern whether or not it fit under the mandatory regime.
- 3.4 MP explained there are 3 types of deals caught by the French FDI regime:

- a) Acquisition of control (definition of control also includes indirect control) within the meaning of the French Commercial Code, of an entity governed by French law;
 - b) Acquire all or part of a branch or activity of an entity governed by French law; and
 - c) To cross, directly or indirectly, alone or in concert, the threshold of 25% of the voting rights of an entity governed by French law (replaced the original threshold of 33.33%).
- 3.5 MP stated that in terms of timing, the timing is similar (as far as he understood) to the UK regime ME described. In France, they may ask the Minister of Economy whether a notification is required for the transaction and the Minister has a 2 month period to give an answer. There is a 30 working day period from notification, and if needed, 45 working days if further review is needed.
- 3.6 In terms of remedies, the French FDI regime has a range. These include injunctions to notify or respect conditions imposed by the Minister of Economy, precautionary measures such as suspension of voting rights, prohibition or limitation of the distribution of dividends, withdrawal of permission, or imposing a possible penalty. Fines have increased and may now be up to the higher of the following amounts: twice the amount of the irregular investment, 10% of the target's annual turnover before tax, EUR 5 million for legal persons and EUR 1 million for natural persons. There are also criminal sanctions that may be imposed and these are similar to the UK regime (5 years imprisonment).
- 3.7 MP stated that in 2020, 275 transactions were controlled by the French Minister of Economy. The results of these figures are not published so it is difficult to have an accurate view of the decisions.

4. **DR MARIUS BOEWE – GERMAN FDI REGIME**

- 4.1 Dr Marius Boewe ("**MB**") explained that Germany has quite an interesting history regarding its FDI regime. One key date in this history is 2017 when the mandatory filing system beyond the defence sector was introduced. Since 2017, FDI has become a real issue in Germany. The law has been changed about five times which makes it an interesting and living regime. Covid has made a big impact on the FDI regime over the course of the last year, especially in terms of sectors involving medicine and vaccines. The most important change since 2017 came into force in May 2021.
- 4.2 MB stated that in general, Germany has a mandatory filing system which is assisted by a voluntary component. The mandatory filing system exists regarding legally defined case groups, otherwise you have the right to apply for a voluntary filing and apply for a certificate of non-objections, which effectively asks the Ministry to confirm that the transaction does not require a filing. After the application, you can receive a certificate within 2 months (in case the Ministry will not open formal proceedings).
- 4.3 MB explained that there are two case groups (each with different sets of rules) in Germany, which define the mandatory system. The first is 'sector-specific' which includes defence, military and IT security. The second is 'cross-sectoral', which is the real battlefield of FDI. The cross-sectoral group comprises more than 25 sectors including critical infrastructures (energy, finance), which each have their own thresholds. For example, you would need to identify the specific output of a power plant to identify whether a filing is required. Further, all critical infrastructures are accompanied by related IT services. If the transaction involves an IT service related to critical infrastructure then a filing obligation would exist.
- 4.4 MB stated that the thresholds which trigger filing obligations are getting more and more complicated. A 10% acquisition of direct or indirect voting rights is sufficient in terms of defence, military, IT or critical infrastructures. Since May, the thresholds' for other case groups is 20%. The government can also open ex officio proceedings in any sector in cases of acquisitions of at least 25%. German law distinguishes on the side of the acquirer for sector-specific sectors (such as defence) – for those who are not German countries, it will trigger a filing.
- 4.5 In terms of timing, MB confirmed that as with other jurisdictions, there is a two-step approach. The initial review will take up to 2 months. If the Ministry does not react in this period, the deal is permitted and cleared to go. If you receive a letter from the Ministry, there is another step that takes 4 months, once the Ministry declares it has all

documentation for the review. There may be a longer gap between the two periods. The Ministry is able to extend the additional period and deals can be reviewed up to 2 months after the Ministry becomes aware of a transaction, which is capped at 5 years after signing.

- 4.6 MB explained that the German regime is not so tight on fines in comparison to the GDPR fines. The Ministry targets gun jumping and standstill obligations. As long as you have not received the permit from the Ministry, the underlying contract is considered to be provisionally invalid under German law. In terms of practical advice, MB highlighted that there have been 3 key changes to the FDI regime over the past 12 months and there have been 5 key changes over the past 4 years. The law is changing constantly and everyone is well advised to monitor the developments closely.
- 4.7 MB raised viewers' attention to the slide on the PowerPoint and stated that the sectors listed on the left hand side were subject to a 10% threshold, whereas those on the right hand side were subject to a 20% threshold.

5. ELISABETH EKLUND – SWEDISH FDI REGIME

- 5.1 Elisabeth Eklund ("EE") explained that Sweden does not have an FDI regime as of yet. Sweden has only just appointed the contact point under the EU regulation – the Inspector for Strategic Projects who deals with arms and dual use products. However there is currently a governmental investigation and a report is expected in November 2021. This means that there will be Swedish FDI legislation coming.
- 5.2 EE stated that as of today, there have been new rules in the Protective Security Act (1 January 2021) which is similar to other countries' legislation but also has many differences. One key difference relates to the sectors covered and lack of timelines. EE explained that if we look at deals that are caught, there are no control or turnover thresholds, which means the legislation has a wide scope. The legislation also applies to activities by public authorities and to Swedish investors (but not to real estate transfers). The legislation is sensitive to the transfer of security sensitive activities which is given a very wide scope. There are mandatory notifications in this regard but no specific sectors are mentioned. The indications in the preparatory works to the legislation state that the main challenge is to understand the sectors affected. In Sweden, instead of the government accessing notifications, it is either the Swedish Security Service or the Swedish Armed Forces.
- 5.3 EE highlighted that timing is a major challenge as there are no timelines specified at all in Swedish legislation.
- 5.4 EE explained that the Swedish remedies and sanctions had similarities with other countries' regimes but there are no criminal sanctions. However there could be prohibitions, conditions and unwinding, and unlawful transactions are null and void. Currently there is legislative proposal for sanction fees as of 1 December 2021 but this needs to be passed by parliament.
- 5.5 EE stated that the Swedish Security Service and Swedish Armed Forces are extremely confidential. 15 countries are identified as having antagonistic intent towards Sweden and the top 3 are Russia, China and Iran. If you have any transactions with connections to these countries, caution is recommended.

6. QUESTIONS

- 6.1 *In terms of exemptions from FDI filings – are there ways to structure a transaction to avoid the reach of the local regime?*
- 6.1.1 ME stated that the easy answer for the UK is no. The UK looks through different structures to find out the ultimate controlling entity/individual. The scope of mandatory notification is limited but the voluntary notification regime is extremely wide in scope. There is no way to cleverly structure a deal for FDI purposes as the UK has deliberately cast its net wide.
- 6.1.2 MP stated that in France it is the same. The provisions are very broad and it is very difficult. The only exclusion concerns acquisitions within a group/company that already has authorisation.

- 6.1.3 MB stated that it is the same for Germany and there is no way out. MB highlighted that intra-group reorganisations are also subject to FDI filings in the defence sector.
- 6.1.4 ME followed up on MB's point on intra-group reorganisations and stated that it is a great point. ME has seen transactions where it is not certain at the time of signing a deal which entity will be the immediate acquirer in even the short term, such that the purchaser intends to reorganise its holding structure after the deal has gone through. Therefore it is important to encourage clients to stick with their acquiring entity or at least be aware that a change in the structure could lead to another notification and another long delay.
- 6.1.5 EE stated that it was not possible to restructure for FDI clearance for Sweden either.
- 6.2 *In terms of timing, is there typically a quick response from authorities or are they taking the full time period? What sort of interaction do you have with the authorities during this period?*
- 6.2.1 MP explained that in France there is a prior declaration now, to know if you are or are not within the scope of the FDI regime. He stated that we should accept that the authorities take the time to get to their answer. He also added that we should be very cautious about notifications because of the exchange of information between authorities in Europe.
- 6.2.2 EE stated that in Sweden it is too early to say and they are curious as well. The main challenge with the Swedish regime is the lack of timelines.
- 6.2.3 MB stated that in Germany the Ministry typically tries to do its best to bring easy transactions to quick decisions. He said that what we have seen more and more is that FDI is not pure legal stuff, it is highly political. The Ministry has the power to expand the timelines as long as they wish. MB highlighted a transaction that had negotiations over 12 months regarding FDI and finally the client decided it was not interested in the transaction anymore.
- 6.2.4 ME explained that in the UK there is a range of timelines based on the affected sector, however the timelines now tend to be closer to the 30 working days set out in the forthcoming legislation. In regulated sectors, it often takes longer (up to 2 months) and ME suspects that the government is reaching out to sectoral regulators to seek their views. They are aiming to get closer to the 30 day deadline set out in the new legislation. ME also highlighted the fact that in previous deals, he would notify in some EU member states and not in others based on his analysis of where notifications were needed. However he would get contacted by non-notified member states asking about the deal. ME therefore emphasised checking and doing your FDI homework thoroughly to determine where notifications are needed and bear in mind that the exchange of information system between EU member states is working well. In addition, through this FDI mechanism, EU regulators are asking questions more typical for an antitrust assessment, such as market shares, which could open up the article 22 EUMR can of worms. There appear to be backdoor ways under FDI which can trigger filings in jurisdictions you may not have thought of and also open up antitrust inquiries.
- 6.3 *Turning to statistics, what sort of information do the FDI regulators publish regarding expectations?*
- 6.3.1 ME stated that the expectation in the UK is that for each transaction reviewed, there will be a summary of the decision. More generally, every year the government will publish an annual report on the operation of the new Act which will give statistics on the number of transactions reviewed, phase 2, average time taken, etc. The expectation is that they will be quite transparent. It is quite early to say but it sounds like we will have good data once it is up and running.
- 6.3.2 EE said that in Sweden, no information will be published at all, based on her understanding.

- 6.3.3 MP said that in France, there were 275 notifications in 2020 but there is no obligation to publish decisions. As a result there is no real transparency.
- 6.3.4 MB stated that it is the same for Germany – there is no real transparency. In 2017 there were 60 filings, in 2020 there were 190 and this year (at mid-April) it was already close to 100. This is all the information available.
- 6.4 *Is there room to challenge the FDI regime?*
- 6.4.1 ME explained that in the UK under the current regime, judicial reviews are possible and there has been a relatively recent challenge on jurisdictional grounds, based on time/limitation. Under the new regime, there is a possibility for judicial review. However clients will need to be pragmatic – if the government wants to block a deal, it will likely find a way to do so.
- 6.4.2 EE agreed with ME. In Sweden, challenge of administrative decisions is usually made to the administrative courts but as regards notifications under the Protective Security Act appeals can only be made to the Government. However FDI is highly political so EE stated that no one would probably be successful in that regard. As with merger control, time can also starve a deal.
- 6.4.3 MB stated it was the same in Germany. Nobody has challenged it, even though the right exists. The expectation is that no one will ever challenge it.
- 6.4.4 MP said the same for France - he had no examples to draw upon.
- 6.5 *Any expected changes to the FDI regimes or any other points?*
- 6.5.1 ME recommended conducting the FDI analysis at the outset of deal planning as it can be very complicated and so fast changing. ME drew upon an example where between signing and closing, the FDI regime changed in Spain and a mandatory notification was required which slowed the deal down. ME recommended staying on top of the requirements in each potentially affected jurisdiction and staying on top of the changes in the law.
- 6.5.2 MP stated that they did not expect new regulations in France as the 10% Covid thresholds have been extended this year for another year. However they are hoping for clearer French FDI guidelines as the French FDI regime is quite unclear.
- 6.5.3 MB said that they do not expect major changes to the German FDI regime. However if you had asked him two years ago he would have given the same answer. The German government is considering technical problems as a result of the new law. There are two or three points which MB and his team think could be improved and could be in the next update. He emphasised that it is necessary to be rigorous about monitoring the regulations on a daily basis.
- 6.5.4 EE stated that she completely agreed with all said. She recommended looking out for the new proposals to the Swedish legislation in the autumn and the current proposals regarding the Protective Security Act applying to outsourcing contracts.

7. **CONCLUSION**

BK thanked the panel and the guests for attending. End of the webinar.