A RECENT CASE STUDY OF REQUEST FOR PRIOR AUTHORISATION

Interview with Hubert Segain, Partner, Herbert Smith Freehills

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Hubert Segain, partner and head of Herbert Smith Freehills' corporate practice in Paris, revisits a recent request for prior authorisation of a foreign investment, which his team successfully obtained in 2021.

The request, carried out in the midst of the pandemic, shows how much complexity has increased in this arena at a time when the media and political representatives are paying close attention to issues of economic sovereignty.

Can you describe the deal and the sector affected by the investment?

The foreign investor was a company in the health industry which we were assisting with an acquisition. It wanted to acquire control over a French company involved in producing medicines. There was no doubt whatsoever that the investment project would be subject to foreign investment screening.

How did the prior authorisation process unfold and how long did it take?

In practice, the Bureau of Foreign Investment (the BIE) has maintained its policy of "application completion", ac-

cording to which the time frame for obtaining authorisation only starts to run once the BIE considers the application file as complete.

After the request for prior authorisation had been submitted, the BIE asked additional questions "for the sake of completeness", in particular questions related to COVID-19. Given the highly technical nature of the target business, the BIE then sought comments directly from the target.

Once the application had been deemed complete, the purchaser quickly sent the BIE a draft letter of commitments, and a back-and-forth exchange ensued. Then as soon as the purchaser had confirmed its agreement to the draft letter of commitments, the Ministry of the Economy authorised the investment.

The process ultimately lasted barely two calendar months, which in practice is much shorter than the maximum total of 75 business days – i.e. approximately three and half months – for the two verification phases according to the reform of the Decree of 31 December 2019.

Have you noticed any changes in recent months in how the procedure unfolds?

In situations involving a non-EU-investor, translating the entire authorisation request into English is recommended, although of course the request is always actually filed in French. This translation is very useful because now the non EU investor can expect to fill out a new form, the "Request for information from the investor" in addition to the French request. This form which reiterates certain parts of the French request, along with additional information, must be disclosed by the BIE to the other EU member states and to the European Commission, in keeping with the procedure established in the EU FDI Screening Regulation.

Also it goes without saying that since the pandemic, the BIE has been paying particularly close attention to investments affecting the health sector.

What practical recommendations would you give to investors or sellers?

Cases like Teledyne/Photonis or Couche Tard/Carrefour have shown that it is now vital for parties to include foreign investment screening in their calculations when assessing and negotiating a deal. Here are a few avenues for thought:

First, try to identify the political and institutional variables in play. For example, clearly a deal in the health sector will be examined more closely in the midst of a pandemic, and a sensitive matter that attracts considerable media attention may also attract more noticeable political intervention. This is especially true when a major election is on the horizon.

The impact of the screening process on the timetable for the transaction must be estimated, even though highly variable time frames from one case to another make this difficult to do in practice.

Any conditions unacceptable to the buyer that might be imposed by the BIE should be identified very early on, before moving forward. This is essential in order to conduct negotiations and attend to the drafting of the purchase agreement. In our recent request, we opted to insert in the SPA a list of conditions that were acceptable to the buyer and also a list of unacceptable conditions, under the heading of buyer undertakings with regard to conditions precedent.

On the side of the buyer, if the buyer is in a strong position – for example because there are other potential buyers – it may be opportune to include a "hell or high water" clause, typical in competition law, along with a break-up fee payable by the buyer if the regulatory risk appears to be justified.

What was once no more than a possible technical condition precedent in an SPA is now a strategic issue that is best addressed beforehand.