LESSONS IN MEDIATING FOR DAIRY WARRIORS

Financial Times

Peter Lichtenbaum
David Fagan

4/20/2011

Italian lawmakers are upset with the French – this time, for trying to buy some butter (in the form of dairy giant Parmalat). The Italians' response? A proposed review mechanism for foreign investment in strategic industries reminiscent of France's "Danone Law", adopted in 2006 after PepsiCo's aborted attempt to buy the French yogurt maker.

The Italian-French food fight is emblematic of a global drive to screen foreign investment on purported national security concerns or national interests. Within the last few months, two European commissioners have proposed a European Union-level committee to vet foreign investment on strategic grounds; Brazil proposed a review for investment in the agricultural sector; and most prominently, China rolled out interim rules for a national security-based review of foreign mergers and acquisitions of Chinese enterprises.

These proposals follow the adoption or amendment, within the past four years, of national security or national interest-based foreign investment review laws in the US, Russia, Germany, Canada and Australia, among others. This is a potentially worrisome trend. Countries need to resist the temptation to deploy such tests in a way that burdens the flow of international investment.

The US debated the role for such laws following the 2006 Dubai Ports World controversy over the proposed sale of port management businesses in U.S. sea ports to the UAE company. The result was a strengthened review process steered by the Committee on Foreign Investment in the United States (Cfius), that is focused on core security risks. This may not be perfect, but it upholds the principles of open investment and offers several lessons.

First, the review process should encourage investment and be tailored to apply to transactions implicating true national security interests. Screening for other reasons, such as a "national interest" standard should require an exceptionally high standard for intervention. To support this principle, reviews should be led by a responsible agency able to assign appropriate weight to the interests of open investment while also fully protecting against national security risks. The review process should be protected from political interference.

The risk with a "strategic" sector approach, such as that implemented by France, is that it in fact serves as a pretext for other objectives. No one could seriously debate a country's right to promote domestic industrial growth. Yet it is one thing to utilise governmental tools to develop industries, but quite another to limit access to those industries. Allowing foreign investment tends to promote sectoral growth, not retard it.

Also, the review mechanism should provide as much certainty as possible to investors. Little matters more to parties in a transaction than knowing what approvals they must obtain, the rules related to them and when they can expect to receive them. This requires quick ―time-frames for the review. Longer processes create uncertainty, which, in turn, can raise price tags for foreign investors or, worse, lead sellers to reject foreign bidders outright. Certainty also requires regulatory consistency so that investors can draw appropriate lessons for the future.

Third, the government agencies conducting the review should be accountable. In the US, there is no judicial review of CFIUS decisions, but there is reporting to Congress. This may not be the ideal model but it is one that makes decisionmakers accountable while preserving limited timeframes for review. In all events, there should be mechanisms in place to ensure sound, objective decisions on foreign investment reviews.

Finally, the regulatory process should preserve confidentiality to reassure investors and sellers that their information will not be compromised, whether by revelation to the public or to domestic competitors. These four principles are fundamental to ensuring that a review process encourages foreign investment. Italian lawmakers and others should bear them in mind.